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# THE FIFTY YEARS' DIGEST

## 1901-1950

(Civil, Criminal & Revenue)

BY

D. V. CHITALEY & N. RAMARATNAM

## Volume VII

**Cr. P. C., S. 345**

**TO**

**Easements Act (5 of 1882), S. 14.**

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# PREFACE

No apology is needed for the publication of this Digest, which is a consolidated one covering the half century from 1901 to 1950. It will be easily appreciated that the bulk of our current case-law is contained in the decisions of this period. It is not necessary to expatiate at length on the virtues of consolidation, as otherwise, one will have to refer to a large number of publications for the same point.

On the importance of case-law, the late Sir William Holdsworth wrote: "Codes are lifeless things compared with the living law evoked by the decision of cases which turn upon the actual happenings in the lives of human beings; and each individual case, which lays down living law based upon these actual happenings, can only cover a very small fraction of the field of law."

In the Preface to the Corpus Juris (American), the following passage occurs: "Often the particular application or illustration stated will precisely fit the state of facts in his (the lawyer's) own case, and the argument of reason and logic may be fortified by pointing out that in prior litigated cases the rule has been applied in the manner contended for. No lawyer is content to depend alone upon his own reason and knowledge. Few have the presumption to assume that they would, unaided by the experience of the past, present all arguments that could be made in any case as to the application of a general rule. Precedents are valuable the same as experience is valuable. Reported decisions are valuable the same as history and science are valuable.... There is more wisdom in the many than in the few. Lawyers should get wisdom from all sources, and in preparing a brief in an important case, should not stop until they find every case that has been decided upon the subject in question. (The Value of Precedents by J. W. McLoud in 28 Am Law Rev. 218)."

It can be seen from the above quotations how superficial is the oft-heard criticism against the growth of case-law in our country.

The enormous growth of case-law makes a Digest an indispensable publication for the legal profession. No doubt, we have now got in the field excellent commentaries and text books in which the decisions bearing on the respective subjects are exhaustively dealt with. But in our opinion, Commentaries and Digests are complementary to each other, and neither can dispense with the other.

In the first place, commentaries dealing exhaustively with the case law bearing on the respective subjects do not cover the entire field of law. In the next place, the point of view and the mode of treatment and dealing with the case-law in a Digest and a Commentary are entirely different. The approach, in each case, is, as it were, from opposite ends. Each system has its own special usefulness to the lawyer. If a lawyer is on the hunt for a parallel precedent, for a case on all fours, he naturally turns to a Digest. If he wants to study the principles bearing on a point, he first thinks of a Commentary or a text book. However exhaustive a Commentary may be, in point of case-law, the emphasis is more on the

underlying principles than on the facts and features of each case which are available only in a Digest. Though a Commentary may give a more correct insight into the legal position and the over-all state of case-law on any question, a Digest has to be resorted to for picking out the particular case which comes closest to the matter on hand.

Further, it has to be remembered that in a Commentary, the case-law is seen *as interpreted* by the Author. In a Digest, the reader has, as it were, a direct access to the case-law and he may bring to bear upon his study of the case-law his own point of view and may thereby be enabled to draw a conclusion which not only did not occur to the Author but was contrary to the Author's conclusion. In any case, a Digest will enable the reader to test the correctness of the conclusions set forth in the commentaries, before he proceeds to study the actual reports after he has selected the decisions for study by the above process.

As regards the special features of the present publication, the first point to be mentioned is that it is a Digest of full head-notes and not merely of short, truncated statements of the law. Separate points decided by a case are digested separately and are not jumbled up together in the same note.

Where the decisions bear upon statutory provisions they have been digested under the appropriate statutory headings. But care has been taken to give topical headings also in proper places with cross-references to the respective statutory headings.

Where the number of cases under a section or heading is very large, they are sub-divided into sub-headings. In such cases a synopsis of the headings and sub-headings also is given.

Where a decision overrules or reverses a previous ruling, this is noted under the decision.

Other features are like those of the well-known Digests published by the Madras Law Journal Office and All India Reporter hitherto, with which the Bar and Bench are already familiar and which they appreciate so much.

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# CONTENTS


**CRIMINAL P. C.** *(contd.)* col.

**S. 345.**
Appeal ... 1
Duty of Court ... 2
Effect ... 6
High Court, compounding before ... 13
See also Cr. P. C., S. 439
Procedure ... 16
See also N. 2
Sanction ... 16
Sanction not necessary ... 18
Who can compound ... 19
See also Cr. P. C., S. 198.
Tests of compoundability ... 20
See also N. 2
**S. 346** ... ... ... 21
**S. 347.**
Scope ... 24
"Before signing judgment" ... 24
"Ought to be tried" ... 25
Committal of accused ... 27
**S. 348** ... ... ... 29
**S. 349.**
See also Cri. Pro. Code, S. 348
To whom reference is to be made ... 31
Procedure of referring Magistrate ... 31
Several accused ... 32
Procedure of Magistrate to whom the case is referred ... 34
**S. 350.**
Applicability ... 25
Case coming again before original Magistrate ... 40
De novo trial ... 42
Judgment ... 47
Procedure ... 49
Right of accused ... 52
See also N. 1 and 3
Scope ... 60
Setting aside conviction ... 63
**S. 350-A** ... ... ... 64
**S. 351** ... ... ... 66
**S. 352** ... ... ... 68
**S. 353.**
Scope and applicability ... 71
Presence of the accused ... 71
Personal attendance dispensed with 73
Cross cases ... 74
**S. 355** ... ... ... 76
**S. 356.**
Scope and application ... 77
Recording evidence — Duty of Court 78
Evidence must be in the language of Court ... 78
Evidence is part of record ... 79
Irregularities ... 79
**S. 357** ... ... ... 80
**S. 359** ... ... ... 80
**S. 360**
Applicability and object ... 81
Provisions—Mandatory ... 82
Reading over of deposition ... 83
Non-compliance with the section —Effect of ... 85
Admissibility in evidence at subsequent trials—Non-compliance with the section ... 87
Perjury ... 88
Sufficient compliance ... 88
Explaining discrepancies ... 89
Interpretation ... 89
Presumption about verification ... 89

**CRIMINAL P. C., S. 360** *(contd.)* col.
Objection ... 89
**S. 361** ... ... ... 89
**S. 362** ... ... ... 90
**S. 363** ... ... ... 93
**S. 364.**
See also Criminal P. C., Ss. 164, 342 and 533
Scope and applicability ... 93
Record of examination ... 95
Record of confession ... 96
See N. 1 and 2.
Language of record ... 96
To explain or add to his answer ... 97
Shall be shown, read and interpreted to accused ... 97
The record shall be signed ... 98
"Shall certify under his own hand" 98
Examination under S. 263 ... 98
Non-compliance ... 98
**S. 366.**
See also Cr. Pro. Code, Ss. 265, 367 and 424
Scope and applicability ... 100
Judgment, meaning of ... 101
Judgment must be pronounced ... 101
Delivery of judgment by successor or another Magistrate ... 102
Presence of accused ... 103
Sentence or release to be after judgment ... 103
Loss of records ... 104
**S. 367.**
See also Criminal P. C., Ss. 265, 366, 424, 537 and 561-A
Scope and applicability ... 104
Contents of Judgment ... 105
Appreciation of Evidence ... 116
Basis of Decision ... 124
Suspicion ... 125
Untrustworthy Evidence ... 126
Benefit of Doubt ... 127
Remarks and Strictures ... 128
See also Cr. P. C., Ss. 439 and 561A
Dictation of Judgment ... 132
Presiding Officer ... 132
Signature of presiding officer ... 133
Death Sentence ... 134
Trial by Jury ... 137
Defects in procedure ... 139
Judgment—Language of ... 139
Non-compliance with the provision —Effect ... 140
**S. 368** ... ... ... 141
**S. 369.**
Scope ... 142
"Judgment"—Illustrative cases ... 143
Matters that can be reviewed ... 147
Need of review—Procedure ... 149
Powers of High Court ... 150
**S. 370** ... ... ... 152
**S. 373** ... ... ... 156
**S. 374** ... ... ... 156
**S. 375** ... ... ... 158
**S. 376** ... ... ... 159
**S. 377** ... ... ... 162
**S. 379** ... ... ... 163
**S. 380** ... ... ... 163
**S. 383** ... ... ... 164
**S. 386.**
See also Criminal P. C., S. 88

CRIMINAL P. C., S. 386 *(contd.)* col.

Scope of fine—Recovery of fine ... 165
Offender undergoing whole term of imprisonment in default, Sub-s. (1) (b), Proviso ... 165
Execution against immovable property ... 167
Attachment of moveable property ... 167
See also N. 4
Attachment of joint Hindu family property ... 167
Attachment of salary ... 169
Claims to property attached ... 169
Execution by civil process ... 171
Issue of distress warrant ... 171
Recovery of allowance and cost under Sec. 488, Cr. P. C. ... 172
Revision ... 172
S. 388 ... ... ... 172
S. 390 ... ... ... 173
S. 391 ... ... ... 173
S. 393 ... ... ... 174
S. 394 ... ... ... 175
S. 395 ... ... ... 175
S. 397.
Several Sentences—Execution of ... 176
Already undergoing a sentence of imprisonment ... 176
Second proviso ... 177
Reversal of one of two sentences ... 179
Imprisonment in default of payment of fine ... 180
Detention under Madras Borstal Schools Act ... 180
Ante-dating sentence ... 180
Power of High Court to pass concurrent sentences ... 180
S. 398 ... ... ... 181
S. 399 ... ... ... 181
S. 401 ... ... ... 181
S. 402 ... ... ... 185
S. 403.
Appeal ... 185
Applicability ... 188
Burden of proof ... 192
Court of competent jurisdiction ... 192
Dismissal of complaint—Effect of ... 198
Discharge—Meaning of ... 201
Fresh trial barred ... 204
Fresh trial not barred ... 213
Miscellaneous ... 224
Principle ... 227
Procedure ... 229
Revision ... 231
Scope ... 233
Trial—Meaning of ... 235
S. 404 ... ... ... 239
S. 405 ... ... ... 242
S. 406 ... ... ... 242
S. 406-A ... ... ... 243
S. 407 ... ... ... 243
S. 408.
Scope and applicability ... 245
Right of appeal and forum ... 246
Concurrent sentences ... 247
Several accused—Proviso (b) ... 248
Change in powers ... 250
Conviction under S. 124-A, Penal Code—Proviso (c) ... 251
S. 409 ... ... ... 251
S. 410 ... ... ... 252
S. 411 ... ... ... 252
S. 411-A ... ... ... 253
S. 412 ... ... ... 259
S. 413.
Scope and applicability ... 261

CRIMINAL P. C., S. 413 *(contd )* col.

Appeal, when lies ... 262
No appeal lies ... 263
"Case", meaning of ... 265
Order under S. 562 ... 266
S. 414 ... ... ... 266
S. 415 ... ... ... 268
S. 415-A ... ... ... 271
S. 417
See also Ss. 423 & 439
Appreciation of evidence ... 271
Burden of proof ... 271
See also N. 13 & 14.
Competency of appeal ... 274
Grounds for ... 276
See also N. 10 & 12
Limitation ... 278
Powers of Appellate Court ... 278
See also N. 10
Procedure ... 281
Revision ... 283
Scope and applicability ... 284
Interference by High Court in appeal ... 286
See also N. 3 & 4
Interlocutory order ... 291
Right to appeal ... 291
Right of accused ... 292
Benefit of doubt ... 292
S. 418
See also Criminal P. C., S. 417
Scope and applicability ... 294
Trial by Jury—Matter of law only ... 295
Trial by Jury—Question of fact ... 297
Trial by Jury—Case triable by assessors only ... 298
Appeal by Crown ... 299
S. 419 ... ... ... 299
S. 420 ... ... ... 302
See also Criminal P. C. S. 419
S. 421
See also Criminal P. C., Ss. 419 and 430
Procedure ... 303
Reasons ... 305
Records ... 308
Right to be heard ... 309
Scope ... 312
Withdrawal of appeal ... 315
See Criminal P. C., S. 423
S. 422
Notice—General ... 315
Notice to appellant or pleader ... 316
Notice to accused ... 316
Notice to complainant—Respondent. 316
Officer appointed by the Provincial Govt. ... 317
Time and place of hearing ... 319
S. 423
See also Criminal P. C., Ss. 376 and 417
Acquittals ... 319
Alteration of conviction ... 322
Alteration of charge ... 330
See also N. 2
Applicability and scope ... 333
Appreciation of evidence ... 334
Burden of proof ... 336
Duty of an appellate Court ... 338
Enhancement of sentence ... 339
See also Criminal P. C. S. 439
Limitation ... 347
New case or plea ... 347
Powers of Appellate Courts ... 348
See also Criminal P. C. S. 439
Remand ... 360

**CRIMINAL P. C., S. 423** *(contd.)* **col.**

Retrial ... 361
See also Criminal P. C. S. 439
Reversal of finding ... 374
Right to be heard and to reply ... 375
Verdict of jury ... 377
See also Criminal P. C., Ss. 297 and 307
Withdrawal of appeal ... 385
Admission of inadmissible and additional evidence ... 385
Alteration of finding ... 386
Award of costs ... 389
Co-accused ... 389
Compounding of offence ... 390
Dismissal for default ... 390
Order restoring property ... 390
Revision and Reference ... 391
Summary dismissal ... 391

**S. 424**
See also Criminal P. C., Ss. 366, 367 and 265
Contents of Judgment—General ... 392
Points for determination ... 394
Reasons for determination ... 394
Appreciation of evidence ... 395
"Dated and signed" ... 396
Non-compliance ... 396
Summary disposal ... 398
"Other than High Court" ... 398

**S. 426** ... ... ... 399

**S. 428.**
Additional evidence ... 400
Applicability and scope ... 405
Non-examination of accused ... 406
Object ... 406
Reasons to be recorded ... 407
Re-hearing of appeal — Application for transfer ... 409
Revision ... 409
Sub-section (4) ... 409

**S. 429** ... ... ... 410

**S. 430** ... 411
See also Criminal P. C., S. 417

**S. 431** ... ... ... 411

**S. 432** ... ... ... 412

**S. 433** ... ... ... 413

**S. 434** ... ... ... 413

**S. 435.**
See also Cr. P. C., S. 439.
Applicability and Scope ... 414
Grounds of interference ... 415
Inferior Court — Illustrations ... 421
Inferior Court — Duty of ... 425
Jurisdiction ... 425
Judicial orders ... 432
Interpretation ... 434
Powers of District Magistrate ... 435
Powers of High Court ... 437
Proceeding under Ss. 144, 176, Chapter XII, etc. ... 441
Reference ... 445

**S. 436.**
Applicability and scope ... 446
Grounds for interference ... 448
Jurisdiction ... 456
Notice ... 462
Order under ... 465
See also N. 1 and 2.
Power of High Court ... 468
See also N. 8.
Proceedings on further enquiry ... 469
Revision ... 472
See also N. 6

**S. 437.**
Applicability and scope ... 473

**CRIMINAL P. C., S. 437** *(contd.)* **col.**

Grounds for interference ... 474
High Court's powers ... 476
Jurisdiction of inferior Court ... 477
Notice ... 478
Order of commitment ... 481
Order of discharge ... 483
Powers of Sessions Judge and District Magistrate ... 488
Further enquiry ... 491
See also N. 2 and 7.
Wrong dismissal of Complaint ... 492

**S. 438.**
See also, Cr. P. C., S. 435.
Court entitled to refer ... 493
Duty of referring Court ... 493
Enhancement of sentence ... 494
Grounds of reference ... 496
Jurisdiction ... 500
Powers of High Court ... 503
See also, Cr. P. C., S. 439.
Procedure ... 506
Scope ... 508
See also, Cr. P. C., Ss. 435 and 439.

**S. 439.**
Abatement ... 511
Acquittal ... 511
Competency of revision ... 531
See also Note 15.
Compounding Offences ... 538
See also Criminal P. C., S. 345.
Conviction ... 539
Discharge ... 544
Discretion ... 546
Enhancement of sentence ... 549
See also Criminal P. C., S. 423.
Evidence ... 569
Expunging remarks ... 577
Finding of fact ... 579
Grounds for ... 589
Interference ... 595
See Note 23.
Interlocutory Order ... 595
Jurisdiction ... 596
Jurisdiction under S. 115, Civil P. C. ... 603
See Note 27.
Jury trial ... 603
See Criminal P. C., S. 297.
Limitation ... 603
New plea ... 607
Notice ... 608
Orders in revision ... 610
Pending proceedings ... 610
Power of High Court ... 617
Private Complaint ... 639
See also Note 2.
Proceedings under Criminal P. C., S. 144 ... 642
Proceedings under Criminal P. C., S. 145 ... 644
Proceedings under Criminal P. C., Ss. 195 and 476 ... 647
Quashing proceedings ... 655
See also Note 22.
Question of Law ... 658
Records of case ... 660
See N. 23.
Reduction of sentence ... 660
Remand ... 662
Retrial ... 662
Scope ... 666
Sentence, Interference with ... 671
See Note 23.
Stay of proceedings ... 671
Wrong procedure ... 672

CRIMINAL P. C. *(contd.)* col.

S. 440 ... ... ... 675
S. 441 ... ... ... 676
S. 442 ... ... ... 676
Chapter 33 ... ... ... 676
S. 443 ... ... ... 678
S. 444 ... ... ... 681
S. 446 ... ... ... 681
S. 447 ... ... ... 683
S. 449 ... ... ... 684
S. 450 ... ... ... 686
S. 451 ... ... ... 687
S. 454 ... ... ... 687
S. 460 ... ... ... 688
S. 464 ... ... ... 688
S. 465 ... ... ... 689
S. 466 ... ... ... 691
S. 468 ... ... ... 691
S. 470 ... ... ... 692
S. 471 ... ... ... 692
S. 473 ... ... ... 694
S. 476.
See also Cr. P. C., Ss. 190, 195, 476-A & 476-B.
Abetment ... 695
Appeal ... 695
See also Cr. P. C. S. 476-B
Applicability and scope ... 698
See also Cr. P. C., S. 195
Civil or Revenue Court ... 702
See also N. 2 and 32.
'Court', meaning of ... 702
Delay ... 709
Detention in custody ... 713
Discretion ... 713
Findings as to offence ... 715
Expert evidence ... 717
Finding of expediency ... 717
Grounds for interference ... 723
Initiation of proceedings ... 725
'In relation to' meaning of ... 730
See also N. 13.
Judicial proceedings ... 732
Jurisdiction ... 739
Legality of order ... 741
Nature of order and proceedings ... 747
Notice or opportunity ... 747
See also N. 28
Other offences ... 750
See also N. 24.
Orders against strangers ... 752
Pending proceedings ... 754
Perjury ... 755
Powers of Court ... 759
Powers of Superior Court ... 766
See also Cr. P. C. Ss. 476-A and 476-B.
Preliminary enquiry ... 773
Probability of conviction ... 775
Procedure ... 777
Prosecution upon complaint under... 782
Revision ... 784
See also N. 8 & 12 and Cr. P. C., Ss. 195 & 439.
Right of accused ... 788
Sanction ... 789
Stay of proceedings ... 791
S. 476-A ... ... ... 792
S. 476-B.
Duty of Court ... 795
Effect of order under ... 796
Forum ... 796
Limitation ... 799
Powers of Appellate Court ... 800
See also, Criminal P. C., S. 476.
Procedure ... 805

CRIMINAL P. C., S. 476-B *(contd.)* col.

Revision ... 806
See also, Criminal P. C., S. 439— and Ss. 195 and 476; Civil P. C., S. 115.
Right of appeal ... 808
Scope ... 810
Second appeal ... 810
S. 477 ... ... ... 812
S. 478 ... ... ... 813
S. 480 ... ... ... 814
S. 481 ... ... ... 817
S. 482 ... ... ... 817
S. 486 ... ... ... 818
S. 487 ... ... ... 818
S. 488
See also Criminal P. C., S. 489.
Against whom order can be passed... 820
See also N. 4.
Amount of maintenance ... 821
See also Criminal P. C., S. 489.
Application under ... 824
Award of maintenance ... 825
Cancellation of order ... 827
Civil suit ... 830
Compromise ... 831
Consent to live separately ... 836
Costs ... 838
Cruelty ... 839
Decree for conjugal rights ... 839
Decree for maintenance ... 842
Divorce ... 843
Enforcement of order ... 845
See also N. 7 and Criminal P. C. S. 490.
Ex parte order ... 854
Husband's offer ... 854
See also N. 23
Jurisdiction ... 856
Limitation ... 860
Maintenance to children ... 861
Means and ability ... 870
Nature and scope ... 872
Neglect to maintain ... 874
Procedure ... 876
Proof of marriage ... 882
Refusal to live with husband ... 883
Unchastity ... 888
Wife's income ... 891
See also, N. 2
Appeal and revision ... 892
S. 489.
See also Cr. P. C., S. 488.
Application to Court ... 892
Cancellation of order ... 893
See N. 3
Change of circumstances and alteration of allowance ... 893
Civil Court decision—Sub-section (2) 894
Powers of Magistrate ... 895
Revision ... 896
S. 490 ... ... ... 896
See also Criminal P. C., S. 488.
S. 491.
Appeal ... 897
Applicability and scope ... 898
See also N. 5.
Burden of proof ... 901
Costs ... 903
Jurisdiction ... 904
See also N. 10.
Legality of detention ... 907
Minors ... 916
Nature of proceedings ... 919
Other remedies ... 920

**CRIMINAL P. C., S. 491** *(contd.)* col.

Powers of High Court ... 920
See also N. 3 and 5.
Procedure ... 923
Sub-section (3) ... 928
See also N. 2, 5 and 10.
Successive applications ... 930
Time for application ... 931
Who can apply ... 932
**S. 491-A** ... ... ... 932
**S. 492** ... ... ... 933
**S. 493** ... ... ... 934
**S. 494**
See also Criminal P. C., Ss. 333 and 337.
Applicability and scope ... 935
Consent of Court ... 935
See also N. 3.
Discretion of Court ... 937
See also N. 2.
Discretion of Pubilc Prosecutor ... 942
Effect of order ... 943
Power and duty of Court ... 945
Procedure ... 946
Prosecution, when can be withdrawn 947
Reasons for consent ... 947
Revision ... 950
Stage for withdrawal ... 951
**S. 495** ... ... ... 951
**S. 496.**
See also Criminal P. C., S. 497.
Scope and object ... 955
Bail before investigation ... 956
Breaking of bail ... 956
Cancellation. ... 956
Defence of India Rules, R. 130A ... 956
Discretion and duty of Court ... 957
Order of release, communication of... 959
Power of High Court ... 960
Security proceedings ... 960
Surety, liability of ... 961
**S. 497.**
Scope of the section ... 961
Principles governing grant of bail ... 961
"Offence punishable with death or transportation for life" — Sub-Section (1) ... 967
Sub-section (2) ... 969
Cancellation of bail and rearrest —Sub-section (5) ... 970
Application for bail — Form and contents ... 974
Revision ... 974
**S.498.**
Bail bonds — Essentials ... 975
Powers of High Court and Court of Session ... 975
"Any person" ... 980
In any case ... 980
Reduction of bail ... 981
Inherent powers ... 981
Cancellation of bail ... 982
Bail pending appeals to 'Privy Council' ... 982
**S. 499.**
Breach of bond ... 983
Form of bond ... 987
Power and duty of Magistrate ... 987
**S. 500** ... ... ... 988
**S. 501** ... ... ... 989
**S. 502** ... ... ... 989
**S. 503.**
See also Criminal P. C., Ss. 505 & 506.
Scope and applicability ... 990
Courts which can issue a commission 990

**CRIMINAL P. C., S. 503** *(contd.)* col.

Discretion of Court ... 991
Pardanashin lady ... 993
Ruling Prince of Indian State ... 993
Examination of witness in Indian State ... 993
Issue of commission to a place outside India ... 994
See N. 1.
**S. 504** ... ... ... 994
**S. 505** ... ... ... 994
**S. 506** ... ... ... 994
**S. 507** ... ... ... 995
**S. 508** ... ... ... 996
**S. 509** ... ... ... 996
See also Evidence Act, S. 45
**S. 510**
Evidentiary value and proof ... 999
Identity of matter of thing examined 1002
"Under the hand" ... 1002
Chemical Examiner ... 1003
**S. 511** ... ... ... 1003
See also Criminal P. C., S. 255A
**S. 512.**
Scope and object ... 1005
Evidence of absconding ... 1006
Examination in absence of accused... 1008
Use of evidence in subsequent trial of absconder ... 1008
Death or incapacity of deponent ... 1009
Approver's evidence under S. 512 ... 1010
**S. 513** ... ... ... 1010
**S. 514.**
Appeal and revision ... 1011
Breach of bond ... 1012
See also Note 3.
Forfeiture ... 1014
Jurisdiction ... 1016
Procedure ... 1019
Remission of penalty ... 1022
Scope ... 1023
Surety ... 1025
Validity of bond ... 1028
See also Note 3.
**S. 514-B** ... ... ... 1029
**S. 515** ... ... ... 1029
See also Criminal P. C., S. 423.
**S. 516-A** ... 1029
See also Criminal P. C., S. 517.
**S. 516-AA** ... ... ... 1031
**S. 517.**
See also Criminal P. C., S. 523.
Appeal ... 1032
See also Criminal P. C. S., 520.
By return of property ... 1034
Disposal of property ... 1040
Limitation ... 1046
Power and duty of Court ... 1047
Revision ... 1048
See also S. 520 Criminal P. C. and Note (1).
Scope and applicability ... 1049
Time of order ... 1054
**S. 518** ... ... ... 1055
**S. 519** ... ... ... 1056
**S. 520.**
See also S. 517, Criminal P. C.
Scope of the section ... 1056
Applicability ... 1057
Orders under S. 517 ... 1057
Court of Appeal ... 1057
Court of Revision ... 1058
Stay ... 1059
Notice ... 1059
Reference to Civil Court ... 1060
Restoration ... 1060

CRIMINAL P. C., S. 520 *(contd.)* col.

Restitution ... 1060
Recovery of property ... 1060
Limitation ... 1060
Powers of High Court ... 1061
S. 521 ... ... ... 1061
S. 522.
Appeal ... 1061
Applicability ... 1061
Notice ... 1068
Order against third party ... 1069
Powers of Court of appeal, revision or reference ... 1070
Remedy of third person ... 1073
Time for order ... 1073
See also N. 5.
S. 523.
Sections 517 and 523 compared ... 1076
"As he thinks fit" ... 1076
Disposal of property ... 1078
Production and custody ... 1080
Order of confiscation ... 1080
Proclamation ... 1080
Inquiry ... 1081
Revision ... 1082
Reference ... 1083
S. 524 ... ... ... 1083
S. 526.
See also Criminal P. C., Ss. 528 and 556.
Adjournment ... 1084
See also N. 12.
Affidavit by accused ... 1091
Applicability ... 1092
Apprehension ... 1095
Costs ... 1107
Duty of counsel ... 1108
Duty of Court ... 1109
See also N. 1.
Fair trial ... 1115
Grounds ... 1118
See also N. 4.
Jurisdiction ... 1162
Power of High Court ... 1165
Procedure ... 1169
See also N. 7.
Right of accused ... 1172
Stay ... 1173
See also N. 1.
Who can apply ... 1174
S. 527. ... 1176
S. 528.
Application ... 1177
Adjournment ... 1177
'Any case' ... 1177
Costs ... 1178
Effects of order ... 1178
Inquiry or trial ... 1178
May withdraw or transfer ... 1178
Notice ... 1181
Reasons for transfer or withdrawal 1184
Record o reasons ... 1186
Revision 1188
Subordinate Magistrate ... 1188
Transfer by Sessions Judge ... 1190
Transfer from Court having no jurisdiction ... 1190
S. 528A. ... ... ... 1190
S. 528B. ... ... ... 1191
S. 529.
Applicability and scope ... 1192
Cognizance of offences under S. 190 1193
Transfer of cases by Magistrates ... 1194
Magistrate, erroneously acting in good faith ... 1195

CRIMINAL P. C. *(contd.)* col.

S. 530.
See also Criminal P. C. S. 529.
Trial of offenders by Magistrates not empowered ... 1196
Summary trials ... 1198
Deciding appeals or revising orders when not empowered ... 1199
Effect on proceedings ... 1199
S. 531.
Scope ... 1202
Objection to local jurisdiction ... 1204
Absence of territorial jurisdiction ... 1204
See also N. 5.
Wrong sessions division or other local area ... 1204
Failure of justice ... 1205
S. 532. ... ... ... 1207
S. 533.
See also Criminal P. C. Ss. 164 and 364.
Curable defects ... 1208
Record of confession ... 1209
Examining Magistrate as witness ... 1210
Mode of proving confession ... 1213
S. 534. ... ... 1213
S. 535. ... ... ... 1213
See also Cr. P. C., S. 537.
S. 536. ... ... ... 1216
S. 537.
Scope and applicability ... 1217
Irregularity and illegality—Distinction ... 1220
Irregularity—General ... 1220
Irregularity in procedure (During Trial) ... 1220
Irregularity in charge ... 1235
Irregularity in judgments ... 1242
See also Criminal P. C., Ss. 366, 367.
Irregularity in other proceedings ... 1243
See also Criminal P. C., S. 539-B.
Irregularity in complaints ... 1245
Irregularities not cured by S. 537 ... 1245
Omissions ... 1252
Misdirection or non-direction to jurors 1263
See also Criminal P. C., S. 297.
Error or omission in Summons ... 1265
Error or omission in judgments or orders ... 1266
Court of competent jurisdiction ... 1266
Failure of justice—General ... 1268
Duty of Appellate Court ... 1272
S. 539. ... ... ... 1274
S. 539A. ... ... ... 1274
S. 539-B.
'Due notice' ... 1275
Purpose and use of ... 1276
Record of memorandum ... 1279
See also N. 2.
Non-compliance ... 1281
See also Criminal P. C., S. 537.
Evidence or information from persons on spot ... 1283
S. 540.
Effect of non-compliance ... 1284
Material witness ... 1284
Power and duty of Court ... 1286
Procedure ... 1288
Rights of parties ... 1291
See also N. 4.
Scope ... 1292
S. 540A. ... ... ... 1294
S. 541. ... ... ... 1295
S. 544 ... ... ... 1295

**CRIMINAL P. C.** *(contd.)* col.

**S. 545**
Applicability and scope ... 1298
Sub-s. (1) (a) ... 1299
Compensation to third person ... 1299
Payment of compensation ... 1301
Power of Court ... 1301
Procedure in appeals ... 1302
**S. 546** ... ... ... 1303
**S. 546-A** ... ... ... 1303
**S. 547** ... ... ... 1304
**S. 548** ... ... ... 1304
**S. 549** ... ... ... 1305
**S. 550** ... ... ... 1306
**S. 551** ... ... ... 1307
**S. 552** ... ... ... 1307
See also Guardians and Wards Act, S. 25.
**S. 554** ... ... ... 1310
**S. 555** ... ... ... 1311
**S. 556**
Permission of the appellate Court ... 1311
'Try or commit for trial' ... 1311
A party or personally interested ... 1311
Personal knowledge ... 1315
Himself a witness in the case ... 1316
Bar to hearing of appeals ... 1317
'Concerned in the official work or local bodies' ... 1318
Local inspections and inquiries ... 1320
Summary proceedings 1321
Consent or objection of the accused 1322
**S. 557** ... ... ... 1322
**S. 561-A**
Scope and applicability — Saving of inherent powers ... 1323
Inherent Powers ... 1325
Expunging remarks ... 1331
See also Criminal P. C., Ss. 367 and 439.
Abuse of process ... 1340
To secure the ends of justice ... 1341
Section does not override the express provisions of law ... 1342
Quashing of proceedings ... 1343
Stay of proceedings ... 1344
Return of property ... 1345
Powers to revise ... 1346
Power of review ... 1347
Bail ... 1349
Time-barred appeal ... 1349
**S. 562**
Admonition and conviction ... 1350
Appeal ... 1351
Applicability and scope ... 1352
See also N. 6.
Compensation and fine ... 1355
Criminal misappropriation or cheating ... 1355
Facts to be considered ... 1357
Offences beyond scope ... 1361
Power of Court ... 1363
See also N. 6.
Revision ... 1366
Second offence ... 1368
Security ... 1368
**S. 565** ... ... ... 1369

**CRIMINAL PROCEDURE (PUNJAB AMENDMENT) ACT (IV of 1930)** ... 1373

**CRIMINAL PROCEEDINGS** ... 1373
See Criminal trial.

**CRIMINAL REVISION** ... 1373
See Criminal P. C., Ss. 435 and 439.

col.

**CRIMINAL TRESPASS** ... 1373
See Penal Code, Ss. 441 to 460.

**CRIMINAL TRIAL.**
Abatement ... 1376
See also Criminal P. C., Ss. 247 and 259.
Abetment of offence ... 1376
Absconder, trial of ... 1376
See Criminal P. C., S. 512.
Accomplice, Pardon to ... 1376
See N. 44 and Criminal P. C., Ss. 337-339.
Accused, examination of ... 1377
See also Criminal P. C., S. 342.
Acquittal—Appeal ... 1377
See also N. 10 and Criminal P. C., Ss. 417, 423.
Adjournment ... 1378
See also Criminal P. C., S. 344.
Amalgamation of cases ... 1378
Amicus curiae ... 1378
See Criminal P. C., S. 561-A.
Appeal ... 1378
See also Criminal P. C., Ss. 404-431.
Appellate Court, Powers of ... 1381
See also Criminal P. C., S. 423.
Appreciation of evidence ... 1381
See (1) Criminal P. C., Ss. 367 and 423.
(2) Evidence Act, Ss. 1 and 5.
(3) Note 44.
Approver ... 1381
See also (1) Criminal P. C., S. 537.
(2) Note 44.
Assessors ... 1381
Autrefois acquit ... 1381
See also Criminal P. C., S. 403.
Bail ... 1381
See also Criminal P. C., S. 496.
Benefit of doubt ... 1382
See also (1) Penal Code, S. 302.
(2) Evidence Act, S. 3.
(3) Note 44.
Burden of proof ... 1382
See Note 44.
Charge ... 1382
See also Criminal P. C., Ss. 221-240.
Charge, omission to frame ... 1384
See also Criminal P. C., S. 535.
Civil and criminal remedies ... 1384
See also Criminal P. C., Ss. 190, 204.
Civil dispute ... 1385
See also Criminal P. C., Ss. 1, 145, 203.
Cognizance of offence ... 1387
See Criminal P. C., S. 190.
Commencement ... 1387
See Criminal P. C., Ss. 4 (1) (k) and 271.
Commission, issue of ... 1387
See also Criminal P. C., Ss. 503, 508.
Commitment ... 1388
See also Criminal P. C., Ss. 209, 215, 347 and 437.
Complaint ... 1389
See also Criminal P. C., Ss. 4 (1) (k), 195, 200, 203 and 476.
Compounding offence ... 1390
See also Criminal P. C., S. 345.

CRIMINAL TRIAL *(contd.)* col.

Confession ... 1390
See also (1) Criminal P. C., Ss. 162, 164, 342 and 364.
(2) Evidence Act, Ss. 24 to 30, S. 144, and S. 133.
(3) Note 44.

Court ... 1391

Conviction ... 1392

Costs ... 1406
See also Criminal P. C., S. 544.

Counter cases ... 1406
See also Criminal P. C., S. 233.

Cross-examination ... 1407
See (1) Criminal P. C., S. 256.
(2) Evidence Act, S. 137.
(3) Note 44.

Defence ... 1407
See also Criminal P. C., Ss. 289, 290, 256, 291 and 340.

Delay ... 1407

De novo hearing ... 1408
See also Criminal P. C., S. 350.

Disputes regarding property ... 1408
See Criminal P. C., Ss. 145-148.

Duty of Court ... 1408
See also (1) Criminal P. C., S. 367.
(2) Note 44.

Duty of prosecution ... 1411
See also (1) Criminal P. C., Ss. 208 and 286.
(2) Evidence Act, Ss. 101 to 104.
(3) Note 44.

Dying declaration ... 1411
See (1) Evidence Act, S. 32.
(2) Note 44.

Europeans, trial of ... 1411
See Criminal P. C., Ss. 285-A, 443 to 449 and S. 528-B.

Evidence ... 1411

Examination-in-chief ... 1510
See Evidence Act, S. 137.

Expunging the remarks ... 1510

First information ... 1510
See also (1) Criminal P. C., S. 154.
(2) Evidence Act, Ss. 34 and 155.

First offenders ... 1512
See Criminal P. C., S. 562.

Habeas corpus ... 1512
See also Criminal P. C., S. 491.

Husband and wife ... 1513
See Evidence Act, S. 20.

dentification ... 1513
See also Criminal P. C., S. 561-A.

Inherent powers of Court ... 1520
See Criminal P. C., S. 94.

Inspection ... 1520
See Criminal P. C., S. 94.

Investigation ... 1520
See also Criminal P. C., S. 156.

Irregularities in proceedings ... 1521
See also Criminal P. C., Ss. 529-537.

Joinder of accused ... 1524
See Criminal P. C., S. 239.

Joinder of charges ... 1524
See Criminal P. C., Ss. 238-240.

Joint trial ... 1524
See also Criminal P. C., Ss. 233-235 and 239.

Judgment ... 1525
See also Criminal P. C., Ss. 366, 367, 423, 424, 439 and 537.

CRIMINAL TRIAL *(contd.)* col.

Jurisdiction ... 1527
See also Criminal P. C., Ss. 28, 177-189.

Jury ... 1529

Liability ... 1535

Local inspection ... 1536
See also Criminal P. C., S. 539-B.

Lunatics ... 1537
See Criminal P. C., Ss. 464-475.

Maintenance ... 1537
See Criminal P. C., Ss. 488-489.

Misjoinder ... 1537
See also Criminal P. C., S. 539.

Misjoinder of charges ... 1537
See also Criminal P. C., Ss. 225-234.

Nuisance ... 1538
See Criminal P. C., Ss. 142-144.

Police diaries ... 1538
See also Note 44 and Criminal P. C., S. 162.

Practice ... 1538

Presumption ... 1540
See also Note 44.

Presumption of innocence ... 1541
See also Evidence Act, Ss. 101 to 104.

Previous conviction ... 1542
See (1) Criminal P. C., Ss. 221, 225-A, 310, 511, 565.
(2) Note 93.
(3) Evidence Act, S. 54.

Private defence ... 1542
See also Criminal P. C., S. 100

Process ... 1542
See also Criminal P. C., Ss. 68-99-A.

Procedure ... 1543

Production of documents ... 1544
See Criminal P. C., Ss. 94-99-A.

Prosecution ... 1544
See also Criminal P. C., Ss. 208, 252, 286, 367, 289, 292.

Preliminary enquiry ... 1546

Public nuisance ... 1546
See also Criminal P. C., Ss. 133-144.

Public prosecutor ... 1546
See also Criminal P. C., Ss. 492-495.

Reference ... 1546
See also Criminal P. C., Ss. 432-438.

Remand ... 1546
See also Criminal P. C., Ss. 344, 423.

Res judicata ... 1547
See also Criminal P. C., S. 403.

Restitution ... 1547
See also Criminal P. C., S. 517.

Re-trail ... 1547
See also Criminal P. C., Ss. 403, 423.

Revision ... 1550
See Criminal P. C., S. 439.

Review ... 1550
See also Criminal P. C., S. 369.

Revival ... 1551

Rights of defence ... 1551
See also Penal Code, S. 96.

Sanction ... 1553
See also Criminal P. C., Ss. 195, 196.

Search ... 1553
See also Criminal P. C., Ss. 96, 103.

**CRIMINAL TRIAL** *(contd.)* col.

Security proceedings ... 1553
See also Criminal P. C., Ss. 106, 123.

Sentence ... 1553
See also (1) Criminal P. C., Ss. 32-35, 562.
(2) Penal Code, Ss. 53-75. 302.

Sessions trial ... 1572
See also Criminal P. C., Ss. 268-283.

Special law ... 1573
See also Criminal P. C., S. 1.

Stay ... 1573
See also Criminal P. C., S. 344.

Summary trial ... 1578
See also Criminal P. C., Ss. 260-265.

Summons case ... 1578
See also Criminal P. C., Ss. 241-250.

Surety ... 1579
See also Criminal P. C., Ss. 106, 499.

Transfer ... 1579
See also Criminal P. C., Ss. 526-528.

Trial by assessors ... 1580
See also Criminal P. C., S. 309.

Trial of offences affecting administration of justice ... 1581
See also Criminal P. C., Ss. 195 and 476-487.

Vitiation of trial ... 1581
See also Criminal P. C., Ss. 529-537.

Warrant cases ... 1585
See also Criminal P. C., Ss. 251-259.

Withdrawal of cases ... 1585
See Criminal P. C., S. 528

Withdrawal of complaint ... 1585
See also Criminal P. C., S. 248.

Witness ... 1586
See (1) Note 44.
(2) Evidence Act, Ss. 118-134 and 138.

Written statement ... 1586
See Criminal P. C., Ss. 364, 342.

Young Offenders ... 1586
See Criminal P. C., S. 399.

**CRIMINAL TRIBES ACT (III of 1911)**
See also Criminal Tribes Act, 1924

S. 3 ... ... ... 1586
S. 5 ... ... ... 1586
S. 22 ... ... ... 1586
S. 23 ... ... ... 1586
S. 26 ... ... ... 1587

**CRIMINAL TRIBES ACT (VI of 1924)** ... 1587
See also Criminal Tribes Act, 1911

S. 3 ... ... ... 1587
S. 10 ... ... ... 1587
S. 22 ... ... ... 1588
S. 23 ... ... ... 1589
S. 24 ... ... ... 1592
S. 25 ... ... ... 1592
S. 29 ... ... ... 1593

**CROSS-APPEAL** ... 1593
See Civil P. C., O. 41, R. 22.

col.

**CROSS-CLAIMS** ... 1593
See Civil P. C., O. 8, R. 6; O. 21, R. 19

**CROSS COMPLAINTS** ... 1593
See Criminal Trial

**CROSS DECREES** ... 1593
See Civil P. C., O. 21, Rr. 18, 19

**CROSS-EXAMINATION** 1593
See (1) Criminal P. C., Ss. 208, 256, 257
(2) Evidence Act, Ss. 137 to 161

**CROSS-OBJECTION** ... 1593
See Civil P. C., O. 41, R. 22

**CROWN** ... 1593
See also (1) Constitutional law
(2) Escheat
(3) Grant

Adverse possession ... 1593
See (1) Adverse possession
(2) Limitation Act, Art. 149

Debts ... 1593
See also Companies Act, 1913, S. 230

Escheat ... 1595

Estoppel ... 1597

Executive functions ... 1597

Grant ... 1597
See also (1) Grant
(2) Crown Grants Act
(3) Government of India Act, 1935, S. 300

Islands and waste lands ... 1598

Judicial functions ... 1598

Prerogative ... 1598

Rights and powers ... 1599

Salvage ... 1599

Servant ... 1599
See also 'Master and Servant'

Suit by or against ... 1599
See Civil P. C., O. 27

**CROWN—ESCHEAT.** ... 1600
See (1) Crown
(2) Marwar Escheat of Property Act.

**CROWN GRANT** ... 1600
See (1) Grant.
(2) Crown Grants Act.
(3) Govt. of India Act, 1935, S. 300

**CROWN GRANTS ACT (XV of 1895)** 1600

S. 2 ... ... ... 1601
S. 3 ... ... ... 1603

**CROWN LANDS ACT (1884) OF NEW SOUTH WALES** ... 1606
See Grant — Crown Grant.

**CROWN LANDS ORDINANCE OF KENYA (No. XII of 1915)** ... 1606

**CROWN SIDE RULES** ... 1606
Chap. 37 R. 2.
See also Letters Patent (Calcutta), Cls. 24 and 29.

col.

**CRUELTY** ... 1607
See (1) Criminal P. C., S. 488.
(2) Divorce Act (1869), S. 10.
(3) Husband and wife— Restitution of conjugal rights.
(4) Prevention of Cruelty to Animals Act, 1890.

**CUL DE SAC** ... 1607
See highway.

**CULPABLE HOMICIDE** ... 1607
See Penal Code, Ss. 299 to 304

**CUMULATIVE SENTENCE** ... 1607
See (1) Criminal P. C., S. 35.
(2) Penal Code, S. 71.

**CURATOR'S ACT (19 of 1841)** ... 1607
See Succession (Property Protection) Act (19 of 1841)

**CURRENT ACCOUNT** ... 1607
See (1) Accounts.
(2) Banker and customer.
(3) Limitation Act, Art. 85.

**CURRENCY NOTE** ... 1607
See Paper Currency Act.

**CURRIMBHOY EBRAHIM (BARONETCY) ACT (4 of 1913)** ... 1607

**CUSTODIA LEGIS** ... 1607
See Civil P. C., O. 40, R. 1.

**CUSTODY** ... 1607
See (1) Arms Act, S. 19.
(2) Criminal P. C., Ss. 466, 475, 491, 552.
(3) Evidence Act, S. 26.
(4) Guardians and Wards.
(5) Guardians and Wards Act.
(6) Lunacy Act.
(7) Minor.
(8) Penal Code Ss. 359, 363, 498.
(9) Possession.

**CUSTOM** 1608—2001
Assam ... 1608
Bengal ... 1608
Berar ... 1611
Bihar ... 1611
Bombay ... 1612
Central Provinces ... 1615
Chota Nagpur ... 1617
General ... 1617
Gold Coast Colony ... 1693
Hill tribes ... 1693
Himachal Pradesh ... 1694
Jammu and Kashmir ... 1694
Madras ... 1695
Marwar ... 1698
Mercantile ... 1699
See Mercantile usage.
North-West Frontier Province ... 1699
Orissa ... 1706
Oudh ... 1707
See also, Custom (U. P.)
Punjab ... 1715
Uttar Pradesh ... 1997

**CUSTOMARY EASEMENT** ... 2001
See (1) Custom.
(2) Easements.
(3) Easements Act, S. 18.

col.

**CUSTOMARY LAW** ... 2001
See (1) Custom.
(2) Hindu law.

**CUSTOMARY RIGHT** ... 2001
See (1) Easements.
(2) Easements Act, S. 18.

**CUSTOM OF TRADE** ... 2001
See (1) Custom.
(2) Merchantile custom.

**CUTCHA ADATIA** ... 2001
See (1) Contract Act, Ss. 30, 211, 219.
(2) Principal and agent.

**CUTCHI MEMONS** ... 2001
See (1) Cutchi Memons Acts, (1920 and 1938).
(2) Hindu law—Applicability.
(3) Muhamadan law — Will.

**CUTCHI MEMONS ACT (46 of 1920)** ... 2001

**CUTCHI MEMONS ACT (10 of 1938)** ... 2002
S. 2 ... 2002

**CUTTACK LAND REVENUE REGULATION (BEN. REG. 12 of 1805)** 2002

**CYCLE TAX** ... 2002
See C. P. Municipalities Act, 1922 S. 175.

**CY PRES** ... 2002
See also (1) Civil P. C., S. 92.
(2) Hindu Law — Religious endowment
(3) Hindu Law — Will.
(4) Muhammadan Law— Waqf.
(5) Religious endowment.
(6) Succession Act, S. 118.

**DACCA CONSERVANCY ACT (VII of 1870)** ... 2004

**DACOITY** ... 2004
See Penal Code, Ss. 395 and 396.

**DAMAGES** ... 2004
See also (1) Contract Act, Ss. 73, 74.
(2) Tort.
(3) Employer's Liability Act.
Assessment of ... 2005
Breach of contract ... 2006
Conversion ... 2008
Illegal attachment and detenue ... 2008
Insurance ... 2009
Interest ... 2009
Landlord and tenant ... 2010
Lessor and lessee ... 2010
Liability for ... 2010
Limitation ... 2012
Master and servant ... 2012
See also Master and Servant.
Measure of ... 2012
Mines ... 2020
Minimising damages ... 2020
Negligence ... 2021
Other illustrative cases ... 2022
Pleader and client ... 2023
Principal and agent ... 2024

**DAMAGES** *(contd.)* col.
Preliminary decree ... 2024
Procuring wrongful decision or orders ... 2024
Proof of ... 2024
Railway company ... 2024
Right to ... 2025
Secretary of State ... 2025
Special damage ... 2025
Suit for ... 2026
Tort ... 2026
Trade mark ... 2027
Trespass ... 2027
Use and occupation ... 2028

**DAMDUPAT** ... 2028
See (1) Contract Act, S. 74.
(2) C. P. Code, S. 34 and O. 34, Rr. 2, 4 and 5.
(3) Interest.
(4) Hindu Law.

**DANCING GIRL** ... 2028
See (1) Hindu Law—(i) Adoption.
(ii) Joint family.
(iii) Succession.
(2) Penal Code, Ss. 372 and 273.

**DANDIDARI** ... 2028
See Land Tenure.

**DANGEROUS DRUGS ACT (II of 1930)** ... 2028
**S. 10** ... 2028

**DARKHAST GRANT** ... 2028
See Grant.

**DARPATNI** ... 2028
See Bengal Patni Regulation (VIII of 1819)

**DARPATNIDAR** ... 2029
See Bengal Ten. Act.

**DASAUNDH** ... 2029

**DASI** ... 2029
See Hindu Law—Succession.

**DASIPUTRA** ... 2029
See Hindu Law—Succession.

**DATTA HOMA** ... 2029
See Hindu Law — Adoption — Ceremonies.

**DATTAK MIMAMSA** ... 2029
See Hindu Law — Texts.

**DAYA BHAG** ... 2029
See Hindu Law—(i) Joint family.
(ii) Texts.

**DEADLY WEAPON** ... 2029
See Penal Code, Ss. 148 and 302.

**DEAD PERSON, DECREE AGAINST** 2029
See Civil P. C., O. 22, R. 6.

**DEAD PERSON, SUIT AGAINST** ... 2029
See C. P. C., O. 1, R. 10 and O. 22 Rr. 1, 2.

**DEAF AND DUMB** ... 2029
See (1) Criminal P. C., S. 341.
(2) Evidence Act, S. 119.
(3) Hindu Law—Succession.

**DEAF AND DUMB ACCUSED** ... 2029
See Cr. P. C., S. 341.

**DEAF AND DUMB WITNESS** ... 2029
See Evidence Act, S. 119

col.
**DEATH-BED GIFT** ... 2029
See Muhammadan Law—Gift.

**DEATH-ILLNESS** ... 2029
See Muhammadan Law—Gift.

**DEATH OF PARTY** ... 2029
See Civil P. C., O. 22, R. 6.

**DEATH REGISTER** ... 2029
See Evidence Act, Ss. 35 and 74.

**DEBT** ... 2029
See (1) C. P. Code, O. 21, Rr. 4 and 46.
(2) Contract Act, Ss. 59 and 60.
(3) Debtor and Creditor.
(4) Hindu Law.
(5) T. P. Act, S. 58.

**DEBT AND JOINT FAMILY BUSINESS** ... 2030
See Hindu Law—Joint family.

**DEBTOR AND CREDITOR** ... 2030
Appropriation ... 2030
See also Contract Act, Ss. 59 and 60.
Composition ... 2030
See also Contract Act, S. 63.
Tender ... 2031
See also N. 6 and Contract Act, S. 38.
Security ... 2031
Relationship of ... 2031
Payment of debt ... 2033
See also N. 3.
Miscellaneous ... 2035

**DEBTS-IMMORAL PURPOSES** ... 2036
See Hindu Law—(1) Alienation.
(2) Debts.

**DEBUTTAR PROPERTY** ... 2036
See (1) Hindu Law—Religious Endowment.
(2) Muhammadan Law—Wakf.
(3) Religious Endowment.

**DECEASED BROTHER'S WIDOW'S MARRIAGE ACT (1921, 11 and 12 GEO. V., Ch. 24)** ... 2036

**DECENNIAL SETTLEMENT REGULATION (BEN. REG. 8 of 1793)** ... 2036
See also Bengal Decennial Settlement Regulation (8 of 1793).

**DECISIONS** ... 2038
See Precedents.

**DECLARATION** ... 2038
See Specific Relief Act, S. 42.

**DECLARATION, OF TRUST** ... 2038
See (1) Hindu Law—Religious Endowment.
(2) Muhammadan Law—Wakf.
(3) Trusts.
(4) Trusts Act.

**DECLARATION, SUIT FOR** ... 2038
See Specific Relief Act, S. 42.

**DECLARATORY DECREE** ... 2038
See Specific Relief Act, S. 42.

**DECLARATORY RELIEF** ... 2038
See Specific Relief Act, S. 42.

**DECLARATORY SUIT** ... 2038
See Specific Relief Act, S. 42.

**DECREE** ... 2038
See also (1) Civil P. C., Ss. 2 (2), 47, 96, 152 and O. 9, R. 13.
(2) Execution.

DECREE *(contd.)* col.

Account Suit ... 2039
See Civil P. C., O. 20, R. 16.
Adjustment ... 2039
See (1) Civil P. C., S. 47.
(2) O. 21, Rr. 2 and 16.
Administration ... 2039
See Civil P. C., O. 20, R. 13.
Against dead person ... 2039
See Civil P. C., O. 20, R. 6.
Amendment of ... 2039
See also Civil P. C., Ss. 151, 152 and 153.
Appeal ... 2040
See Civil P. C., Ss. 96 and 100.
Appellate ... 2040
See Civil P. C., O. 41, R. 35.
Assignment ... 2040
Attachment ... 2040
See Civil P. C., S. 51 and O. 21, R. 53.
Certified copies of ... 2040
See Civil P. C., O. 41, R. 1.
Charge—decree ... 2040
See Civil P. C., O. 34, R. 15.
Compromise or Consent Decree ... 2040
See (1) N. 16 and (2) Compromise Decree.
(3) Civil P. C., O. 23, R. 3 and
(4) Deed—Construction.
Consent decree, penal clause ... 2040
See Contract Act, S. 74.
Consent decree, setting aside ... 2040
See Civil P. C., S. 96.
Construction ... 2040
See also (1) Civil P. C., Ss. 35 and 47; O. 20, Rr. 6, 11 and 12; O. 23, R. 3; O. 34, R. 5.
(2) Deed—Construction.
Contents and forms of ... 2066
See N. 27 and Civil P. C., O. 20.
Date of ... 2066
See also Civil P. C., O. 20, R. 7.
Effect of ... 2067
Executability ... 2068
See also Civil P. C., S. 47.
Execution ... 2071
See also Civil P. C., Ss. 36 to 74 and O. 21.
Execution by assignee ... 2075
See Civil P. C., O. 21, R. 16.
Ex parte ... 2075
See also Civil P. C., O. 9, R. 11
Finality of ... 2080
See also Civil P. C., Ss. 11, 38 and 100.
Foreign Decree ... 2084
See Civil P. C., S. 13.
Form of ... 2084
See also Civil P. C., O. 20.
Fraud ... 2088
Instalment ... 2089
See (1) N. 16;
(2) Civil P. C., S. 47, O. 20, R. 11.
Interest ... 2089
See Civil P. C., S. 34.
Merger ... 2089
Mesne Profits ... 2089
See Civil P. C., O. 20, R. 12.
Minor ... 2089
Mortgage Decree ... 2093
See Civil P. C., O. 34.
Partition suit ... 2093
See Civil P. C., O. 20, R. 18.

DECREE *(contd.)* col.

Partnership ... 2093
See Civil P. C., O. 20, R. 15.
Penal clauses ... 2093
See Contract Act, S. 74.
Possession ... 2093
See Civil P. C., O. 20, R. 12.
Pre-emption suit ... 2093
See Civil P. C., O. 20, R. 14.
Recovery of property ... 2093
See Civil P. C., O. 20, Rr. 9 and 10.
Set-off ... 2093
See Civil P. C., O. 20, R. 19.
Setting aside of ... 2093
See Civil P. C., S. 11, O. 9, Rr. 13 and 1.
Validity of ... 2114
See also Civil P. C., O. 22, R. 4.
Variation of ... 2118
See Civil P. C., Ss. 99, 152 and O. 20, R. 3.
Void decree ... 2118
See Civil P. C., S. 9.

**DEDICATION** ... 2119
See (1) Hindu Law — Religious endowment
(2) Muhammadan law—Wakf
(3) Religious endowment

**DEED** ... 2119
Ancient document
See Evidence Act, S. 90
Attestation ... 2119
Construction ... 2119
See also Civil P. C., S. 100
Execution ... 2329
Material alteration ... 2334
See also Contract Act, S. 62
Pardanashin lady ... 2342
See (1) Contract Act, S. 16
(2) Evidence Act, S. 111
Recitals ... 2342
Rectification ... 2344
See Specific Relief Act, Ss. 31 and 33
Validity ... 2344

**DEFAMATION** ... 2346
See (1) Penal Code, Ss. 499 and 500
(2) Tort—Defamation

**DEFAMATION—COMPLAINT** ... 2346
See Criminal P. C., S. 128

**DEFAMATION OF JUDGE** ... 2346
See (1) Contempt
(2) Contempt of Courts Act
(3) Penal Code, Ss. 172, 185 and 190

**DEFAULT** ... 2346
See Civil P. C., O. 9 and O. 17, R. 3

**DEFENCE** ... 2346
See Criminal P. C., Ss. 255, 256, 290 and 364

**DEFENCE—LIMITATION** ... 2346
See Limitation Act, S. 3

**DEFENCE OF BURMA ACT, 1940** ... 2346
S. 2 ... ... ... 2346
S. 18. ... ... ... 2346

**DEFENCE OF BURMA RULES** ... 2346
R. 2. ... ... ... 2346
R. 130 ... ... ... 2347

**DEFENCE OF INDIA ACT (IV of 1915)** ... 2347

col.

**DEFENCE OF INDIA ACT (XXXV of 1939)** ... 2348
**Preamble** ... ... ... 2348
**S. 1** ... ... ... 2349
**S. 2** ... ... ... 2350
**S. 3** ... ... ... 2360
**S. 8** ... ... ... 2360
**S. 14** ... ... ... 2361
**S. 15** ... ... ... 2362
**S. 16** ... ... ... 2362
See also Defence of India Act, S. 2
**S. 17** ... ... ... 2365
**S. 19** ... ... ... 2365
**S. 21** ... ... ... 2370

**DEFENCE OF INDIA (ADAPTATION TO MYSORE) ACT (126 of 1939)** ... 2371
**S. 2** ... 2371

**DEFENCE OF INDIA (AMENDMENT) ORDINANCE (14 o 1943)** ... 2371
**S. 2** ... 2371
**S. 3** ... ... 2372

**DEFENCE OF INDIA (CRIMINAL... LAW AMENDMENT) ACT (4 of 1915)** 2373
**S. 5** ... ... ... 2373

**DEFENCE OF INDIA ORDINANCE (5 of 1939)** ... 374
**R. 81** ... 2374

**DEFENCE OF INDIA (SECOND AMENDMENT) ORDINANCE (31 of 1945)** ... 2374
**S. 2** ... 2374

**DEFENCE OF INDIA SECOND AMENDMENT ORDINANCE (12 of 1946)** ... 2374

**DEFENCE OF INDIA RULES (1939)** ... 2374
**R. 2** ... ... ... 2376
**R. 3** ... ... ... 2377
**R. 4** ... ... ... 2378
**R. 5** ... ... ... 2378
**R. 16** ... ... ... 2380
**R. 17** ... ... ... 2380
**R. 19** ... ... ... 2380
**R. 26** ... ... ... 2380
See also Defence of India Rules, R. 129
**R. 30** ... ... ... 2391
**R. 34** ... ... ... 2392
**R. 35** ... ... ... 2398
**R. 38** ... 2399
See also Defence of India Rules, R. 34.
**R. 38B** ... ... ... 2402
**R. 39** ... ... ... 2403
**R. 45** ... ... ... 2406
**R. 47** ... ... ... 2406
**R. 56** ... ... ... 2407
**R. 58** ... ... ... 2409
**R. 75A** ... ... ... 2409
Applicability & Scope ... 2409
Requisition ... 2409
Compensation ... 2413
**R. 81** ... 2414
See also, Defence of India Rules, R. 119
**R. 81A** ... ... ... 2438
**R. 83** ... ... ... 2439
**R. 84** ... ... ... 2439
**R. 89** ... ... ... 2440
**R. 90** ... ... ... 2440
**R. 90B** ... ... ... 2444
**R. 90-C** ... ... ... 2445

DEFENCE OF INDIA RULES *(contd.)* col.

**R. 96** ... ... ... 2445
**R. 97** ... ... ... 2445
**R. 114** ... ... ... 2445
**R. 116** ... ... ... 2446
**R. 117** ... ... ... 2446
**R. 119** ... ... ... 2447
Scope and applicability ... 2447
Publication ... 2450
Notice ... 2458
See also N. 2.
Presumption and proof ... 2461
See N. 1.
**R. 120** ... ... ... 2461
**R. 121** ... ... ... 2461
See also, Defence of India Rules, Rr. 35, 81 and 90
**R. 122** ... ... ... 2463
**R. 128** ... ... ... 2464
**R. 129** ... ... 2464
See also, Defence of India Rules, R. 26
Scope ... 2464
Power of arrest and detention ... 2468
**R. 130** ... ... ... 2472
**R. 130A** ... ... ... 2476
**R. 132** ... ... ... 2477
See Defence of India Rules R. 81

**DEGRADED WOMAN** ... 2477
See (1) Hindu Law—Maintenance
(2) Hindu Law—Stridhanam.
(3) Hindu Law—Succession.

**DEITY** ... 2477
See (1) Civil P. C., S. 92.
(2) Hindu Law—Religious Endowment.

**DEKKHAN AGRICULTURISTS' RELIEF ACT (17 of 1879)** ... 2477
**S. 2** ... ... ... 2478
See also S. 10-A.
Agriculturist, who is ... 2478
Agricultural income ... 2485
District or part of district ... 2486
Money ... 2486
**S. 3 (a)** ... ... ... 2486
**S. 3 (b)** ... ... ... 2486
**S. 7** ... ... ... 2489
**S. 10** ... ... ... 2489
**S. 10-A** ... ... ... 2489
Evidence ... 2489
Applicability and scope ... 2489
Object ... 2493
Power of Court ... 2494
Suit for redemption ... 2494
**S. 11** ... ... ... 2494
**S. 12** ... ... ... 2495
Scope and applicability ... 2495
Taking account ... 2497
Compromise decree ... 2498
Burden of proof ... 2498
**S 13** ... ... ... 2499
Scope and applicability ... 2499
Agreement regarding mortgage transactions ... 2500
Mode of accounting ... 2501
Suit on pro-note ... 2502
**S. 15** ... ... ... 2502
**S. 15-B** ... ... ... 2504
See also, S. 20
**S. 15-D** ... ... ... 2506
Scope and applicability ... 2506
Accounts ... 2508
Redemption ... 2509
Sale or foreclosure ... 2510

DEK. AGRI. RELIEF ACT *(contd.)* col.
S. 20 ... ... ... 2511
S. 21 ... ... ... 2513
S. 22 ... ... ... 2514
See also S. 2.
Scope and applicability ... 2514
Immovable property .. 2516
Specifically mortgaged ... 2516
Management by Collector ... 2517
Crops ... 2518
Appeal ... 2518
S. 23 ... ... ... 2518
S. 39 ... ... ... 2518
S. 43 ... ... ... 2518
S. 44 ... ... ... 2518
S. 47 ... ... ... 2519
S. 48 ... ... ... 2519
S. 53 ... ... ... 2519
S. 63-A ... ... ... 2520
See also, Registration Act, S. 17
S. 65 ... ... ... 2520
S. 71 ... ... ... 2520
S. 71-A ... ... ... 2521
See also Ss. 12 and 13.
S. 72 ... ... ... 2521
Chap. III ... ... ... 2521
Chap. IV ... ... ... 2521

**DELAY** ... 2522
See (1) Evidence Act, S. 115.
(2) Limitation Act, S. 15.
(3) Specific Relief Act, S. 22.

**DELHI AND AJMER-MERWARA RENT CONTROL ACT (19 of 1947)** 2522
S. 1 (2) ... 2522
S. 1 ... ... ... 2522
S. 7 ... ... ... 2522
S. 9 ... ... ... 2522
S. 14 ... ... ... 2523
Sch. II ... ... ... 2523

**DELHI LAWS ACT (13 of 1912)** ... 2523
S. 2 ... ... ... 2523

**DELHI LAWS ACT (7 of 1915)** ... 2523
S. 2 ... ... ... 2523

**DELHI RENT CONTROL ORDINANCE (1944)** ... 2524
S. 11 ... ... ... 2524

**DELIVERY** ... 2524
See (1) Contract Act, S. 108.
(2) Muhammadan Law—Gift.
(3) Railways Act, S. 72.
(4) Sale of Goods Act, Ss. 31 to 44.
(5) T. P. Act, Ss. 83 and 122.

**DEMONSTRATIVE LEGACY** ... 2524
See (1) Hindu Law—Will.
(2) Will.

**DENIAL OF TITLE** ... 2524
See (1) Evidence Act, S. 116.
(2) Landlord and tenant.
(3) T. P. Act, S. 111.

**DEPOSED CHIEFS' REMOVAL ORDINANCE (Nigeria)** ... 2524
S. 2 ... ... ... 2524

**DEPOSIT** ... 2524
See (1) Civil P. C., O. 21, Rr. 84 89 and O. 24.
(2) Contract Act, S. 73.
(3) T. P. Act, Ss. 83 and 84.

col.
**DEPOSIT OF TITLE-DEEDS** ... 2524
See T. P. Act, S. 59.

**DEPOSITION** ... 2524
See Evidence

**DEPOSITORY** ... 2524
See Limitation Act, Art. 145

**DESAI INAM** ... 2524
See Grant—Inam.

**DESCENDANTS** ... 2524
See (1) Custom (General (and) Punjab)—Succession.
(2) Hindu Law—Succession.
(3) Muhammadan Law—Succession.
(4) Succession Act.

**DESCRIPTION OF PARTY TO SUIT** ... 2524
See Civil P. C., O. 1, R. 10.

**DESCRIPTION OF WITNESS** ... 2524
See Evidence.

**DESERTION** ... 2524
See (1) Divorce Act, Ss. 3, 10.
(2) Parsi Marriage and Divorce Act.
(3) Hindu Law—Maintenance.
(4) Husband and wife.

**DESHGAT WATAN** ... 2524
See (1) Bombay Hereditary Offices (Amendment) Act, 1886.
(2) C. P. Code, S. 60.
(3) Grant.

**DESHMUKHI WATAN** ... 2525
See Grant.

**DETENTION IN CIVIL PRISON** ... 2525
See Civil P. C., Ss. 51, 55 to 59, 134 to 136, O. 21, Rr. 37, 38 and O. 38.

**DETENTION IN CUSTODY** ... 2525
See (1) Cr. P. C., Ss. 344 and 491.
(2) Criminal Trial.
(3) Local Preventive Detention Acts.
(4) Local Public Safety Acts and Orders.

**DETENTION OF ACCUSED BY POLICE** ... 2525
See (1) Cr. P. C., Ss. 344 and 491.
(2) Criminal Trial.

**DETERMINATION OF TENANCY** ... 2525
See (1) DEED—Construction.
(2) Landlord and tenant.
(3) Lease.
(4) T. P. Act, Ss. 105, 117.

**DEVASTHAN** ... 2525
See (1) Hindu Law—Religious endowment.
(2) Religious endowment.

**DEWAS (JUNIOR) DEBT CONCILIATION ACT (1943)** ... 2525
S. 4. ... 2525

**DEVASTAVIT** ... 2525
See (1) Executor.
(2) Probate and Administration Act, S. 146.

**DHARDHURA** ... 2525
See (1) Bengal Alluvion and Diluvion Regulation (11 of 1825).
(2) Landlord and Tenant.

col.

**DHARMA** ... 2525
See (1) Hindu Law—Religious Endowment.
(2) Mahommedan Law—Religious Endowment.
(3) Trust.

**DHARMADA** ... 2525
See Hindu Law—Will.

**DHARMAKARTA** ... 2525
See Hindu Law — Religious Endowment.

**DICTA** ... 2525
See Precedents.

**DICTIONARY** ... 2525
See (1) Evidence Act, S. 57.
(2) Interpretation of Statutes.

**DIGAMBAR JAINS** ... 2525
See (1) Custom (General).
(2) Hindu Law—Applicability.

**DIGWARIS** ... 2525
See Land tenure.

**DILUVION** ... 2526
See (1) Agra Tenancy Act, 1926, S. 72.
(2) Alluvion and Diluvion.
(3) Bengal Alluvion and Diluvion Regulation, 1825,
(4) Bihar Tenancy Act, 1825, S. 52.
(5) Custom (Punjab).
(6) Riparian rights.

**DIRECTORS** ... 2526
See (1) Company and
(2) Companies Act.

**—Appointment of** ... 2526
See Companies Act, Ss. 83A and 83B.

**—Liability** ... 2526
See Companies Act, S. 70.

**—Loans** ... 2526
See Companies Act, S. 86D.

**—Powers and duties of** ... 2526
See Companies Act, Sch. I, Table A. Regulations 71 to 73.

**—Prosecution** ... 2526
See Companies Act, S. 237.

**—Qualifications** ... 2526
See Companies Act, S. 85.

**DISAFFECTION** ... 2526
See Penal Code, S. 124-A.

**DISAPPEARANCE** ... 2526
See (1) Criminal P. C., S. 512.
(2) Evidence Act, Ss. 107 and 108

**DISCHARGE** ... 2526
See (1) Criminal P. C., Ss. 209, 253 and 254.
(2) Evidence Act, Ss. 101 to 104 and 114.

**DISCHARGE OF ACCUSED** ... 2526
See Criminal P. C., Ss. 209, 253 and 254.

**DISCHARGE OF BURDEN OF PROOF** ... 2526
See Evidence Act Ss. 101-104 and 114.

**DISCIPLINARY JURISDICTION** ... 2526
See (1) Contempt.
(2) Contempt of Courts Act.
(3) Legal Practitioner.
(4) Legal Practitioner's Act.
(5) Letters Patent (Cal. Bom. Mad.) Cl. 10.

col.

**DISCONTINUANCE OF POSSESSION** ... 2526
See (1) Adverse possession—Possession.
(2) Landlord and tenant — Adverse possession.
(3) Limitation Act, Arts. 142, 144.

**DISCOVERY AND INSPECTION** ... 2526
See Civil P. C., O. 11.

**DISCRETIONARY RELIEFS** ... 2526
See Specific Reliefs Act, S. 42.

**DISHONEST INTENTION** ... 2526
See (1) Evidence Act, Ss. 14, 15 and 111.
(2) Penal Code, Ss. 24 and 403 to 408

**DISHONESTY** ... 2526
See Penal Code, S. 24.

**DISHONOUR, BILLS OF EXCHANGE** ... 2526
See 'Negotiable Instruments, Act, Ss. 93 and 98.

**DISHONOUR—HUNDI** ... 2526
See Neg. Instri Act, Ss. 91—98.

**DISMISSAL FOR DEFAULT** ... 2526
See Civil P. C., O. 9, Rr. 2, 3, 8, 9.

**DISMISSAL FROM SERVICE** ... 2527
See (1) Government oi India Act, (1935), S. 240.
(2) Master and servant.

**DISMISSAL OF COMPLAINT** ... 2527
See Criminal P. C., Ss. 203 and 247.

**DISMISSAL OF SUIT** ... 2527
See Civil P. C., O. 9. R. 8.

**DISPARAGING REMARKS** ... 2527
See (1) Civil P. C., S. 151.
(2) Criminal P. C., Ss. 367, 439 and 561A.

**DISPOSAL** ... 2527
See Penal Code, S. 372.

**DISPOSAL OF DEAD BODY** ... 2527
See Penal Code, S. 318.

**DISPOSAL OF PROPERTY** ... 2527
See Criminal P. C., S. 517.

**DISPOSSESSION** ... 2527
See (1) Adverse Possession.
(2) Limitation Act, Arts. 142—144.

**DISPUTE AS TO POSSESSION OF IMMOVABLE PROPERTY** ... 2527
See Criminal P. C., Ss. 144 to 147.

**DISQUALIFICATION** ... 2527
See (1) Hindu Law — Succession.
(2) Legal Practitioner.
(3) Legal Practitioner's Act, S. 14.

**DISQUALIFICATION OF MAGISTRATES** ... 2527
See Criminal P. C., Ss. 526 to 528.

**DISQUALIFCATION TO GIVE EVIDENCE** ... 2527
See Evidence Act, S. 118.

**DISQUALIFIED HEIR** ... 2527
See Hindu Law—Succession.

**DISSOLUTION OF MARRIAGE** ... 2527
See (1) Divorce Act.
(2) Dissolution of Muslim Marriages Act, 1939,
(3) Hindu Law—Marriage.
(4) Husband and wife.
(5) Muhammadan Law—Divorce.

col.

**DISSOLUTION OF MUSLIM MARRIAGES ACT (8 of 1939)** ... 2527
S. 2 ... ... ... 2527
Conversion ... 2527
Failure to maintain wife ... 2527
Functions of Court ... 2531
'Khula' divorce ... 2532
Marriage before puberty ... 2532
Retrospective effect ... 2534
See also S. 4
Scope ... 2534
Second marriage by husband ... 2535
"Virulent venereal disease" ... 2535
S. 4 ... ... ... 2535
S. 5 ... ... ... 2536
**DISSOLUTION OF PARTNERSHIP** ... 2536
See (1) Contract Act, Ch. XI.
(2) Partnership.
(3) Partnership Act, Ss. 39, 59.
**DISTANT KINDRED** ... 2536
See Muhammadan Law—Succession.
**DISTINCT CAUSE OF ACTION** ... 2536
See C. P. C., S. 11 and O. 2, R. 2.
**DISTINCT OFFENCES** ... 2536
See Cr. P. C., Ss. 35, 233 and 438.
**DISTINCT RELIEFS** ... 2536
See Civil P. C., O. 7, Rr. 7 and 8.
**DISTINCT SUBJECTS** ... 2536
See Court-fees Act, S. 17.
**DISTRAINT** ... 2536
See (1) Bengal Tenancy Act.
(2) Dekkhan Agriculturists' Rel. Act.
(3) Landlord and Tenant.
(4) Madras Estates Land Act.
**DISTRESS** ... 2536
See (1) Bengal Tenancy Act.
(2) Dekkhan Agriculturists' Rel. Act.
(3) Landlord and Tenant.
(4) Madras Estates Land Act.
**DISTRICT BOARDS ACTS** ... 2536
See Local District Boards Acts.
**DISTRICT COURT** ... 2536
See C. P. Code, S. 2 (4).
**DISTRICT MAGISTRATE** ... 2536
See Cr. P. Code, Ss. 6, 10 and 30.
**DISTRICT MAGISTRATE — REVISION BY** ... 2536
See Cr.. P. C., S. 438.
**DISTRICT MUNICIPAL ACTS** ... 2536
See Local Acts.
**DIVERSION** ... 2537
See (1) Easements
(2) Easements Act.
(3) Riparian Rights.
**DIVESTING OF ESTATE** ... 2537
See Hindu Law—(1) Adoption.
(2) Succession.
**DIVISION** ... 2537
See (1) Hindu Law—Joint Family —Partition.
(2) Partition.
(3) Partition Act.
**DIVORCE** ... 2537
See (1) Buddhist Law (Burmese)—Marriage—Dissolution.
(2) Dissolution of Muslim Marriages Act, 1939.
(3) Divorce Act.
(4) Divorce (Indian) and Colonial) Jurisdiction Act (1926).
(5) Hindu Law—Marriage.
(6) Husband and Wife.

DIVORCE *(contd.)* col.
(7) Jews—Divorce.
(8) Muhammadan Law.
(9) Parsi Marriage and Divorce Act.
(10) Restitution of conjugal rights.

**DIVORCE ACT (4 of 1869)** ... 2537
S. 1. ... ... ... 2537
S. 2 ... ... ... 2537
See also S. 7.
Jurisdiction of Indian Courts. ... 2537
Mode of determining domicile ... 2538
Proof of domicile ... 2540
Acquisition of domicile ... 2540
Change of domicile ... 2541
Foreign domicile ... 2543
Duty of Court ... 2545
Residence ... 2546
Profession of Christian religion ... 2546
Christian Marriage ... 2547
S. 3. ... ... ... 2547
Residence ... 2547
Jurisdiction ... 2549
"Desertion" ... 2552
S. 4. ... ... ... 2552
S. 7 ... ... ... 2553
English Law—Applicability ... 2553
Adultery and desertion ... 2558
Security for costs ... 2559
Previous marriage subsisting proof ... 2560
Lex loci contractus ... 2561
Practice and procedure ... 2561
Appeal ... 2564
Domicile ... 2564
S. 8 ... ... ... 2564
S. 10 ... ... ... 2565
Adultery proof ... 2565
Bigamy with adultery ... 2568
Change of religion ... 2568
Cruelty ... 2569
Adultery with cruelty ... 2570
Desertion ... 2571
Adultery with desertion ... 2571
Domicile of parties ... 2572
See also N. 10
Proof of valid marriage ... 2572
Jurisdiction of Court ... 2573
See also N. 8.
Nature of evidence ... 2573
See also N. 1.
Effect of delay ... 2573
Dissolution and annulment ... 2574
Claim for damages ... 2574
Fraud ... 2574
Cost ... 2575
Revival of matrimonial offence ... 2575
S. 11 ... ... ... 2575
S. 12 ... ... ... 2577
See also Divorce Act, Ss. 13 and 15
S. 13 ... ... ... 2579
S. 14 ... ... ... 2580
Scope ... 2580
Proof ... 2581
Condonation ... 2583
Collusion ... 2585
Connivance ... 2585
Discretion of Court ... 2585
Delay ... 2589
Conduct conducive to adultery ... 2589
S. 15 ... ... ... 2591
S. 16 ... ... ... 2591
S. 17. ... ... ... 2594
Applicability and scope ... 2594
Confirmation of decree ... 2594
Evidence ... 2596

**DIVORCE ACT** *(contd.)* col.
Notice ... 2597
Power and duty of Court ... 2598
S. 18. ... ... ... 2599
S. 19. ... ... ... 2600
Burden of proof ... 2600
Form of decree ... 2601
Grounds of decree ... 2601
Other cases ... 2604
Power of court ... 2605
S. 20. ... ... ... 2606
S. 22. ... ... ... 2607
S. 23. ... ... ... 2609
S. 26. ... ... ... 2609
S. 31. ... ... ... 2609
S. 32. ... ... ... 2609
S. 34. ... ... ... 2609
S. 35. ... ... ... 2612
S. 36. ... ... ... 2613
S. 37. ... ... ... 2614
S. 38. ... ... ... 2617
S. 40. ... ... ... 2617
S. 41. ... ... ... 2618
S. 43. ... ... ... 2619
S. 44. ... ... ... 2620
S. 45. ... ... ... 2620
S. 47. ... ... ... 2622
S. 49. ... ... ... 2622
S. 50. ... ... ... 2622
S. 51. ... ... ... 2623
S. 55. ... ... ... 2624
S. 56. ... ... ... 2626
S. 57. ... ... ... 2626
S. 61. ... ... ... 2626
S. 62. ... ... ... 2626

**DIVORCE (INDIAN AND COLONIAL) JURISDICTION ACT (16 & 17 AND GEO. V, C. 40, 1926)** ... 2627
S. 1. ... ... ... 2627

**DIVORCE LAW (JAMAICA) (1879)** ... 2631
See also Husband and wife—Divorce suit.

**DOCTRINE OF FACTUM VALET** ... 2631
See Hindu Law — (i) Adoption.
(ii) Marriage.

**DOCUMENT** ... 2631
See (1) Deed.
(2) Evidence.
(3) Evidence Act, Ss. 61 to 100
(4) Penal Code, S. 29.

**DOCUMENT—ALTERATION** ... 2631
See Contract Act, S. 62.

**DOCUMENT—DECREE FOR EXECUTION OF** ... 2631
See Civil P. C., O. 21, R. 34.

**DOCUMENT—EXPERT** ... 2631
See Evidence Act, S. 45.

**DOCUMENT—FABRICATION** ... 2631
See Penal Code, S. 464.

**DOCUMENT—FALSE** ... 2631
See Penal Code, S. 464

**DOCUMENT—FORGERY OF** ... 2631
See (1) Evidence Act, S. 45
(2) Penal Code, Ss. 463 and 465.

**DOCUMENT—PRODUCTION OF** ... 2631
See Civil P. C., O. 7, Rr. 14 to 18 and O. 11, R. 14.

**DOCUMENTARY EVIDENCE** ... 2631
See Evidence Act, Ss. 61 to 100.

**DOMESTIC TRIBUNAL** ... 2632
See also (1) Arbitration.
(2) Civil P. C., S. 9.
(3) Club.

**DOMESTIC TRIBUNAL** *(contd.)* col.
(4) Company.
(5) Racing.
(6) Jurisdiction.

**DOMICILE** ... 2633
See also
(1) Divorce Act, Ss. 2 and 10.
(2) Succession Act, Part II.

**DOMINANT AND SERVIENT OWNER** ... 2633
See (1) Easement.
(2) Easements Act, S. 4.

**DONATIO MORTIS CAUSA** ... 2633
(1) Hindu Law—Gift
(2) Hindu Law—Will.
(3) Mahomedan Law—Gift.
(4) Mahomedan Law—Will.
(5) Transfer of Property Act, Ss. 122—128.
(6) Will.

**DONOR AND DONEE** ... 2633
See (1) Deed.
(2) Evidence Act, S. 111.
(3) Grant.
(4) Hindu Law — Gift.
(5) Muhammadan Law—Gift.
(6) T. P. Act, Ss. 122—127.

**DOULE'S SETTLEMENT MANUAL —Appendix VII, Para 12** ... 2633
Appendix VII, Para. 12

**DOWER** ... 2634
See Muhammadan Law.

**DRAIN** ... 2634
See (1) Easements.
(2) Easements Act, Ss. 13 and 28.

**DRUGS** ... 2634
See (1) Bombay Abkari Act.
(2) Dangerous Drugs Act.
(3) Drugs Control Order.
(4) Local Excise Acts.
(5) Local Prohibition Acts.
(6) Opium Act.

**DRUGS CONTROL ORDER (1943)** ... 2634
Cl. 11. ... ... ... 2634
Cl. 12. ... ... ... 2635
Cl. 16. ... ... ... 2636
Cl. 17. ... ... ... 2636

**DRUNKENNESS** ... 2637
See Penal Code, 85.

**DUBASH** ... 2637
See (1) Contract Act, S. 182.
(2) Principal and agent.

**DUMB AND DEAF WITNESS** ... 2637
See Evidence Act, S. 119.

**DUMBNESS** ... 2637
See (1) Hindu Law — Succession.
(2) Evidence Act, S. 119.

**DURESS** ... 2637
See (1) Contract.
(2) Contract Act, S. 16.
(3) Penal Code, Ss. 339 to 348.

**DURGAH** ... 2637
See (1) Durgah Khwaja Sahib Act, 1936.
(2) Durgah Khwaja Sahib (Emergency Provisions) Act, 1950.
(3) Muhammadan Law—Waqf.

**DURGAH KHWAJA SAHIB (EMERGENCY PROVISIONS) ACT, (1950)** ... 2637
S. 52 ... ... ... ... 2637

**DURPATNIDAR** ... 2637
See (1) Bengal Patni Regulation, 1819.
(2) Bengal Tenancy Act.

| | col. |
|---|---|
| **DUTY OF COURT—JUDGMENT** ... | 2637 |
| See (1) Civil P. C., O. 20, R. 4. | |
| (2) Criminal P. C., S. 367. | |
| (3) Jurisprudence. | |
| **DWAYAMUSHYAYANA** ... | 2637 |
| See Hindu Law — Adoption. | |
| **DWIRGAMMAN CEREMONY** ... | 2637 |
| See Hindu Law—Widow. | |
| **DYING DECLARATION** ... | 2637 |
| See (1) Cr. P. C., S. 164. | |
| (2) Evidence Act, S. 32. | |
| **EARNEST MONEY** ... | 2637 |
| See (1) Contract Act, S. 73. | |
| (2) T. P. Act, Ss. 54 and 55. | |
| **EASEMENTS** ... | 2637 |
| See also (1) Easements Act. | |
| (2) Riparian Rights. | |
| (3) Limitation Act, S. 26. | |
| (4) Specific Relief Act, Ss. 52 to 57. | |
| Acquisition ... | 638 |
| See also (1) Easements Act, Ss. 12 and 15. | |
| (2) Limitation Act, S. 26. | |
| Continuous ... | 2638 |
| See Easements Act, S. 5. | |
| Customary right ... | 2638 |
| See also Easements Act, S. 8. | |
| Dominant and Servient owners ... | 2639 |
| Extinction ... | 2640 |
| See also Easements Act, Ss. 37 to 48. | |
| Ferry ... | 2640 |
| See N. 8 and 8-A. | |
| Highway ... | 2640 |
| See Highway. | |
| Light and air ... | 2640 |
| Licence ... | 2641 |
| See also Easements Act, Ss. 52 to 64. | |
| Overhanging trees ... | 2641 |
| Party wall ... | 2642 |
| See also Co-sharer. | |
| Presumption ... | 2643 |
| Privacy ... | 2643 |
| Rights of ... | 2644 |
| Riparian rights ... | 2650 |
| See N. 8 and Riparian rights. | |
| User ... | 2650 |

| | col. |
|---|---|
| **EASEMENTS ACT (5 of 1882)** ... | 2651 |
| **S. 1.** ... ... ... | 2651 |
| **S. 2** ... ... ... ... | 2652 |
| **S. 3** ... ... ... ... | 2656 |
| **S. 4** ... ... ... ... | 2656 |
| Essentials ... | 2657 |
| Law and fact, question of ... | 2657 |
| Owner or occupier ... | 2657 |
| Beneficial enjoyment ... | 2658 |
| Land includes artificial structures ... | 2658 |
| Prescriptive easement and ownership ... | 2658 |
| Easement and natural rights ... | 2660 |
| Easement and Customary right ... | 2662 |
| Easements, what are ... | 2662 |
| Easements what are not illustrations ... | 2666 |
| **S. 5** ... ... ... ... | 2667 |
| **S. 7** ... ... ... ... | 2669 |
| Scope and applicability ... | 2669 |
| Right to build ... | 2669 |
| Right to light and air ... | 2670 |
| Right to support ... | 2671 |
| Surface and percolating waters ... | 2671 |
| See also N. 7 | |
| Right to uninterrupted flow of stream ... | 2674 |
| Drainage ... | 2676 |
| See also N. 5 | |
| Right to use water for consumption and irrigation ... | 2680 |
| Definition of "owner" and "interruption" ... | 2683 |
| Right of privacy ... | 2683 |
| **S. 8** ... ... ... | 2683 |
| **S. 10** ... ... ... | 2685 |
| **S. 12** ... ... ... | 2685 |
| **S. 13** ... ... ... | 2687 |
| Scope and applicability ... | 2687 |
| Easement of necessity ... | 2689 |
| Apparent, continuous and necessary easement ... | 2691 |
| Right of way ... | 2691 |
| Right to water and water-course ... | 2698 |
| Right to light and air ... | 2703 |
| Right of support ... | 2705 |
| Implied grant ... | 2706 |
| See also N. 4 | |
| Right in space ... | 2707 |
| **S. 14** ... ... ... | 2707 |

# ABBREVIATIONS

## *REPORTS*

**A.I.R. 1914 All., Bom., etc.** ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
**A. M. L. J.** ... Ajmer-Merwara Law Journal.
**Agra. H. C. R.** ... Agra High Court Reports.
**All. or I. L. R. All.** ... Indian Law Reports, Allahabad Series.
**All. L. Jour.** ... Allahabad Law Journal.
**All. W. N.** ... Allahabad Weekly Notes.
**All. W. R.** ... Allahabad Weekly Reporter.
**I. L. R. Assam** ... Indian Law Reports, Assam Series.
**Avadh W. N.** ... Avadh (or Oudh) Weekly Notes.
**B. R.** ... Bihar Reports.
**Beng. L. R.** ... Bengal Law Reports.
**B. L. J. R. or Bihar L. J. R.** ... Bihar Law Journal Reports.
**Bom. or I. L. R. Bom.** ... Indian Law Reports, Bombay Series.
**Bom. H. C. R.** ... Bombay High Court Reports.
**Bom. L. R.** ... Bombay Law Reporter.
**Bom. P. J.** ... Bombay Printed Judgments.
**Bur. L. Jour.** ... Burma Law Journal.
**Bur. L. R.** ... Burma Law Reports.
**Bur. L. Tim.** ... Burma Law Times.
**Cal. or I. L. R. Cal.** ... Indian Law Reports, Calcutta Series.
**Cal. L. Jour.** ... Calcutta Law Journal.
**Cal. L. R.** ... Calcutta Law Reports.
**Cal. W. N.** ... Calcutta Weekly Notes.
**Cal. W. N. (D. R.)** ... Calcutta Weekly Notes (Dacca Reports).
**C. P. L. R.** ... Central Provinces Law Reports.
**Cr. App. Rep.** ... Cohen's Criminal Appeal Reports.
**Cr. or Cri. L. Jour.** ... Criminal Law Journal.
**I. L. R. Cut.** ... Indian Law Reports, Cuttack Series.
**Cut. L. T.** ... Cuttack Law Times.
**E. P.** ... East Punjab.
**I. L. R. E. P. or East Punj.** ... Indian Law Reports, East Punjab Series.
**F. C. R.** ... Federal Court Reports.
**F. L. J.** ... Federal Law Journal.
**I. L. R. Hyd.** ... Indian Law Reports Hyderabad Series.
**Ind. App.** ... Law Reports, Indian Appeals.
**Ind. Cas.** ... Indian Cases.
**I. T. R.** ... Income Tax Reports.
**J. & K.** ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
I. L. R. Kar. ... Indian Law Reports, Karachi Series.
K. B. ... (Law Reports) King's Bench Division.
(L. J.) K. B. ... Law Journal Reports, King's Bench.
K. L. T. or Ker. L. T. ... Kerala Law Times.
I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
Lah. L. T. ... Lahore Law Times.
L. R. A. ... Law Reporter, Allahabad.
Low. Bur. Rul. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal
Madh. B. L. R. ... Madhya Bharat Law Reporter.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.
Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N.-W. P. H. C. R. ... North-West Provinces High Court Reports.
Oudh Cas. ... Oudh Cases.
Oudh L. Jour. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.

Pak. Cas. ... Pakistan Cases.
Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. L. Jour. ... Patna Law Journal.
Pat. L. Tim. ... Patna Law Times.
Pat. L. W. ... Patna Law Weekly.
Pat. W. N. ... Patna Weekly Notes.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
I. L. R. Raj ... Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.
Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.
Rang. L. R. ... Rangoon Law Reports.
Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.
R. D. ... Revenue Decisions.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
Sind L. R. ... Sind Law Reporter.
S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
Suth. W. R. ... Sutherland's Weekly Reporter.
I. L. R. Trav. Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. ... Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Vind.-Pra. or V. P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.

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*Other Abbreviations.*

A. C. ... Appellate Jurisdiction, Civil.
A. Cr. ... Appellate Jurisdiction, Criminal.
App. ... Appendix or Appeal.
Appr. ... Approved.
Art. ... Article.
B. R. ... Board of Revenue.
C. A. ... Court of Appeal.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
Foll. ... Followed.
Illu. ... Illustrations.
Jour. ... Journal.
L. P. ... Letters Patent.
N. ... Note.
No. ... Number.
O. ... Order.
O. C. ... Original Jurisdiction, Civil.
O. Cr. ... Original Jurisdiction, Criminal.
Over. ... Overruled.
P. ... Page.
Pr. ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Rel. on. ... Relied on.
Rev. ... Revenue.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
S. N. ... Short Notes of cases.
V. ... Volume Number.

# THE FIFTY YEARS' DIGEST
# 1901--1950

## (Civil, Criminal & Revenue.)

## VOLUME VII

**Criminal P. C. (5 of 1898)**
**——S. 345.**


1. **Appeal.**
2. **Duty of Court.**
3. **Effect.**
4. **High Court, compounding before.**
   See also Cr. P. C., S. 439.
5. **Procedure.**
   See also N. 2.
6. **Sanction.**
7. **Sanction not necessary.**
8. **Who can compound.**
   See also Cr. P. C., S. 198.
9. **Tests of compoundability.**
   See also N. 2.


### 1. Appeal.

——Ss. 345 (2) and 417 — Order sanctioning composition of offence — Appeal, if lies. See (1946) 47 Cr LJ 119 (Nag).

**——Ss. 345 and 417 — Order according sanction to compounding of an offence — Right of appeal.**

Sub-section (6) of S. 345 confers the right of appeal against an order according sanction to the compounding of an offence. Therefore the effect of the words "shall have the effect of an acquittal" in Sub-s. (6) is that S. 417 and all other section relating to appeal are brought into operation. AIR (Vol 32) 1945 Nag 104: 1945 NLJ 7: ILR (1945) Nag 505: 47 Cr LJ 119: 221 Ind Cas 208 (DB).

**——S. 345 — Appeal against acquittal.**

The presentation of an appeal against an order of acquittal under S. 345, Criminal P. C., is not a proper procedure. Such an appeal should not be entertained in the absence of proof of the grossest misuse of the sole discretion of the Magistrate to allow or refuse the compromise between the complainant and the accused. AIR (Vol 29) 1942 Pat 58: 22 PLT 825: 8 BR 54: 43 Cr LJ 44: 196 Ind Cas 604 (DB).

**——S. 345 (6) — Acquittal of person under S. 345 (6) in respect of whom charge for wrongful confinement has been framed and who has not compounded case — High Court will interfere though Local Government has not appealed — Acquittal — Interference by High Court — Principles.**

Ordinarily, the High Court will interfere but rarely in revision with acquittals, whether put forward on behalf of Government or on behalf of private individuals, particularly so in cases where the correctness of the acquittal cannot be considered without a consideration of the evidence, but when a case comes to the notice of the High Court where the acquittal has depended not on an appreciation of the evidence but has occurred in complete disregard of the Criminal P. C., the High Court should interefere despite of the fact that no appeal has been preferred by Government. The High Court will interefere with an acquittal not on merits but under S. 345 (6), Criminal P. C., of a person in respect of whom, a charge for wrongful confinement has been framed and who has not compounded the case. AIR (Vol 24) 1937 Nag 72: 38 Cr LJ 334 : ILR (1937) Nag 286 : 166 Ind Cas 926.

### 2. Duty of the Court.


(a) **General.**
(a-1) **Police Report.**
(b) **Refusal to sanction.**
(c) **Acquittal.**


### (a) General.

**——S. 345 — Complainant denying composition.**

Where upon a prosecution by complainant under S. 337, I. P. C. the accused produces, during trial, a receipt given by the father of the complainant and alleges that the complainant had agreed not to prosecute him, but the complainant denies the payment, the Court cannot inquire into the factum of compromise alleged by one and denied by the other party under S. 345 (2). AIR (Vol 24) 1937 Mad 825: (1937) 2 MLJ 383: 46 MLW 289: (1937) MWN 864: 39 Cr LJ 133: 172 Ind Cas 369.

**——S. 345 — Reference to higher Court for instructions, if compromise may be accepted — Legality of.**

In the case of an offence under S. 325, I. P. C., which is compoundable under S. 345 (2), Criminal P. C., it is illegal for the Magistrate who seized of the case to make a reference to another Court for instructions whether to accept a compromise or not. He must accept or disallow it himself. AIR (Vol 22) 1935 Lah 226: 35 PLR 329: 35 Cr LJ 1372: 1935 Cr C 357: 151 Ind Cas 532 (2).

**——S. 345 — Compromise.**

Where two out of three accused in a case compromise it but the third chooses to stand the trial, there is nothing illegal in the Magistrate issuing process against the third. AIR (Vol 20) 1933 Cal 552: 37 CWN 319: 34 Cr LJ 1063: 145 Ind Cas 700.

**——S. 345 — Permission.**

According to law the Magistrate trying the case has to exercise his own discretion as to whether a compromise is to be allowed or not in a challan case. He is wrong when he refers the case to the District Magistrate. 127 Ind Cas 712: 1930 Cr C 304: 31 PLR 121: AIR (Vol 17) 1930 Lah 272.

**——S. 345 — Before composition is allowed the Court must be satisfied that the composition is legal and valid in law. 122 Ind Cas 118: 31 Cr LJ**

353: 31 Bom LR 789: 1929 Cr C 322: AIR (Vol 16) 1929 Bom 375 (DB).

——S. 345 — **Late stage — Permission of Magistrate.**

A Magistrate is not bound to entertain an application for composition, preferred at a late stage of the case and subsequently retracted by party thereto and where some of the offences for which the accused is charged are non-compoundable. 122 Ind Cas 118: 31 Cr LJ 353: 31 Bom LR 789: 1929 Cr C 322: AIR (Vol 16) 1929 Bom 375 (DB).

——S. 345 — **When compounding should be allowed.**

It is the duty of a Magistrate in each case, which is compoundable with his leave, to decide whether he will or will not allow a compromise and the responsibility rests entirely with him. It is not necessary in the interests of justice to disallow compromise where the parties amicably arrive at it at an early stage of the proceeding and the offence is not so serious that punishment is necessary. 65 Ind Cas 437: 7 PWR Cr 1922: 23 Cr LJ 85: AIR (Vol 9) 1922 Lah 138.

——S. 345 — **Effect of composition — Compoundable offence — Written agreement signed by both parties — Fresh evidence if can be gone into.**

Where the parties are entitled to compound a case and put in an agreement signed by both parties, the Magistrate has no power to call for further evidence. 16 Bom LR 939: 16 Cr LJ 88: 26 Ind Cas 1000: AIR (Vol 1) 1914 Bom 258 (DB).

——S. 345 — **Compounding — Penal Code, S. 148.**

In a case before a Magistrate, the evidence disclosed an offence under S. 148 of the Penal Code. The complainant subsequently applied to withdraw the case on the ground that some of his witnesses had turned round. The magistrate allowed the offence to be compounded under S. 345.

Held, that the Magistrate had no authority to allow the offence to be compounded and that he usurped a jursidiction not vested in him by law, as the offence disclosed was not a compoundable one under S. 345 of the Code (1902) 4 Bom LR 718 (720) (DB).

**(a-1) Police report.**

——S. 345 — **Magistrate, if can send record of proceedings of judicial character to Police for opinion.**

A Magistrate has no right to send the record of the proceedings, which are of a judicial character, before him to the Superintendent of Police for his opinion.

The proper course for him is to ask the prosecuting Inspector to take his instructions from the District Magistrate, or from the Superintendent of Police, as to the attitude of the Crown towards the proposed compromise. AIR (Vol 26) 1939 Pat 141: 19 PLT 840: 5 BR 463: 40 Cr LJ 460: 189 Ind Cas 627.

——S. 345 — **Magistrate, held did exercise his own judgment and did not base it on Police report.**

Where the Magistrate has not abdicated his own judgment in favour of that of the Police whose opinion he invited on the question whether the compounding should be allowed, and after receiving the reply of the Police, he hears arguments on both sides, he cannot be said to have not exercised his own judgment. AIR (V 25) 1938 Nag 37 : 20 NLJ 244 : ILR (1940) Nag 195 : 39 Cr L J 59 (2) : 172 Ind Cas 89.

——S. 345 — **Magistrate should use his own discretion — Magistrate refusing to do so on opinion of Police.**

A Magistrate cannot surrender the discretion which vests in him to any other Court or to any outside agency. Allowing a case to be compounded is a judicial act, and any argument whether composition should be allowed or not, must be addressed to the Magistrate in open Court either by the Prosecuting Counsel or the Prosecuting Inspector on behalf of the Crown or by those who desire the composition.

It is improper to refer to Police authorities by means of correspondence and to arrive at a decision as the result of that correspondence. It is even more improper if the correspondence discloses, that the decision depended entirely on the view taken by the Police.

Where the prosecution protests against the proposed compromise in open Court and if the Magistrate comes to a decision after hearing both sides, there would be no objection to a considered order; but to pass an order setting out his opinion that the offence was a minor one and would clearly be compoundable, but refusing to allow permission to compound on a statement made by the District Superintendent of Police which the Magistrate is not certain that he believes, is to exercise no discretion whatever and to shirk his responsibilities as a Magistrate.

Such positive abandonment by the Magistrate of his own discretion to that of the District Superintendent of Police undermines confidence in the administration of justice. AIR (V 25) 1938 Nag 39: 39 Cr LJ 120 : 172 Ind Cas 352.

——S. 345 (2) — **Offence under S. 325, Penal Code — Compounding of — Duty of Magistrate — Opinion of Police.**

Under S. 345 (2), Criminal P. C., an offence punishable under S. 325 of the I. P. C., may only be compounded with the permission of the Court before which any prosecution for such offence is pending, that is to say, the Court which is in possession of the case.

No reference is permitted by any Subordinate Magistrate to a superior Court on the question whether an offence should be compounded or not; it is the Court itself which has to determine the question a fortiori the Court is not permitted to refer the question to any outside agency.

Where the Magistrate entirely surrenders his own judgment and discretion as a Magistrate to the opinion of the Police, the opinion of the Police in a matter which the Magistrate is by law bound to dispose of in his judicial capacity is entirely irrelevant. In asking for an opinion of the Police, the action of the Magistrate is particularly reprehensible in that it is bound to give rise to the impression that Magistrates are influenced in their decisions by the opinion of the Police. AIR (V 24) 1937 Nag 114: ILR (1937) Nag 183: 38 Cr LJ 689: 169 Ind Cas 33.

——S. 345 — **Magistrate calling for opinion of Police.**

It is essential for the administration of justice and for the self-respect of the magistracy as a body that Magistrate should avoid any suspicion of being influenced in their decisions by the opinion of the Police who investigate the cases which are brought before them. AIR (V 24) 1937 Nag 114 : ILR (1937) Nag 183 : 38 Cr LJ 689 : 169 Ind Cas 33.

——S. 345 — **Police report.**

The Court is not entitled to substitute the discretion and the Police Officer for his own. 1932 MWN 1088.

**(b) Refusal to sanction.**

——S. 345 (2) — **Permission to compound — Inadequacy of compensation — Refusal of permission — Propriety.**

Where permission to compound an offence under S. 324, I. P. Code, is asked for, it is not proper for a Court to hold that the compensation being

inadequate, permission should not be granted. AIR (V 37) 1950 All 86: 51 Cr LJ 393: 1950 AWR 176: 1950 ALJ 92.

——S. 345 (2) — Offence of cheating — Clerk of Court receiving money saying he would bribe Judge — Sanction to compound — If can be given. See (1946) 47 Cri L Jour 119 (Nag).

——S. 345 — Cheating by Court official.

Where a Court official cheats a litigant representing that money is needed for bribing the Judge, the matter is of a very grave public concern and the offence should not be allowed to be compounded.

All public servants attached to a Court are trustees and guardians of the honour and integrity of the Court. It is a matter of grave import if any of them attempts to extract an illegal gratification or extort money from those who seek access to the Court, or endeavours to lead them astray and, by abusing his position, tries to enrich himself.

Persons in this class of life are looked upon as persons of influence and of some authority by the ordinary ignorant litigant public. If, therefore, they abuse the position of confidence in which they are placed by reason of their office, it becomes a matter of great public concern. A I R (Vol 32) 1945 Nag 104 : 1945 NLJ 7 : ILR (1945) Nag 505 : 47 Cr LJ 119 : 221 Ind Cas 208 (DB).

——S. 345 — Power of Court — Compounding offence by award.

A criminal case is not a matter between parties as a civil case is. A Magistrate is not bound to recognize a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait, he will not be doing anything illegal.

But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question, and if it is an offence compoundable under S. 345 effect will be given to such compounding. But till the actual compounding takes place the Magistrate is not bound at all to stay his hands but may go on with the trial of the case himself. AIR (Vol 12) 1925 Mad 1211 : 26 Cr LJ 1594 : 22 MLW 390 : 1925 MWN 753 : 49 MLJ 544 : 90 Ind Cas 666.

——S. 345 — Refusal to compound.

A case may be compounded under S. 345 at any time before the sentence is pronounced. And a Magistrate cannot refuse a compromise petition on the ground that it was presented when the judgment was being written. AIR (Vol 5) 1918 Cal 238 : 45 Cal 816 : 19 Cr LJ 752 : 28 CLJ 261 : 22 CWN 744 : 46 Ind Cas 528 (DB).

——S. 345 — Refusal to compound — Offence compoundable — Duty of Magistrate.

If an offence is compoundable, the Magistrate would be wrong in refusing to allow it to be compounded. 197 PLR 1910 : 44 PWR (1910) Cr. : 11 Cr LJ 638 : 30 PR 1910 Cr. : 8 Ind Cas 387.

(c) Acquittal.

——S. 345 — Composition denied by accused.

Where a composition alleged by the complainant is denied by the accused, it is the duty of the Magistrate to satisfy himself whether the case was compounded or not. He cannot acquit the accused without inquiring into the matter. AIR (Vol 19) 1932 Sind 7: 25 SLR 341: 33 Cr LJ 109: 135 Ind Cas 271 (DB).

——S. 345 — Denial of compromise by complainant.

Where it is alleged by the accused in a compoundable case that the case has been compounded and the complainant denies the fact, the Court should decide whether the compromise was or was not actually arrived at. If it was, the accused must be acquitted; if not, the Court should proceed with the case. AIR (Vol 18) 1931 Lah 402 (1) : 32 PLR 293 (2) : 32 Cr LJ 1034 : 133 Ind Cas 448.

——S 345 — Where the offence is compoundable by parties without consent of Court, and it is so compounded and a deed of composition filed by parties present in Court inasmuch as only verification necessary is whether parties signed it and understood contents, the Magistrate should not adjourn case for verification but do it without unnecessary delay acquitting the accused. AIR (Vol 17) 1930 All 409 : 52 All 254 : 31 Cr LJ 1215 : 1930 ALJ 281 : 1930 Cr C 525 : 127 Ind Cas 420.

——S. 345 — Compounding by agent — If permissible.

Court can acquit accused on the representation of an agent, who had filed complaint on another's behalf, that he desired to compound the offence, without enquiring into the agent's authority to compound. AIR (Vol 11) 1924 All 778: 22 ALJ 820 : 5 LRA Cr 143 : 26 Cr LJ 98 : 83 Ind Cas 658.

——Ss. 345, 248 and 258 — Non-compoundable offence — Warrant case — Withdrawal by private complainant — Order of acquittal.

In a warrant case in respect of a non-compoundable offence, a Magistrate cannot enter an order of acquittal on a private complainant's offering to withdraw from the prosecution. (1913) 37 Bom 359 : 15 Bom LR 61 : 14 Cr LJ 77 : 18 Ind Cas 413.

3. Effect.

(a) General.
(a-1) Acquittal.
(b) Legality.
(c) Arbitration.
(d) Magistrate becomes functus officio.

(a) General.

——S. 345 (6) — Complaint under Ss. 452 and 392, Penal Code withdrawn — Accused can be tried and convicted under Ss. 452 and 392 subsequently on same facts — On second occasion accused not found guilty under Ss. 452 and 392 but under S. 323 — If can be convicted under S. 323.

Where the Magistrate consigns the complaints under Ss. 452 and 392, I. P. C., to the record room on the statement of the complainant that he does not wish to proceed with the case, the offences complained of being non-compoundable offences, the accused must be held to have been discharged.

They are, however, liable to be proceeded against under the same sections and convicted if the offences could be established against them. Where the Magistrate on the second occasion finds upon a consideration of the evidence that no offence had been established under Ss. 452 and 392 of the I. P. C., but that the accused were guilty under S. 323 of the I. P. C., he cannot in view of the provisions of S. 345 (6), Criminal P. C., convict them under S. 323, upon the same facts, if the original complaint included the offence under S. 323 in addition to the offences under Ss. 452 and 392. AIR (Vol 28) 1941 Oudh 510 : 1941 OWN 869 : 42 Cr LJ 746 : 1941 AWR 243 : 195 Ind Cas 488.

——S. 345 — Section 345 (6) does not apply to a panchayat. AIR (Vol 28) 1941 Pat 169 : 7 BR 606 : 42 Cr LJ 434 : 193 Ind Cas 491.

——S. 345 — Compromise and subsequent acquittal of accused in father's complaint, whether bar to complaint by daughter.

Where an application made by certain persons to the Police against a certain person contain defamatory matter against such person and his minor daughter, both the father and his daughters have a right to seek redress, therefore, in Civil and Criminal Courts and can, therefore, file separate complaints and a compromise and acquittal of the accused in father's complaint is no bar to the complaint by the daughter as the complaint by the father, although on the same facts, could not have been filed on behalf of the minor daughter or compromised without the Court's permission. AIR (Vol 25) 1938 Lah 739: 40 Cr LJ 131: 178 Ind Cas 791.

——S. 345 — Composition with one of the two accused is no obstacle in convicting the other. 1933 MWN 222 (1).

**——S. 345 — Withdrawal.**

Composition once effected cannot be withdrawn. AIR (Vol 17) 1930 All 409 : 52 All 254 : 1930 ALJ 281 : 1930 Cr C 525 : 127 Ind Cas 420.

——S. 345 — Where, in a trial under Ss. 147 and 325, Penal Code, the accused was acquitted under S. 147, but convicted under S. 325, and where during the pendency of the appeal against this conviction, the matter was compromised ;

Held, that there was no reason for rejecting the application praying that the compromise might be allowed, as the offence was a compoundable one. AIR (Vol 16) 1929 Cal 96 : 55 Cal 1190 : 30 Cr LJ 484 : 115 Ind Cas 528 (DB).

——S. 345 — When the case is once brought in the Court and the parties have adjusted the matter between themselves and the matter is compoundable with the permission of the Court, the composition does not mean hushing up the matter. AIR (Vol 16) 1929 Pat 512 : 11 Pat LT 492 : 31 Cr LJ 607 : 1929 Cr C 272 : 124 Ind Cas 95.

**——S. 345 — Procedure.**

Where in a trial of the accused for offences under the Penal Code Ss. 147 and 325, the Court sanctions the compromise of the charge under S. 325, the prosecution for the offence under S. 147 does not ipso facto fail. If in such a case, the circumstances require it, the Court can discharge the accused in respect of the charge under S. 147. AIR (Vol 12) 1925 Lah 464 : 26 Cr LJ 686 : 26 PLR 55 : 86 Ind Cas 62.

**——Ss. 345 and 248 — Composition with some accused — Withdrawal of complaint against some of the accused — Compounding of offence.**

Where a complaint against several accused persons is withdrawn as against one of them, there is a withdrawal of the whole complaint in respect of all the accused. The compounding of an offence in regard to one of several accused persons amounts to a compounding of the offence in regard to all. AIR (Vol 7) 1920 Pat 828 : 20 Cr LJ 824: 1 Pat LJ 32: 53 Ind Cas 824 (DB).

**——S. 345 (6) — Effect of composition — Composition out of Court — Effect of.**

Proof of composition out of Court of an offence has the same effect in a criminal trial as in a Civil suit. It operates as a complete bar to a prosecution. Composition pleaded by an accused should be inquired into by the Magistrate trying the accused, and if proved, it bars the jurisdiction of the Magistrate. AIR (Vol 1) 1914 Cal 136 : 41 Cal 14 : 14 Cr LJ 292 : 17 CWN 976 : 19 Ind Cas 948.

**——S. 345 — Refusal to compound.**

The refusal of a third party to compromise is no sufficient reason to refuse composition if the complainant and the accused are willing to compromise. AIR (Vol 1) 1914 Oudh 167 : 17 OC 92 : 15 Cr LJ 567 : 24 Ind Cas 975.

**——S. 345 — Effect of composition — Compounding offence — Penal Code, Ss. 143, 325, 448.**

Where the petitioners were accused of offences under Ss. 143, 325 and 448 of the Penal Code but the Magistrate summoned the petitioners under S. 325 only and in the course of the hearing the whole matter was compounded and the sanction of the Magistrate obtained therefrom, held that the complainant could not revive the case against the accused on the ground that the terms of the compromise had not been carried out. (1913) 17 CWN 948: 14 Cr LJ 458: 20 Ind Cas 618 (DB).

**(a-1). Acquittal.**

**——S. 345(6) — Filing of verified compromise in respect of compoundable offences — Effect — Automatic acquittal — Power of Magistrate to amend charge subsequently.**

Under sub-s. (6) of Section 345, Cr. P. Code, the composition of a compoundable offence has the effect of an acquittal of the accused with whom the offence has been compounded. The language of the sub-section itself makes it clear that the composition itself has the effect of an acquittal and the failure to pass an order of acquittal following the filing of a compromise of the offence does not affect the position. Hence a Magistrate before whom a compromise verified by both parties in respect of a compoundable offence has been filed, cannot alter the charges subsequently even though he has not passed an order of acquittal. 1950 ALJ 522: 1950 AWR 532.

**——S. 345 — Composition of compoundable case by parties — Effect of — Subsequent withdrawal by complainant — Jurisdiction of Magistrate to try offence.**

A composition arrived at between the parties of a compoundable case is complete as soon as it is made and its immediate effect is the acquittal of the accused. This necessarily deprives the Magistrate of his jurisdiction to try the case and the subsequent withdrawal from the composition by the complainant can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case. AIR (V 37) 1950 Nag 91: 51 Cr LJ 751: 1950 NLJ 54: ILR (1950) Nag 434: 4 IA Cr D 322.

**——Ss. 345(6) and 403 — Complaint of assault on complainant and his mother — Compromise and acquittal — Subsequent complaint by mother — If barred.**

A complaint of assault on the complainant and his mother was compromised after the hearing commenced on accused appearing on a warrant. The accused were acquitted under S. 345, Cr. P. Code. Subsequently a week later the mother appeared before the same magistrate and filed a complaint mentioning the facts. The magistrate then summoned the accused and the case went to another magistrate for hearing who decided that further proceedings were barred under S. 403, Cr. P. Code, and discharged the accused. On revision,

Held: The acquittal on compromise was clearly one under S. 345(6) of Cr. P. Code. It did not purport to acquit the accused of any offence which the Court had no jurisdiction to acquit. Composition could only have the effect of an acquittal of the accused with whom the offence had been compounded. The mother was not a party to the compromise and there was no bar to proceedings on her complaint. AIR (V 34) 1947 Cal 31: 83 CLJ 179: ILR (1946) 2 Cal 319: 225 Ind Cas 221: 50 CWN 823: 47 Cr LJ 699 (DB).

——Ss. 345(6), 107 — **Bond executed for keeping peace — Forfeiture of, in absence of other evidence — Legality.**

The composition of an offence under S. 345(6), Criminal P. C., shall have the effect of an acquittal of the accused with whom the offence has been compounded and if there is no other evidence on the record to show that the accused committed a breach of the peace, the order forfeiting part of the bond not being supported by any evidence is illegal. AIR (V 27) 1940 Lah 32: 41 Cr LJ 359: 186 Ind Cas 642.

——S. 345(6) — **Complaint under S. 500, Penal Code (Act XLV of 1860), compromised outside Court — Party resiling from it before it is filed — Effect — Acquittal of accused, if must be ordered.**

A composition arrived at between the parties at offence under S. 500, I. P. C., which is compoundable without the permission of the Court is complete as soon as it is made and has the effect of an acquittal in spite of the fact that one of the parties subsequently resiles from the compromise.

If it is proved that the parties signed the document and understood its contents, it is incompetent for any party to it to withdraw from it. Since the compromise has the immediate effect of acquittal so as to deprive the Magistrate of his jurisdiction to try the case, the subsequent withdrawal from it even before the filing of the compromise in the Court by any party can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case.

The simple question for the Magistrate in such a case is to find whether or not the parties signed the document and understood its contents. AIR (V 27) 1940 Nag 181: 1940 NLJ 25: 41 Cr LJ 287: 186 Ind Cas 370.

——S. 345 — **Complainant cannot resile and insist on case being proceeded with.**

In law, a composition once arrived at between the parties is complete as soon as it is made, and it has the effect of acquittal even though one of the parties later on resiles from the compromise.

The Magistrate is, in duty, bound to order an acquittal on the filing of the compromise petition signed by both parties in Court for an offence which is compoundable without leave of the Court and the complainant cannot by a subsequent withdrawal of the petition before any order is passed on it, insist upon the case being proceeded with. AIR (V 26) 1939 Pat 141: 19 PLT 840: 5 BR 463: 40 Cr LJ 460: 180 Ind Cas 627.

——S. 345 — **Acquittal.**

Under S. 345(6) on the compromise of the offence under S. 345(5-A), the accused is entitled to an acquittal. AIR (V 21) 1934 Lah 317(1): 35 Cr LJ 579: 35 PLR 257: 1939 Cr C 549: 147 Ind Cas 1081.

——S. 345 — **Several offences.**

Where in a joint complaint with reference to distinct and independent transactions there is composition with respect to one transaction the effect of such composition is acquittal with respect to charges brought under the particular transaction. The composition does not operate as acquittal with reference to the offence committed in the other transaction. AIR (V 17) 1930 All 92: 120 Ind Cas 117: 1930 Cr C 81: 1930 ALJ 85: 30 Cr LJ 1149.

——S. 345 — **Several accused.**

The compounding of an offence with one or more of several accused persons has not the effect of acquittal in respect of the remaining accused between whom and the complainant no composition has been arrived at. AIR (V 13) 1926 Lah 424: 7 Lah 344: 27 Cr LJ 576: 27 PLR 493: 94 Ind Cas 144.

——S. 345 — Composition of compoundable offence results in an immediate acquittal of the accused. Therefore once a composition has been effected, complainant cannot be permitted to withdraw from it. AIR (V 12) 1925 Lah 159: 25 Cr LJ 810: 81 Ind Cas 346.

——S. 345 — Where there are several accused, the composition does not necessarily have the effect of an acquittal in the case of the other accused. AIR (V 8) 1921 Bom 166: 45 Bom 346: 22 Cr LJ 55: 59 Ind Cas 199 (DB).

——S. 345 — A composition arrived at between the parties of a compoundable offence is complete as soon as it is made and it has the effect of an acquittal of the accused under S. 345 in respect of that ofience though one of the parties later on resiles from the compromise and when the petition is filed in Court and signed by both parties it ought to be given effect to. AIR (V 8) 1921 Cal 403: 33 CLJ 226: 22 Cr LJ 301: 60 Ind Cas 797.

——S. 345 — **Composition with some of the accused — Effect.**

The compounding of the offence against two of the accused does not in law have the effect of an acquittal of the remaining accused and does not stand in the way of their conviction. AIR (V 7) 1920 Lah 108: 1 Lah 169: 121 PLR 1920: 21 Cr LJ 437: 56 Ind Cas 229.

——S. 345 — **Compounding with some accused — Composition with one of the accused — Effect of.**

The composition of an offence with one of the several accused persons under S. 345 of the Cr. P. Code does not have the effect of acquittal of all the accused persons. 7 CWN 176, Diss. AIR (V 5) 1918 Mad 413: 41 Mad 323: 19 Cr LJ 176: 43 Ind Cas 592 (DB).

——S. 345, cl. 6 — **Compounding of offence, if enures to the acquittal of all the accused.**

If in the case of a compoundable offence, the complainant intimates to the court that he has compounded and desires to withdraw his complaint, the order passed by the Magistrate allowing the withdrawal is in respect of the offence & not soley in regard to the persons actually under trial at the time, as the law contemplates that all the accused persons should be under trial at the same time before a judicial officer, unless in some exceptional circumstonces such as their absconding, or sickness of some such reason the attendance of some of them cannot be obtained.

Where out of several persons named in the complaint, the Magistrate issued process against one and subsequently allowed the complainant to compound with him but did not issue process against the others and he also refused to stay proceedings against them in respect of the offence complained of.

Held, that the Magistrate ought to have issued process against the latter at the same time it was issued against the former, and the offence having been compounded, all the accused were entitled to an acquittal. (1903) 7 CWN 176 (176, 177) (DB).

**(b) Legality.**

——S. 345 (2) — **Compounding offence — Public policy — Requirements — Contract Act (IX of 1872), S. 23.**

Public policy requires that in cases where public interests are involved, the parties should not compound an offence. But in a case where an offence is compoundable, there is no rule of public policy which would prevent the parties from entering into a compromise before the matter has reached the criminal Court. But once the matter has reached the criminal Court, an agreement to compound it

without the leave of the Court would, if permitted, defeat the provisions of S. 345 (2), Cr. P. Code and hence it would be void under paragraph (2) of S. 23 of the Contract Act. 1950 ALJ 379 : 1950 AWR 429.

**——S. 345 — Accused charged under Ss. 148 and 324, I. P. Code — Composition of offence under S. 324 — Trial of accused under S. 148 — If barred.**

Where the accused are charged under Ss. 148 and 324, I. P. Code, and the offence under S. 324 is compounded with the permission of the Court, an order of acquittal in respect of both the offences is illegal as the offence under S. 148 is not compoundable. The composition of the offence under S. 324 is no bar to the trial of the accused on the charge under S. 148, I. P. Code. AIR (V 37) 1950 Lah 121 : 51 Cr LJ 1016.

**——S. 345 — Applicability — Offences under Ss. 147 and 149 — Compounding — Permissibility.**

The offences under Ss. 147 and 148, I. P. Code, are not compoundable at all, and hence no acquittal can be allowed in respect of convictions under these sections by reason of a compromise having been arrived at between the rival parties. AIR (V 35) 1948 Pat 58 : 27 PLT 545 : 229 Ind Cas 529: 48 Cr LJ 433 : 13 BR 389 (DB).

**——S. 345 — Right to compound.**

Where the offence charged is non-compoundable the settlement must be deemed to be invalid, but where the offence charged is compoundable the settlement cannot be deemed to be invalid because the Legislature itself allows a settlement of such case and it cannot, therefore, be said that the object of such an agreement is opposed to public policy. AIR (V 17) 1930 Oudh 196 : 125 Ind Cas 385 : 1930 Cr C 957 : 4 Luck 669 : 7 OWN 575.

**——S. 345 — Validity of agreement.**

A compounded a complaint of grievous hurt filed by his wife without obtaining her signature on the application of compromise on the other party's (H's) passing an unregistered document that A shall be allowed to stay in a certain house for his life-time free of rent. A suit was brought by H for ejectment of A, alleging that the agreement was illegal and was inoperative as it was unregistered.

Held, that the consideration for the agreement was not illegal and the agreement was not void merely because of the absence of the signature of A's wife. AIR (V 15) 1928 Bom 305 : 112 Ind Cas 459 : 52 Bom 693 : 30 Bom LR 885.

**——S. 345 — Composition by agent — Legality of.**

A compounded a complaint of grievous hurt filed by his wife without obtaining her signature on the application of compromise on the other party's (H's) passing an unregistered document that A shall be allowed to stay in a certain house for his lifetime free of rent. A suit was brought by H for ejectment of A, alleging that the agreement was illegal and was inoperative as it was unregistered.

Held, that the consideration for the agreement was not illegal and the agreement was not void merely because of the absence of the signature of A's wife. AIR (V 15) 1928 Bom 305 : 112 Ind Cas 459 : 52 Bom 693 : 30 Bom LR 885.

**——S. 345 — Offence under S. 498 Penal Code.**

Where a person acting as the agent of another under S. 199, Cr. P. Code, started proceedings for the prosecution of an alleged offender for an offence under S. 498, I. P. Code, committed in respect of the wife of that other person the former (agent) is not competent to compound the case under S. 345 on behalf of the husband. An order of acquittal based upon such composition is invalid and does not bar the institution of a fresh complaint by the husband. AIR (V 9) 1922 Pat 618 : 71 Ind Cas 248 : 24 Cr LJ 120.

**——S. 345 — Mistake — Non-compoundable offence mentioned in summons.**

Where in a trial for a compoundable offence, by oversight, an offence which is not compoundable is mentioned in the summons that does not take away the right of the complainant to withdraw from the prosecution, and further trial of the case after complainant has applied for withdrawing from the prosecution is illegal. AIR (V 8) 1921 Pat 75 : 62 Ind Cas 189 : 2 PLT 602 : 1921 PHCC 16 : 22 Cr LJ 493.

**——S. 345 — Effect of composition — Complainant whether can retract — Accused — Meaning of — Incomplete agreement.**

The compounding of offences mentioned in para, 1 of S. 345 of the Cr. P. Code is lawful even if it takes place before any complaint is filed in respect thereof in a Court. Once a composition has been arrived at, it has the effect of an acquittal under the section so as to bar the trial of the offence. An incomplete agreement would not amount to a valid composition. If a person resiles from a composition, the Court must enquire into the matter. AIR (V 6) 1919 Mad 879 : 34 MLJ 217: 7 LW 274: 23 MLT 240 : 19 Cr LJ 359 : (1918) MWN 493 : 41 M 685: 44 Ind Cas 583 (DB).

**(c) Arbitration.**

**——S. 345 — Arbitration.**

A criminal complaint cannot be referred to arbitration and therefore, the award following it cannot be made a rule of civil Court. AIR (V 16) 1929 Lah 394 : 116 Ind Cas 215 : 30 PLR 122 : 11 LLJ 89.

——S. 345 — Both parties to a proceeding under S. 427, I. P. Code, filed a petition of compromise agreeing to be bound by the decision of arbitrators named therein and asked for adjournment for settlement of their dispute. The arbitrators made an award, which was objected to by the complainant.

Held, that the agreement to refer the case to arbitration was not a final settlement of the dispute which the Court was bound to accept as it was not the intention of the parties to treat the reference to arbitration as taking the case out of the jurisdiction of the criminal Court. AIR (V 13) 1926 Cal 266 : 90 Ind Cas 544 : 42 CLJ 139 : 26 Cr L J 1584 (DB).

**——S. 345 — No composition.**

Pending a criminal case of defamation the parties entered into an agreement referring to certain arbitrators the decision of all their disputes including the criminal case within 15 days.

Held, that until the arbitrators decided the dispute the offence cannot be treated as compounded. AIR (Vol 12) 1925 Mad 1211: 90 Ind Cas 666: 26 Cr CLJ 1594: 22 MLW 390: 1925 MWN 753: 49 MLJ 544.

**——S. 345 — Arbitration — Acquittal on the award.**

If the Magistrate does not follow the procedure laid down in the Code but sends the complaint for arbitration between the parties, the procedure adopted is not authorised by any law and the order of acquittal made in the award is illegal and ultra vires. 7 Cr LR 116.

**(d) Magistrate becomes functus officio.**

**——S. 345 — Effect of composition — Magistrate becomes functus officio.**

Where a case is compoundable without the permission of the Court, a Magistrate has no jurisdiction to go on with the case after composition but is bound to give effect to the composition as soon as the petition of compromise is put in. 112 Ind Cas 562: 29 Cr LJ 1058.

——S. 345 — Magistrate becomes functus officio.

Where in a compoundable case a petition of compromise was filed and the Court recorded the following order:—'Case compromised. Petition filed. The injury has not been healed as yet. Complainant must again appear on 30th June 1920, when I shall pass final orders, etc,"

Held, that after the order was passed the Magistrate became functus officio and had no jurisdiction over the matter any further. AIR (Vol 8) 1921 Pat 290: 63 Ind Cas 611: 2 PLT 584: 1921 PHCC 304: 22 Cr LJ 675.

**4. High Court, compounding before.**

See also, Cri. P. C., S. 439.

——S. 345 (5-A) — Jurisdiction — Compounding in revision — When to be allowed — Exceptional circumstances — What are.

Sub-section 5-A of S. 345, Cr. P. Code, is designed to meet exceptional cases and under it, the High Court has jurisdiction, when acting in the exercise of its powers of revision under S. 439, Cr. P. Code, to allow any person to compound any offence which he is competent to compound under the section. The occasions when the Court may properly allow a compromise and set aside convictions at this stage must of course be rare. There must be indication in the record that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before that Court passed final orders in the case. Where it appears that the parties have really settled their differences, that the offence took place several years ago, that allowing the compromise would result in an amicable settlement of all disputes, and that further litigation would be avoided, the case must be regarded as exceptional and a fit one to be compounded. 229 Ind Cas 529: 48 Cr LJ 433: 13 BR 389: AIR (Vol 35) 1948 Pat 58: 27 PLT 545.

——S. 345 — Conviction of accused under S. 325 Penal Code — Application for compounding offence rejected — Appeal — Appellate Court finding offence under S. 323 and not under S. 325 — Power of Appellate Court, while writing judgment to hold offence as one under S. 345 (1) and then to consider application for compounding offence.

The accused was convicted under S. 325, I. P. C., and sentenced to imprisonment till the rising of the Court and a fine of Rs. 104. An application to compound the offence was rejected merely on the ground that the offence was one under S. 325.

The accused appealed to the Sessions Court against his conviction and a further application by the parties asking that the case may be compounded was made in the Sessions Court.

The Sessions Judge considered on the facts that the offence was one under S. 323 only, an offence which, in the original Magistrate's Court, may be compounded without the permission of the Court but which when in appeal under Cl. (5) of S. 345, Criminal P. C., requires the leave of the Appellate Court for such composition.

The Sessions Judge, however, found himself unable to grant such leave, because he felt that the offence could not be held to be one under S. 323, until he had pronounced his judgment and as the offence could be compounded only before the judgment was pronounced, so no compounding of the offence was possible:

Held, that the Judge had taken an unduly technical view of the matter. The Appellate Court, while writing its order or judgment could hold that the offence actually committed was one falling under Cl. (1) of S. 345 and then consider an application made for compounding the offence and pass an order allowing the offence to be compounded and the consequential order of acquittal. AIR (Vol 28) 1941 Sind 216: ILR (1941) Kar 429: 43 Cr LJ 293: 197 Ind Cas 868 (DB).

——S. 345 (5-A) — High Court, if can record compromise — Use of discretion — Aggrieved person must be before High Court.

It is clear from the language of S. 439, Criminal P. C., read with S. 345 (5-A) of the Code that the High Court can, in certain circumstances allow a compromise to be recorded in the exercise of its revisional jurisdiction in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge.

The language of S. 439 is very wide and it does not limit the jurisdiction of the High Court to interfere in revision merely in cases in which the High Court has called for the record of a case on the ground of some alleged illegality or impropriety in the order made by an inferior Criminal Court.

The High Court is competent to record the compromise having regard to the provisions of S. 345 (5-A) even although there is no impropriety in the order of either of the lower Courts in suitable circumstances; the parties can be allowed in such cases to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them.

But the exceptional powers conferred by S. 345 (5-A) should not be used where the proceedings before the lower Court disclose no irregularity or impropriety, except where the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before the Court passed final order.

Ordinarily, the party who seeks to invoke the jurisdiction of the High Court under Sub-s. (5-A) of S. 345, must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence.

In any event it would not be competent for the High Court to allow a compromise to be recorded under Sub-s. (5-A) of S. 345, unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded. AIR (Vol 26) 1939 Cal 728: ILR (1939) 1 Cal 567: 41 Cr LJ 125: 185 Ind Cas 177.

——S. 345 (5-A), (6) — Permission to compound by High Court sitting in revision.

Where the complainant in a charge under S. 324, I. P. C., applies to the High Court, sitting in revision of the order of the Sessions Judge, alleging that he has compromised the case with the accused and urges in person before the High Court that he has compromised the case with the accused voluntarily, it is expedient in the interests of justice that the compromise should be accepted. Under S. 345 (6), Criminal P. C., on the composition of the offence, the accused is entitled to an acquittal. AIR (Vol20) 1934 Lah 317 (1): 35 Cr LJ 579: 35 PLR 257: 147 Ind Cas 1081.

——S. 345 (5-A) — Compromise in revision — Acceptability of.

A Court of revision can accept a compromise under Cl. (5-A) of S. 345, Criminal P. C. But that does not mean that the Court of revision should accept a compromise in every case where there has been not only a conviction by the first Court but that conviction has been upheld by the Court

of appeal. AIR (Vol 21) 1934 Sind 122: 28 SLR 109: 36 Cr LJ 210: 152 Ind Cas 412 (DB).

——S. 345 (5) — **Compromise after hearing of appeal.**

A compromise arrived at after the hearing of the appeal does not come within S. 345, Criminal P. C. AIR (Vol 20) 1933 All 434: 34 Cr LJ 926: (1933) ALJ 1493: 145 Ind Cas 126 (DB).

——S. 345 — **Revision — Discretion.**

Where a Magistrate refuses to allow composition, and the offence is compoundable with leave of the Court and the Court does not rightly exercise the discretion, High Court can intervene in revision and allow composition. 11 Pat LT 492: 124 Ind Cas 95: 31 Cr LJ 607: 1929 Cr PC 272: AIR (Vol 16) 1929 Pat 512.

——S. 345 — **When given.**

Where the trial Court declined to grant permission of a compromise in a case under S. 417, I. P. C., on the ground that the offence related to Public trust property but it was found that matter would not be suitably dealt with in a criminal case and the compromise was sought at an early stage, the High Court allowed the case to be compounded. 89 Ind Cas 385: 3 Pat LR Cr. 75: 26 Cr LJ 1345: AIR (Vol 12) 1925 Pat 583.

——S. 345 — **Interference in.**

Under the new Code, S. 345, sub-cl. 5-A, a High Court acting in the exercise of its powers of revision under S. 439, may allow any person to compound any offence which he is competent to compound under this section and under Sch. 2, Chapter V, an offence under S. 420, Penal Code, is made compoundable by the new Code. 81 Ind Cas 717: 46 All 91: 21 ALJ 838: 5 LRA Cr 8: 25 Cr LJ 1005: AIR (Vol 11) 1924 All 209.

——S. 345 — Application for stay of criminal proceedings pending civil suit cannot be made to the High Court unless Magistrate has refused it. AIR (V 11) 1924 Mad 235 : 18 MLW 236 : 24 Cr LJ 640 : 73 Ind Cas 528.

——S. 345 — The High Court may allow an offence under S. 498, Penal Code to be compounded in revision. AIR (V 11) 1924 Oudh 260 : 24 Cr LJ 590 : 73 Ind Cas 334.

——**Ss. 345 and 439 — Compounding in revision.**

A Court exercising revisional jurisdiction cannot grant leave to the parties to file a compromise. Section 439 (d), Cr. P. C. does not override S. 345 (7) and does not enable even the High Court to allow a composition to be filed. AIR (V 7) 1920 All 169 : 42 All 474 : 18 ALJ 574 : 21 Cr. LJ 447 : 2 UP LR (A) 140 : 56 Ind Cas 239.

——**Ss. 345 and 439 — Compounding in revision.**

The High Court sitting as a Court of revision under S. 439 has no power to allow the composition of an offence under S. 345 of the Code. AIR (V 6) 1919 Lah 471 : 35 PR (Cr) 1918 : 20 Cr LJ 87 : 48 Ind Cas 887 (DB).

——**Ss. 345 and 423 (d) — Scope of the section — Construction of statutes — Special exhaustive provision.**

It is an elementary rule for the construction of statutes that when a special provision obviously exhaustive in its scope, has been made for a special topic as in S. 345 the scope thereof cannot be indirectly enlarged by reference to a genial provision such as that contained in S. 423 (d). AIR (V 4) 1917 Cal 705 : 43 C 1143 : 20 CWN 1071 : 17 Cr LJ 339 : 35 Ind Cas 515 (DB).

——**Ss. 345 — Compounding in revision — Power of the High Court.**

An offence cannot be allowed to be compounded when the matter is pending before the High Court in revision. Section 345, Cr. P. C. exhausts the cases in which composition of offences is allowed. 32 A 153, Diss. AIR (V 3) 1916 Mad 483 : 29 MLJ 621 : 18 MLT 381 : 16 Cr. LJ 750 : 39 M 604 : 31 Ind Cas 350 (DB).

——**Ss. 345 and 439 — Compounding in revision.**

Composition is allowable when the case is under appeal with the permission of the Court before which appeal is to be heard but the section does not apply to cases in revision. AIR (V 2) 1915 All 8 : 37 A 127 : 13 ALJ 104 : 16 Cr LJ 247 : 28 Ind Cas 103.

——**S. 345 — Compounding in revision.**

The parties to a criminal case have no locus standi to ask the High Court on its revisional side to consider a compromise effected by them out of Court as one coming under S. 345 of the Code. AIR (V 1) 1914 Cal 901 : 18 CWN 1212 : 15 Cr LJ 728 : 26 Ind Cas 176 (DB).

### 5. Procedure.

See also N. 2.

——**S. 345 — Pending civil suit.**

Applications for staying of criminal proceedings during the pendency of a civil suit are sometimes argued as if there were an invariable rule that when the same issue is agitated both in the civil and criminal side, the civil shall take precedence of the criminal Court.This is not so. Each case must be considered on its own merits and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the cases on its file with the utmost expedition.

It must be assumed that in either Court justice will be done and which Court precedes the other is merely a question of convenience. AIR (V 14) 1927 Mad 778 : 53 MLJ 265 : 50 Mad 839 : 26 MLW 113 : 39 MLT 14 : 1927 MWN 672 : 28 Cr LJ 812 : 104 Ind Cas 252.

——**S. 345 — Nature of the complaint not the result.**

The procedure under which a case is tried is governed by the nature of the offence complained of and not by the ultimate result. The same analogy applies to a case of compounding. The question of a case being compoundable or not must be decided with reference to the state of facts existing at the date of the application to compound.

It is not possible for a Court to see what the ultimate result of the case will be. Where at the stage at which the application to compound was presented, the case was going on as a case under S. 325, I. P. C., which is not compoundable without the leave of the Court.

Held, that the application for compromise without Court's leave was properly rejected. AIR (V 12) 1925 Nag 395 : 26 Cr LJ 1428 : 89 Ind Cas 900.

——**S. 345 — Procedure.**

Where more persons than one are charged with an offence and a compromise with some is entered into, the Court will accept the compromise and proceed to hear the case against the rest. AIR (V 8) 1921 Sind 101 : 26 Cr LJ 238 : 16 SLR 149 : 84 Ind Cas 62 (DB).

### 6. Sanction.

——**S. 345 — Case whether compoundable or not depends on sworn statement of complainant — Sworn statement disclosing compoundable offence — Agreement in respect of, is not for stifling prosecution — Contract Act (1872), S. 23 — Stifling prosecution.**

Complaints are often exaggerated and the object of a sworn statement is to see whether there is any justification for taking action in respect of all the offences disclosed by the complaint. If the sworn

statement discloses only minor offences, the Magistrate is perfectly justified in taking action only as regards the offences disclosed in the sworn statement.

Where the complaint is about non-compoundable offences but the sworn statement discloses offences which are only compoundable, the parties are at liberty to compound and an agreement in respect of such compoundable offences is not invalid. AIR (V 33) 1946 Mad 80 : (1945) 2 MLJ 468 : 58 MLW 605 : 1945 MWN 697.

**——S. 345 — Cheating — No prosecution launched.**

The provisions of S. 345, Criminal P. C. expressly prohibit the compounding of the offence of cheating without the leave of the Court. Notwithstanding that no prosecution is launched, the offence remains and cannot be compounded without Court's leave. AIR (V 29) 1942 Mad 662 (1) : 55 MLW 493 : (1942) 2 MLJ 191 : 1942 MWN 487 : 44 Cr LJ 29 : ILR (1943) Mad 183 : 203 Ind Cas 272 (DB).

**(Reversing AIR (V 29) 1942 Mad 173 : (1941) 2 MLJ 827 : 43 Cr LJ 734 : 54 MLW 571 : 201 Ind Cas 91.)**

**——S. 345 (2) (1) (7) — Offence under S. 420, Penal Code if can be compounded before challan by police is put up.**

An offence under S. 420 of the I. P. C. can only be compounded with the permission of the Court and an argument that it can be compounded without permission before the challan is put up by the police would amount to take the offence out of the category of the offences mentioned in sub-s. (2) and put it within the category of those mentioned in sub-s. (1) of S. 345, Criminal P. C. Sub-section (7) of that section lays down that no offence shall be compounded except as provided by that section, and any arrangement entered into between the parties before the case comes into Court at all is ineffective. When the case had been challaned, it is open to the parties to renew their application for compounding but then composition can only be effected with the consent of the Court. AIR (V 25) 1938 Nag 37 : 39 Cr LJ 59 (2) : 20 NLJ 244 : ILR (1940) Nag 195 : 172 Ind Cas 89.

**——S. 345 (2) — There must be pending prosecution and permission of Court must be obtained.**

Under S. 345 (2), Criminal P. C., there must be a prosecution pending and the permission of the Court must be given. Any act of the parties done before the prosecution has begun and without reference to any Court cannot be a composition under this sub-section, and whatever may be the civil rights to which it may give rise, can have no effect on the trial. AIR (V 24) 1937 Mad 825: 46 MLW 289 : (1937) 2 MLJ 383 : (1937) MWN 864 : 39 Cr LJ 133 : 172 Ind Cas 369.

**——S. 345 — Procedure.**

Where an accused person has been committed for trial or where he has ben convicted, he cannot claim as of right that the case against him be withdrawn and that he be acquitted, on the ground that the parties have compromised the case, and the offence with which he is charged is a compoundable one. In such a case he is required to obtain leave of the Court and the Court will always be reluctant to grant leave where it finds that an accused person has been rightly committed or convicted. AIR (V 21) 1934 Sind 122 : 28 SLR 109 : 36 Cr LJ 210 : 152 Ind Cas 412 (DB).

**——S. 345 — Compounding in revision.**

A Court of revision can sanction a compromise under S. 345. (1913) 11 ALJ 13 : 14 Cr LJ 46 : 18 Ind Cas 270.

Also (1910) 7 ALJ 103 : 11 Cr LJ 203 : 32 A-153 : 5 Ind Cas 696 (DB).

**——S. 345 (2) — Compromise — Stifling prosecution.**

An agreement to stifle prosecution of an offence mentioned in S. 345 (2), can only be effected with Court's permission after the institution of proceedings. (1912) 8 NLR 97 : 16 Ind Cas 555.

**——S. 345— Want of sanction to compound.**

The sanction required under S. 345 is compulsory and the mere fact that the Magistrate would have allowed the parties to compound does not make the slightest difference in the matter and cannot validate a compromise, without such sanction. 93 PLR 1909 : 140 PWR 1909 : 4 Ind Cas 999.

### 7. Sanction not necessary.

**——S. 345 — Offence compoundable without Court's leave — Agreement compounding such offence, legality.**

An agreement to compound an offence compoundable without the permission of the Court is lawful, there being no law or public policy violated in such a case. But in the case of a non-compoundable offence, the agreement is unlawful. AIR (V 29) 1942 Mad 173 : (1941) 2 MLJ 827 : 54 MLW 571 : 43 Cr LJ 734 : 201 Ind Cas 91.

**——S. 345 — Absence of.**

In cases governed by S. 345 (2), Cr. P. Code, the permission of the Court before which a prosecution is pending is essential before the case can be validly compounded, and so no effect can be given to a compromise as a plea in bar of conviction unless the Court has given its sanction. Without the sanction of the Court, the so-called compromise arrived at between the parties, outside the Court, is of no legal effect and cannot be taken cognizance of by any Court dealing with the offence. AIR (V 15) 1928 Lah 232 : 9 Lah 400 : 29 Cr LJ 585 : 109 Ind Cas 601 : 29 PLR 510 : 10 AI Cr R 302 (DB).

**——S. 345 — Stage — Section 342, I. P. C.**

The offence under S. 342, Penal Code, is compoundable without permission of the Court and the fact that the prosecution evidence has been closed and that a charge is framed against the accused is no bar to the composition as the offence can be compounded at any time before passing of the sentence. (1928) 112 Ind Cas 562 : 29 Cr LJ 1058 (Lah).

**——S. 345 — Composition of offence after conviction — Not valid.**

The composition of offence is permissible only up to the time of the judgment not after. After conviction there can be no composition without the leave of the court and an Appellate Court is not bound to recognise and give effect to an agreement which the parties might enter into after the conviction of the accused. AIR (V 6) 1919 Mad 274 : 11 LW 33 : 20 Cr LJ 823 : 53 Ind Cas 823.

**——S. 345 — Scope of the section — Validity of composition outside where no permission of Court is necessary.**

The composition referred in S. 345 is in the nature of a contract and requires no monetary consideration but some consideration. The composition is not limited to acts done in Court; nor to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court. An agreement to compound come to by the parties out of Court from which one subsequently resiles comes within the basis of S. 345. AIR (V 3) 1916 Mad 854 : 39 M 946 : 2 LW 1200 : 18 MLT 602 : 16 Cr LJ 803 : 31 Ind Cas 819 (DB).

——S. 345 — Compoundable offence — Conviction set aside on appeal — Liberty to compound when retrial ordered — No sanction of Court necessary.

Where the accused is charged with an offence which is compoundable and is convicted by the Magistrate, but on appeal the conviction is set aside and a retrial ordered.

Held, that it is open to the complainant and the accused to compound the case in the same manner in which a case may be compounded before conviction by the Magistrate.

Held further, that it was not necessary in this case, to apply to the court for permission to compound. (1906) 3 ALJ 523 : (1906) AWN 200 (201).

**8. Who can compound.**

See also Cr. P. C. S. 193.

——S. 345(1) — Compromise petition — Presentation by accused — If competent.

A compromise petition under S. 345(1), Cr. P. Code, may be presented by the accused and need not be presented by the complainant. AIR (V 37) 1950 Nag 91: 51 Cr LJ 751: 1950 NLJ 54: ILR (1950) Nag 434: 4 A I Cr D 322.

——S. 345 — S. 341, I. P. C.

An offence of wrongful restraint is compoundable by the person restrained and it is not necessary that a composition should be arrived at after a complaint has been filed in Court. AIR (V 14) 1927 All 375: 101 Ind Cas 671: 49 All 484: 25 ALJ 396: 8 LRA Cr 49. 7 AICr R 339: 28 Cr LJ 495.

——S. 345 — Who can compound.

A complaint was filed by the wife for cheating her husband and was compounded by the wife and the accused was acquitted; the husband subsequently filed another complaint against the same accused for cheating. Held, that the composition of the previous complaint by wife, not having been arrived at with the husband, the real person aggrieved, is not a valid composition which will bar a subsequent prosecution.

Patkar, J. —Any person may set the criminal law in motion, but it is only the person specified in S. 345, who can compound the offence. AIR (V 14) 1927 Bom 410: 102 Ind Cas 549: 51 Bom 512: 29 Bom LR 718: 28 Cr LJ 581: 8 AICrR 236 (DB).

——S. 345 — Where the complaint was in respect of two offences, one against the complainant and quite clear that the only person who can compound alone cannot compound the whole case and he can compound the offence committed against him. AIR (V 10) 1923 Cal 168: 73 Ind Cas 322: 27 CWN 168: 37 CLJ 254: 24 Cr LJ 578 (DB).

——S. 345 — S. 498, I. P. C.

However anomalous the position may be it is quite clear that the only person who can compound a case under Sec. 498 is the husband of the woman. AIR (V 9) 1922 Lah 177: 69 Ind Cas 370: 23 Cr LJ 690: 5 LLJ 183.

——S. 345 — Composition with some accused — Several accused — Compounding with some — Effect of.

It is open to the complainant to compound with one or more of the accused and to proceed with the case against the rest. 7 CWN 176, Dissented from. AIR (V 8) 1921 Bom 166 : 22 Bom LR 1221 (DB).

——S. 345 (1) — Aggrieved person — Compounding of offence — 'Hurt'.

The person by whom an offence under S. 323, Cr. P. C. may be compounded is the person to whom the hurt is caused and not the person who causes the hurt. AIR (V 4) 1917 All 377: 15 ALJ 467: 18 Cr LJ 729: 40 Ind Cas 729.

——S. 345 — Aggrieved person — Death of — Compoundable offence — Indian Penal Code, S. 325 — Parties to revision.

An offence under S. 325 of the I.P.C. is compoundable with the permission of the Court but the only person who can compound is the man who is hurt. Where, therefore, the man who is hurt is dead, the case cannot be compounded by the widow of the deceased. AIR (V 2) 1915 All 443: 37 All 419: 13 ALJ 630: 16 Cr LJ 586: 30 Ind Cas 138 (DB).

——S. 345 — Several persons aggrieved.

Where hurt was caused to three persons, one of whom died, the remaining two cannot lawfully compound the offence as regards the deceased. (1909) 6 ALJ 882: 10 Cr LJ 473: 31 A. 606: 4 Ind Cas 24 (DB).

——S. 345 — Compounding of offences — Dispute between two sets of persons — Death of one in one set — Compromise with another.

A person to whom an injury has been done is the only person who can compound a case. Where there was a fight between two sets of persons and one man in one set died in consequence of the injuries received.

Held, that the other members of the same set could not compromise the case on behalf of the deceased even though the hurt which resulted in his death was simple hurt. (1909) 6 ALJ 882 : 31 All 606 (607) (DB).

**9. Tests of compoundability.**

See also N. 2.

——S. 345(5) — Question of reduction of offence from one section to another taking effect only after pronouncement of judgment, if material.

Clause (5) of S. 345, Criminal P. C., applies to all offences which may be compounded under the section and hence the question of the reduction of the offence from one section to another taking effect only on pronouncement of judgment would not be material. AIR (V 28) 1941 Sind 216: ILR (1941) Kar 429: 43 Cr LJ 293: 197 Ind Cas 868 (DB).

——S. 345 — Determination of whether or not offence is compoundable depends on offence directly charged in complaint and not that which might have been spelled out of the complaint. AIR (V 17) 1930 Oudh 196: 125 Ind Cas 385: 1930 Cr C. 957(2): 4 Luck 669: 7 OWN 575.

——S. 345 — Compounding, what is.

——Compound — Meaning of — Giving accused document saying "I withdraw case against accused" is compounding the case. AIR (V 10) 1923 All 474: 74 Ind Cas 262: 45 All 145: 24 Cr LJ 758.

——S. 345 — Where a complaint has been compounded as against one of several accused charged with the same offence, the whole case is deemed as compounded. AIR (V 10) 1923 Pat 348: 67 Ind Cas 592: 4 PLT 107.

——S. 345 — In a trial under S. 323 against a number of persons the compounding of the offence against one of them does not amount to compounding of the offence against all. AIR (V 8) 1921 All 35: 61 Ind Cas 209: 43 All 483: 19 ALJ 374: 22 Cr LJ 353.

——S. 345 — Subsequent to charge.

The fact that the prosecution evidence had been closed and that a charge was framed against the accused is no bar to the composition of the offence. (1928) 112 Ind Cas 562: 29 Cr LJ 1058 (Lah).

——S. 345 — Offences concerning individuals and those affecting the State — Distinction — Test.

Compoundability is the only test laid down by the code to determine the class of offences which

concern individuals as distinguished from those which have referred to the interests of the State; and courts of law cannot go beyond that test and substitute for it one of their own. (1904) 6 Bom LR 73: 28 Bom 326(328) (DB).

——S. 346.

——S. 346 — Jurisdiction — Forged document — Intention to use for cheating — Case, if triable by Sessions Court.

When the document forged is a valuable security, then notwithstanding the fact that the forged document was intended to be used for the purpose of cheating, the Court which ought to try an accused person is the Court of Session and not that of a Magistrate. It would be wrong in principle to leave it to Magistrate to pick and choose, as it were, a particular section of the I. P. C., and apply it to some only of the facts constituting an offence which is triable by them and ignore the rest of the facts which would constitute an offence under a section of the I. P. C., which is exclusively triable by a Court of Session. AIR (Vol 32) 1945 Sind 125: ILR (1945) Kar 109: 47 Cr LJ 37: 221 Ind Cas 31 (DB).

——S. 346 — Conviction on evidence partly recorded by Magistrate who originally tried case and partly recorded by Magistrate to whom case was sent for trial — Legality.

Where a case is submitted by a Magistrate to the District Magistrate under S. 346, there is to be a trial de novo before the District Magistrate or the Magistrate to whom the case has been assigned by him. Consequently, a conviction recorded on evidence partly recorded by the Magistrate, who originally tried the case, and partly recorded by the Magistrate to whom the case was sent for trial under S. 346 is illegal. AIR (Vol 30) 1943 Lah 27: 43 Cr LJ 925: 44 PLR 455: 203 Ind Cas 178.

——S. 346 — Case reported to superior Magistrate under S. 346 — Latter, if can refer case back to same Magistrate — "To any Magistrate subordinate to him" in Cl. 2, S. 346, meaning of.

Where a Subordinate Magistrate submits a case under S. 346, Criminal P. C., to a superior Magistrate, the latter cannot refer the case back to the very Subordinate Magistrate who has reported the case to him under S. 346 (1). The superior Magistrate must assume the case presented in the report as correct for the purpose of dealing with it under Cl. (2) of S. 346. The phraseology of Cl. (2) of S. 346 "to any Magistrate subordinate to him having jurisdiction" is intended to mean a Subordinate Magistrate other than the Magistrate who made the reference or report and competent to deal with the case as submitted. AIR (Vol 29) 1942 Bom 84: 44 Bom LR 53: 43 Cr LJ 562: ILR (1942) Bom 198: 199 Ind Cas 351 (DB).

——S. 346 — Section 346, Criminal P. C., implies that a Subordinate Magistrate can legally enquire into a serious offence up to the stage at which the question of charge or discharge has to be decided. AIR (Vol 26) 1939 Lah 122: 40 Cr LJ 515: ILR (1938) Lah 619: 41 PLR 221: 181 Ind Cas 49.

——S. 346 — Transfer of case under S. 346 — De novo trial.

Per Henderson, J.: When a case has been transferred under the provisions of S. 346, Criminal P. C., the Magistrate is bound to hold a de novo trial. Apart from that the ordinary rule is that the Magistrate, who tries the case, is to record the evidence and, unless an exception is definitely provided for by some statute, that ordinary provision should prevail. AIR (Vol 25) 1938 Cal 415: 42 CWN 508: 39 Cr LJ 606 (2): 175 Ind Cas 537 (DB).

——Ss. 346, 233, 30 — Charges under Ss. 420 and 465, Penal Code — Conviction under S. 420 and acquittal under S. 465 — Appeal against conviction under S. 420 — Re-trial.

The Magistrate convicted the accused under S. 420, I. P. C., and also framed a charge under S. 465, I. P. C. Eventually, however, he came to the conclusion that on the facts the offence would fall under S. 467, I. P. C. As he was not invested with enhanced powers under S. 30, Criminal P. C., he would not convict under that section but registered an order of acquittal under S. 465 remarking that this would not be any bar to proceedings against the accused under S. 467. On an appeal against their conviction under S. 420, I. P. C., the Additional Sessions Judge, without going into the merits of the case in any way, pointed out that the procedure of the Magistrate was illegal and the Magistrate should have acted under S. 346, Criminal P. C., that is to say, he should have stayed proceedings and submitted the case to the District Magistrate or other Magistrate to whom he was subordinate. He, accordingly, set aside the conviction and ordered a fresh trial in accordance with law :

Held, that the order of the Additional Sessions Judge was of doubtful legality. Since he was dealing only with the appeal from conviction under S. 420, he could only direct a re-trial on that charge or one of cognate nature. AIR (Vol 22) 1935 Lah 945: 37 PLR 64: 37 Cr LJ 303: 160 Ind Cas 363.

——Ss. 346, 350 — Stay — Case submitted to another Magistrate — De novo trial.

Evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless the law expressly makes it so. Consequently, when a case has been submitted to a First Class Magistrate on the stay of its proceedings before the Second Class Magistrate, under S. 346, Criminal P. C., the First Class Magistrate is bound to try it de novo. His failure to re-hear vitiates the trial. AIR (Vol 20) 1933 Sind 191: 34 Cr LJ 749: 27 SLR 266: 144 Ind Cas 231 (DB).

——S. 346 — Scope.

The terms of sub-s. (2), S. 346 are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it : AIR (Vol 17) 1930 Mad 765: 126 Ind Cas 495: 1930 Cr C 961: 32 MLW 381: 31 Cr LJ 1010: 1930 MWN 493: 59 MLJ 368 (FB).

——S. 346 — Graver and lesser offence — Jurisdiction.

Where the offence complained of was one under S. 430, I. P. C., but the Bench tried the accused for a lesser offence under S. 426, I. P. C. and it appeared that they had jurisdiction to try the former and not the latter offence,

Held that the proceeding was not void. 1930 MWN 770.

——S. 346 — 'Evidence' — Scope of.

The word "evidence" in S. 346 is not restricted to depositions recorded by Magistrate but includes all facts and statements disclosed by his enquiry. AIR (Vol 14) 1927 Mad 591: 100 Ind Cas 992: 28 Cr LJ 384: 7 AI Cr R 545.

——S. 346 — 'Inquiry' — Scope of.

Where a Magistrate directs under S. 202 an inquiry by another Magistrate or Police Officer or other person, he is doing so in the course of his own inquiry into the offence and his inquiry therefore has already begun within the meaning of S. 346 of the Code. AIR (Vol 14) 1927 Mad 591: 100 Ind Cas 992: 28 Cr LJ 384: 7 AI Cr R 545.

——S. 346 — Validity of transfer — Charge sheet before Referring Sub-Magistrate.

Where on a reference under S. 202, Cr. P. C., the Police sent a charge sheet to the Referring Sub-Magistrate who accepted it and sent it up under

S. 346 to the Sub-Divisional Magistrate as in his opinion the case was a first class one,

Held : that the Sub-Magistrate had jurisdiction to do so. AIR (Vol 14) 1927 Mad 591: 100 Ind Cas 992: 28 Cr LJ 384: 7 AI Cr R 545.

**——S. 346 — Procedure — Evidence recorded by Magistrate without jurisdiction.**

Passing orders on evidence taken by another Magistrate who was not competent to try the case after merely hearing arguments, cannot be considered to be a "trying the case himself." AIR (Vol 10) 1923 Mad 327: 72 Ind Cas 525: 24 Cr LJ 413: 17 MLW 247.

**——S. 346 — Reference by a Sub-Magistrate.**

The duty of a Sub-Divisional Magistrate under S. 346 is "either if so empowered to try the case referred to him himself or to refer it to any Magistrate subordinate to him having jurisdiction or to commit the accused for trial." And where he refers the case to a Sub-Magistrate the reference should be made explicitly and with some distinct indication of what action the Sub-Magistrate is to take, not with an obscure injunction which could afford no real guidance. Further a superior Magistrate cannot simply return a case to the Subordinate Magistrate from whom it comes but must refer to some other Magistrate or dispose of it himself. AIR (Vol 10) 1923 Mad 51: 69 Ind Cas 438: 45 Mad 846: 1922 MWN 641: 16 MLW 581: 31 MLT 365: 23 Cr LJ 710 (DB).

**——Ss. 346, 350 — Part heard case — Transfer of — Commitment, on evidence recorded by transferring Magistrate — Legality.**

A commitment can be ordered by a Magistrate to whom the case is transferred, on the evidence recorded by the transferring Magistrate. This is distinct from a Mgistrate deciding the case on evidence heard by his predecessor. AIR (Vol 3) 1916 Nag 115: 12 NLR 146: 18 Cr LJ 35: 36 Ind Cas 867.

**——Ss. 346 and 447 — Duty of Court to explain rights — Revision — Right not claimed — Applicability of S. 346 to the case.**

Unless and until the accused has definitely claimed to be tried as an European Br. subject and his claim has been allowed, the Local High Court, not being a High Court within the meaning of S. 4 (j) of the Cr. P. Code with reference to proceedings against European Br. subjects, can exercise its revisional power. (1911) 7 NLR 93: 12 Cr LJ 436: 11 Ind Cas 620.

**——Ss. 346, 532 — Commitment made under S. 346, Cr. P. C. — 'De novo' trial, if necessary.**

Commitment made to the Sessions by a Magistrate acting under the power conferred by S. 346, Cr. P. C., is not illegal simply because he has not examined de novo the witnesses who were examined by the Magistrate who submitted the case under the provisions of the section. To the case of an accused thus committed to the Court of Sessions S. 532, Cr. P. C., has no sort of application. (1907) 12 CWN 136 (137) (DB).

**——S. 346 (1) — Complaint to Magistrate having no jurisdiction.**

Where the objections that the Collector should have filed the complaint himself and that he had no power to delegate that right to the Revenue Divisional Officer and that the complaint should have been made to the Sub-Magistrate having jurisdiction at the place where the Collector received the letter are correct, the Magistrate should return the complaint for presentation to the Magistrate having jurisdiction and not forward the papers to his immediate superior under S. 346 (1), Criminal P. C. AIR (Vol 30) 1943 Mad 526: (1943) 1 MLJ 467: 1943 MWN 335: 44 Cr LJ 776: 208 Ind Cas 400.

——S. 346 (2) — A Joint Magistrate is not entitled to order the Sub-Magistrate to hold a preliminary enquiry and commit the accused to the Court of Session. He can order for the trial. 1935 MWN 958.

**——S. 347.**

1. Scope.
2. "Before signing judgment."
3. "Ought to be tried".
4. Committal of accused

**1. Scope.**

**——S. 347 — Counter case to preliminary register case which has to be committed to Sessions, whether sufficient reason to treat it also as preliminary register case.**

Where the offence disclosed is triable by a Second Class Magistrate and it is not stated that he cannot adequately deal with it, the fact that the case is counter to preliminary register case which has to be committed to Sessions is not a sufficient reason for treating it also as a preliminary register case. (1941) 191 Ind Cas 156: (1940) MWN 530: 52 MLW 65: (1940) 2 MLJ 215: 42 Cr LJ 86.

**——S. 347 — Counter cases to preliminary registered cases.**

The Sub-Divisional Magistrate has no power to direct the Second Class Sub-Magistrate to treat the calendar cases which are triable by a First Class Magistrate as Sessions cases. If he thinks that those cases ought to be tried by the Court of Session, he should proceed himself to commit them to the Sessions Court under S. 347, Criminal P C. His order practically amounts to a refusal to exercise his jurisdiction and to perform his duty. Whether such calendar cases are counter-cases to preliminary registered cases or whether the facts are complicated or not, the cases which are triable by him must be heard by him and the work should not be transferred in such a manner. AIR (Vol 25) 1938 Mad 529: (1938) 1 MLJ 403: 47 MLW 486: (1938) MWN 417: 39 Cr LJ 715: 176 Ind Cas 182.

**——S. 347 — Counter-cases.**

If one of the two counter-cases has been committed to sessions, there is no ground for committing the other also if Magistrate can adequately deal with it. 1934 MWN 272 (1).

——S. 347 — Failure to exercise jurisdiction under S. 254, Criminal P. C., by a Magistrate is as much as the wrongful exercise of jurisdiction under S. 347, Criminal P. C., a point of law on which a committal wrongly made by him can be quashed. AIR (Vol 24) 1937 Sind 32: 38 Cr LJ 379: 31 SLR 403: 167 Ind Cas 379.

**——S. 347 — Joint summons and warrant case — Committal of former.**

S. 347 allows a Magistrate duly empowered to commit, to exercise his discretion of commitment in the cases in which he can inflict adequate sentences or otherwise: the committal of a summons case would be more wide and not illegal in the least arising out of the same transaction together with a warrant case. AIR (Vol 7) 1920 Sind 55: 21 Cr LJ 791: 58 Ind Cas 519.

**——S. 347 — Stop further proceedings.**

S. 347 does not apply to a case where the Magistrate thinks from the first that a case ought to be tried by the Court of Session and he must in that case conform to provisions of S. 208. The words "stop further proceedings" refer to trial or inquiry with a view to trial by himself in a case which the Magistrate thinks ought to be tried by the Court of Sessions or High Court. (1912) 5 Bur LT 239: 13 Cr LJ 877: 6 LBR 129: 17 Ind Cas 813 (FB).

**2. "Before signing judgment."**

——S. 347 — A Magistrate has power at any stage of the proceedings to decide that the case is one

which he ought not to try and which ought to be committed to the Sessions and he should ordinarily commit the case for a trial, provided the evidence has been completed. AIR (Vol 17) 1930 Cal 666: 1930 Cr C 1058 (DB).

### 3. "Ought to be tried".

**——S. 347 — Offence under S. 124-A, Penal Code — Article published in Tamil — Chief Presidency Magistrate trying case having Urdu mother-tongue — Case held should be committed to Sessions.**

The accused was prosecuted under S. 124-A, I. P. C., in respect of an article published in Tamil. The accused filed an application before the Chief Presidency Magistrate whose mother-tongue was Urdu that the case should be committed to the High Court for being tried with the aid of jury. The main point urged was that the offending article being in Tamil, it would be conducive to the ends of justice if the case was tried by a jury, majority of whom would be in a position to decide whether the article was one that would bring or attempt to bring into hatred or contempt or excite disaffection against the Govt. The Magistrate dismissed the application stating that since the law had not made the offence triable exclusively by a Court of Session he was entitled to try it:

Held, that the main considerations which ought to have weighed with the Magistrate in deciding whether he should try the case himself or should commit it to the High Court for being tried with the aid of jury were: (1) The advantage of a trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implication and its effect on the general public and the readers' reaction to it; (2) the adequacy of the sentence that might be passed by the Court for the offence in question; and (3) the capacity of the Judge to appreciate the impression that was likely to be formed in the minds of the reading public. The reason urged for the accused in the petition was sufficient to justify the accused being tried not only by a Judge who knew Tamil but also with the aid of a jury who knew Tamil. AIR (Vol 33) 1946 Mad 349.

——S. 347 — Though, ordinarily, a Magistrate should try a case which he is competent to try and which he can adequately punish, it is desirable and advantageous that when a case is committed to Sessions, the counter-case should also be committed and tried by the Court of Session though the Magistrate himself is competent to try the counter-case and inflict adequate punishment. AIR (Vol 30) 1943 Sind 112: ILR (1943) Kar 90: 44 Cr LJ 631: 207 Ind Cas 272.

**——S. 347 — Offence triable both by Magistrate and Sessions Court.**

Offences which are triable both by a Magistrate and a Sessions Court, should ordinarily be tried by the Magistrate though, of course, if he considers that the maximum sentence which he can inflict is insufficient, he has the power to commit to Sessions, but this is an exception to the general rule, that if the Magistrate can try he should do so. In such a case the Magistrate must exercise his discretion after due consideration and state the reasons why he commits to a Court of Session. AIR (Vol 27) 1940 Oudh 15: 1939 AWR 188: 40 Cr LJ 903: 1939 OWN 868: 184 Ind Cas 260.

**——S. 347 — Nose-cutting case.**

It cannot be said that nose-cutting cases should, as a matter of course, be committed to the Court of Session for trial, although the Magistrate should always consider whether he ought not to commit. AIR (Vol 25) 1938 Bom 430: 40 Bom LR 832: 39 Cr LJ 928: 177 Ind Cas 647 (DB).

**——S. 347 — Case, if should be committed, on ground that injury might have been fatal.**

Where the accused, while stealing water melons worth about six annas inflicts an injury, the mere fact that the injury might have been fatal, when in fact it is not so, is not enough by itself to commit the accused to Sessions. A case should be considered from the point of view, not of what injury might have been inflicted but what injury was in fact inflicted. AIR (Vol 25) 1938 Sind 79: 39 Cr LJ 507: 174 Ind Cas 920.

**——S. 347 — Complicated and serious cases — Duty to commit.**

Where in the trial of a criminal case, the Magistrate is of opinion that a prima facie case has not been made out against the accused such as would justify the accused being put on his trial, he must at once be discharged.

On the other hand, if the circumstances as disclosed in the depositions necessitate the framing of a charge against the accused for an offence the seriousness of which may vary according to the facts that are established, the Magistrate should try the case himself if it is within his cognizance and the offence in the circumstances disclosed in the depositions appears to be a trivial one. E contra a Magistrate ought not to take upon himself the responsibilities of trying a case which, taking a reasonable view of the effect of the depositions, must be regarded as involving the trial of the accused for a grave offence or one in which complicated or difficult questions of law or fact arise. The function of a Magistrate is to dispose of petty cases, and he ought to commit to Sessions, cases of a complicated or serious nature which he is neither by training nor experience qualified to try. AIR (Vol 19) 1932 Rang 193: 10 Rang 495: 34 Cr LJ 187: 141 Ind Cas 256.

**——S. 347 — Importance and nature of the case.**

It is not open to a Magistrate to decline to commit a case to High Court Sessions on the ground that there is congestion of work in High Court Sessions.

K, the Editor of a widely circulated vernacular paper in Bombay was charged with offence under S. 124-A, I. P. C.

Held, that having regard to the seriousness of the offence and large circulation the case was of public importance and the accused was entitled to be tried before the High Court Sessions. AIR (Vol 16) 1929 Bom 313: 119 Ind Cas 666: 53 Bom 611: 31 Bom LR 602: 30 Cr LJ 1090: 1929 Cr C 124.

**——S. 347 — Concurrent jurisdiction — Reasons for committal.**

Where an offence is triable both by the Sessions Court and by a Magistrate, the latter can commit an accused to Sessions only if he is of opinion that the case ought to be tried by the Sessions Court. He must give reasons for his entertaining that opinion, for the order of commitment is a judicial order. AIR (Vol 15) 1928 Pat 551: 109 Ind Cas 804: 29 Cr LJ 612: 10 AI Cr R 347.

**——S. 347 — Discretion — S. 254, Cr. P. Code.**

Before the commencement of the enquiry or trial if the Magistrate is of opinion that the case is one which for any reason ought to be tried by the Court of Sessions then he has ample power to inquire into the case with a view to commitment and subsequently to commit, if the evidence justifies the Court. S. 347 is couched in general terms and gives the Magistrate very wide powers. There is no suggestion that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence. The discretion vested in the Magistrate cannot be limited by the provisions of S. 254. AIR

(Vol 12) 1925 Rang 207: 89 Ind Cas 525: 26 Cr LJ 1389: 3 Rang 42.

——S. 347 — **Committal to Sessions — Magistrate having power to impose the maximum sentence.**

It is competent to a Magistrate to commit a case to the Court of Sessions even though he can himself impose the maximum sentence provided by law for the offence, if in his opinion, the case is one which for other reasons ought to be tried by the Court of Session. AIR (Vol 6) 1919 Mad 907: 35 MLJ 559: (1918) MWN 870: 9 LW 14: 19 Cr LJ 997: 42 M 83: 48 Ind Cas 337 (DB).

——S. 347 — **Local investigation — Magistrate putting himself in position of witness — Commitment.**

Where after a local investigation and without recording its result, a Deputy Magistrate places himself in the position of a witness, a commitment by him of the case to the Sessions, will meet the ends of justice in as much as he will be liable to be called as a witness in the Sessions Court. (1912) 16 CLJ 45: 13 Cr LJ 688: 16 Ind Cas 336 (DB).

### 4. Committal of accused.

——S. 347 — **Procedure — Commitment — Duty of Magistrate to follow Ch. 18.**

The phrase "under the provisions hereinbefore contained" in S. 347, Cr. P. Code, is referable to Ch. 18 of the Code, which lays down the procedure for conducting an inquiry into cases triable by the Court of Session or High Court. The intention of S. 347, as it stood before its amendment in 1923 was that the subsequent inquiry should be in accordance with Ch. 18 and under S. 347, the Magistrate has to follow the provisions of Ch. 18 before passing an order of commitment to the Court of Session. AIR (Vol 37) 1950 Pat 550: 29 Pat 935 (DB).

——Ss. 347, 288 — **Statement recorded by Magistrate in presence of accused whether substantive evidence under S. 288.**

There is nothing in S. 347, Criminal P. C., to suggest that where a Magistrate decided to commit under that section, he should be required to commence proceedings de novo under Chap. XVIII. What is necessary is that as soon as a Magistrate acting under S. 347 has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by S. 208 and S. 212 of offering defence evidence; and always provided that the requirements of Ss. 208, 211 and 212, as well as the formalities required by S. 213, are carefully observed, there is no reason why a Magistrate should be required to take proceedings de novo under Chap. XVIII. In such a case, any statement recorded by the Magistrate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chap. XVIII, and may, therefore, be transferred and treated as substantive evidence under S. 288 in the trial before the Sessions Court. Where the accused is duly informed that the Magistrate has decided to commit him to the Sessions and is given every opportunity to produce his defence both before and after his decision, there can be no prejudice to the accused by the transfer of the statements in question. AIR (Vol 27) 1940 Lah 389: 42 PLR 714: ILR (1940) Lah 151: 42 Cr LJ 29: 190 Ind Cas 761 (DB).

——Ss. 347, 208 — **Finding before closing of prosecution evidence that case should be tried by Sessions or High Court — Whether can commit, without completing prosecution evidence under S. 208.**

Section 347, Criminal P. C., is controlled by the provisions contained in Chap. XVIII. A Magistrate, who, under Chap. XVIII, Criminal P. C., is enquiring into a case triable by the Court of Session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the Court of Session or High Court, is not empowered under S. 347, Criminal P. C., (subject to the production of defence witnesses under S. 212), to commit the accused for such trial without completing the rest of the prosecution evidence, and he is bound to record the rest of the evidence for the prosecution, under S. 208, Criminal P. C., and then commit. AIR (Vol 23) 1936 All 134: (1935) ALJ 1321: 37 Cr LJ 337: 1935 AWR 1490: 58 All 671: 160 Ind Cas 856 (FB).

——S. 347 — **Further cross-examination.**

A Magistrate acting under S. 347 is not obliged to ask the accused whether he wished to further cross-examine prosecution witness. 1935 MWN 646.

——Ss. 347, 231 — **Evidence disclosing offence exclusively triable by Court of Session — Alteration of charge — Fresh opportunlty to accused to recall witnesses.**

If after the framing of a charge and the examination and cross-examination of the prosecution and defence witnesses, the Magistrate finds that the evidence prima facie discloses an offence triable exclusively by the Court of Session, the Magistrate can frame a charge for the offence so disclosed and commit the accused to the Sessions. Section 231, Criminal P. C., is not applicable to such a case and the Magistrate is not bound to allow a further opportunity to the accused to recall the prosecution witnesses for further cross-examination and to produce further evidence after the amendment of the charge. If the accused wishes to produce fresh defence witnesses whose names did not occur to him when he was asked for a list under S. 211 (1), the Magistrate has discretion to summon such fresh witnesses. AIR (Vol 18) 1931 All 434: 32 Cr LJ 849: (1931) ALJ 587: 53 All 692: 132 Ind Cas 47.

——S. 347 — **Procedure.**

A Magistrate committing the accused to the Court of Session under S. 347, Criminal P. C., has to follow the provisions of Chap. XVIII, Criminal P. C. If before passing an order for commitment, the accused applies to the Magistrate for an opportunity to cross-examine prosecution witnesses, and to examine the defence witnesses and the Magistrate declines to examine the witnesses on behalf of the accused or to allow cross-examination of the prosecution witnesses, the accused might approach the High Court for a direction to the Magistrate to follow the provisions of Chap. XVIII of the Criminal P. C. But after an order for commitment is passed, it must be shown that the accused has suffered any prejudice by reason of the action of the Magistrate taken in the proceedings AIR (Vol 18) 1931 Bom 517: 33 Bom LR 1192: 33 Cri LJ 68: 134 Ind Cas 1230 (DB).

——S. 347 — **Defective procedure — Construction — Depositions not read over.**

The phrase: "Under the procedure hereinbefore contained" relates to those provisions in Chap. 18 of the Code which defines the procedure to be adopted in the inquiries into cases triable by the Court of Session. Where according to provisions of S. 360 read with Ss. 207 and 208 of Chap. 18 the evidence recorded is not read over to each witness in the presence of the accused, no commitment can be made. S. 347 in no way overrides and in no way dispenses with the obligation of following Chap. 18. The omission to read over the depositions to the witness is not mere formal omission but may deprive the accused of the valuable right to contradict the witness during the Sessions trial by reference to their prior statements. The accused has a right to claim that the p rovisions relating to inquiries before commitment shall be observed irrespective

of the consideration as to whether he is prejudiced or not. 121 Ind Cas 618: 52 Mad 995: 30 MLW 646: 2 M Cr C 293: 1929 MWN 894: 1929 Cr C 602: 31 Cr LJ 273: AIR (Vol 16) 1929 Mad 862: 57 MLJ 555.

**——S. 347 — Commitment for part.**

Magistrate taking cognizance under Ch. 21 — Accused found not guilty with respect to part but Magistrate finding prima facie grounds for commitment with respect to another part — He should acquit in respect of former and commit in respect of latter. 85 Ind Cas 360: 26 Cr LJ 520: AIR (Vol 12) 1925 Oudh 547 (DB).

**——S. 347 — Procedure — Chapter XVIII.**

Section 347 is subject to the provisions of Ch. 18 and even when a committal order is made under S. 347 the Magistrate has to conform to the provisions of Ch. 18 and cannot deprive the accused of any right he has under this chapter. S. 347 appears in Ch. 24 of the Code which contains general provisions for inquiries or trial and is one of those sections providing what a Magistrate should do when in the course of an inquiry he finds that he should not finally deal with the case himself. But when he does make up this mind to commit he cannot disregard the provisions of Chap. 18. 83 Ind Cas 708: 17 SLR 188: 26 Cr LJ 148: AIR (Vol 11) 1924 Sind 61 (DB).

**——S. 347 — Chap. XVIII — Trial under S. 354 — Accused allowed benefit of cross-examination etc. — Altering charge and committing — Whether commitment legal.**

Where an accused was tried under S. 354, I. P. C., and allowed benefit of cross-examining prosecution witnesses and examining his own, the alteration of charge by the Magistrate into one under Ss. 376 and 511 of Penal Code and commitment to the Sessions will not render the commitment order illegal. 15 Cr LJ 366: 23 Ind Cas 734: AIR (Vol 1) 1914 Mad 643 (DB).

**——S. 347 — 'Stop further proceedings".**

'Stop further proceedings' means to stop proceeding with the case as a trial and commit the case to the Sessions for trial. (36 Cal 48, Diss.) (1913) 36 Mad 321: 23 MLJ 368: 13 Cr LJ 778: (1912) MWN 1243: 13 MLT 116: 17 Ind Cas 410 (DB).

**——S. 348**

**——Ss. 348 and 349—Procedure—Magistrate, when bound to commit—Theft case— Trial by Second Class Magistrate — Conviction — Some accused having previous convictions— Reference to Subdivisional Magistrate for award of heavier sentence—Legality —Recording of conviction— Effect of—Surplusage.**

A Magistrate is not to commit a case to the Court of Session unless he is satisfied that there are sufficient grounds for so doing; where a sentence of two years' rigorous imprisonment would, in the opinion of the Magistrate, be more than sufficient, there is no sufficient ground for a committal to the Court of Session. Where in such a case of theft, a Magistrate with second class powers sees no sufficient ground for committing the accused to the Court of Session, and tries the accused, and convicts them, but finding that some of the accused with previous convictions deserve a higher sentence than he could impose, refer the case to the Sub-divisional Magistrate under S. 349, Cr. P. Code, such reference is not invalid or illegal.

Though it is wrong for the Magistrate to record a conviction, that has to be taken as an expression of his opinion only and has to be treated as a mere surplusage and a legal nullity. 1946 Mad 171; 8 Cr LJ 478; 17 Cr LJ 20, not foll. AIR (V 36) 1949 Pat 317: 50 Cr. LJ 664 (DB).

**——Ss. 348 and 349—S. 349 applies to all offences while S. 348 applies to offences under Ch. 12 or Ch. 17, Penal Code—Case failing under S. 348—Magistrate should act under S. 348 and not under S. 349.**

Section 349 is a general section which applies to all offences whereas S. 348 applies only to persons who have been convicted of an offence punishable under Ch. 12 or Ch. 17, Penal Code, in any prior case.

In a trial of several accused for offences under Ss. 380, 410 and 411 one of the accused was also charged under S. 75, Penal Code. The Magistrate found all the accused guilty of the offences with which they were charged but being of opinion that he could not pass adequate sentence against the accused charged under S. 75, Penal Code, he sent the papers under S. 349, Criminal P. C. to the Sub-Divisional Magistrate who acquitted all of them:

Held, that the Magistrate should have committed the accused to sessions under S. 348 and should not have taken action under S. 349. The Sub-Divisional Magistrate had, therefore, no jurisdiction to try the case and acquit the accused. AIR (V 33) 1946 Mad 171: (1945) 2 MLJ 576: (1946) MWN 7.

**——S. 348—Conviction of theft and committal of Sessions on the ground that accused was old offender — Committal irregular — Proper procerude.**

Where on a charge of theft, a Sub-Magistrate tries the accused as in a warrant case and convicts him. It is irregular thereafter to commit the accused to Sessions on the ground that the accused was an old offender. In such a case, the Magistrate can send the papers to a First Class Magistrate for passing an enhanced sentence as the accused was an old offender. AIR (V 31) 1944 Mad 498 : (1944) 2 MLJ 40 : 1944 MWN 499 (1) : 46 Cr. LJ 36 : 216 Ind Cas 81.

**——Ss. 348, 349—Penal Code, S. 411— Procedure—Irregularity — Criminal Rules of Practice and Orders, R. 97.**

The Sub-Magistrate submitted the case under S. 349, Criminal P.C. to the Sub-Divisional Magistrate as he (Sub-Magistrate) was of opinion that the accused was guilty under S. 411, I.P.C., and was liable to a more severe punishment than he was competent to inflict. The Sub-Divisional Magistrate on perusal of the record, acquitted the accused:

Held, that under S. 348, Criminal P. C., the Sub-Magistrate should have committed the accused to the Court of Session. The irregularity was such as could have been cured by Sub-Divisional Magistrate under R. 97, Criminal Rules of Practice and Orders. AIR (V 28) 1941 Mad 748 : 1941 MWN 524

——Ss. 348 and 349 — Second Class Magistrate finding that he cannot sufficiently punish an old offender submitted the records under S. 349, Cr. P. C. to Sub-Divisional Magistrate.

Held, that the Taluk Magistrate ought, under these circumstances, to have proceeded not under S. 349 but under S. 348, 1935 MWN 1293.

**——S. 348—Magistrate Committing or transferring the case — Whether can pass a finding of guilt.**

It is illegal and ultra vires for a Magistrate acting under this section when he thinks he cannot pass adequate sentence, to submit the case with a finding of guilt. AIR (V 3) 1916 LB 65 : 17 Cr. LJ 201 : 9 Bur LT 213 : 34 Ind Cas 313.

**——S. 348 and 403 — Conviction and subsequent commitment to Sessions bad.**

A Magistrate acting under S. 348 ought merely to frame a charge and then commit the accused to

the Sessions but not find the accused guilty before commitment as in that case a conviction would bar a fresh trial under S. 403 of the Cr. P. Code. AIR (V 1) 1914 Mad 149 : 38 Mad 552 : 15 Cr. LJ 188 : 22 Ind Cas 764.

——S. 349

See also Cri Pro Code. S. 348.

1. To whom reference is to be made.
2. Procedure of referring Magistrate.
3. Several accused.
4. Procedure of Magistrate to whom the case is referred.

**1. To whom reference is to be made.**

——S. 349 —Fact of previous convictions of accused not known to Magistrate— Accused not charged under S. 75, I.P.C. —Case not sent to Magistrate with higher powers under S. 349.

Held, that the High Court could under S. 439 (1) reverse the finding and conviction and order retrial by competent Court. AIR (V 25) 1938 Oudh 261 : 1938 AWR 92 (1) : 40 Cr. LJ 25 : 1938 OWN 1062 : 178 Ind Cas 248.

**——S. 349—Jurisdiction—Nagpur City.**

Nagpur City has not been declared a sub-division of the Nagpur District and until therefore action is taken in this respect with reference to Ss. 4 (u), 8 and 13, the City Magistrate, Nagpur cannot be described as a Sub-Divisional Magistrate for the purposes of having cases referred to him under S. 349 by 2nd and 3rd Class Magistrates in Nagpur City. An order of the City Magistrates disposing of a reference to him is therefore void as being made without jurisdiction. AIR (V 14) 1927 Nag 209 : 101 Ind Cas 665 : 28 Cr. LJ 489 : 8 AI Cr. R. 167.

**——S. 349 (1)—Jurisdiction to deal with a case—Dt. or Sub-Divisional Magistrate — Transfer.**

A case was sent up under S. 349 to the Sub-Divisional Magistrate, who transferred the case to a First Class Magistrate who committed the accused to the Sessions. Held, that the jurisdiction to deal with proceedings under S. 349, Cr. P. Code, was conferred upon District and Sub-Divisional Magistrates and no others. AIR (V 1) 1914 Bom 217 38 Bom 719 : 16 Bom LR 598 : 16 Cr. LJ 273: 28 Ind Cas 321 (DB).

**2. Procedure of referring Magistrate.**

**——S. 349 (1) — Magistrate acting under —If required to record judgment.**

A second or third class Magistrate acting under S. 349 (1). Cr. P. Code, is not required to write a judgment. All he is required to do is to record his opinion and submit the proceedings and forward the accused to the District Magistrate or the Sub-Divisional Magistrate. AIR (V 36) 1949 Cal 308 : 50 Cr LJ 563: 52 CWN 576.

**——S. 349 (1) — Duty of magistrate— Procedure—Magistrate stating in reference that he convicts accused — Reference, if vitiated.**

Under S. 349 (1), Cr. P. Code, a magistrate is only to record his opinion and submit the proceedings. It is wrong for him to record a conviction when making the reference, but if he does so, it would be treated as a nullity and no formal quashing is called for. The very act of submitting the proceedings is enough to show that in the opinion of the magistrate the accused is guilty of the offence charged. If however he states that he convicts the accused, the proceedings are not thereby vitiated nor is the reference rendered illegal. At the highest it is only an irregularity which would not vitiate the proceedings. AIR (V 33) 1946 Pat 412: 1947 PWN 18: 47 Cr LJ 1016: 227 Ind Cas 167: 13 BR 11: 25 Pat 153: 27 PLT 156 (DB).

**——Ss. 349, 380, 562—Reference under S. 562 (1) — Power of Magistrate to set aside conviction and acquit—Difference between Ss. 349 and 380.**

It is not permissible for a Magistrate acting under Section 380, Criminal P. C., to set aside the conviction of the accused and to acquit him.

There is a very clear difference beween Ss. 349 and 380. When a Magistrate of the Second or Third Class submits proceedings under S. 349, he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under S. 562, a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under S. 380, that Magistrate has to deal with a person who has beten convicted. AIR (V 20) 1933 Mad 728: (1933) MWN 716: 38 MLW 428: 34 Cr LJ 1045: 65 MLJ 405 : 57 Mad 85 : 145 Ind Cas 659 (DB).

**——S. 349—Conviction and reference — Legality of.**

A Magistrate, while sending up a case under S. 349 is prohibited from passing a sentence, but he is not necessarily prohibited from finding the accused guilty, and any such conviction will not preclude the Sub-Divisional Magistrate from proceeding under S. 349. The conviction is a mere surplusage. There is no legal objection to the conviction being treated as such surplusage and as a legal nullity, so that the Magistrate to whom the case is sent can proceed with it wtihout a reference to the High Court for the purpose of having the conviction formally quashed. AIR (V 15) 1928 Bom 240 : 52 Bom 456: 30 Bom LR 620: 29 Cr LJ 904: 11 AI Cr R 119: 111 Ind Cas 664 (DB).

**——S. 349 — Procedure.**

If the Magistrate considers a person to be guilty and to deserve a larger penalty than the Magistrate himself can impose, the Magistrate should send the case to a superior Court for imposing a fitting sentence. He should not convict the accused but after an expression of opinion as to the accused's guilt, the Magistrate should forward the case without any record of conviction. AIR (V 11) 1924 Pat 764 : 82 Ind Cas 284 : 3 Pat 1015 : 5 PLT 571 : 1924 PHCC 247 : 25 Cr LJ 1276 (DB)

**——S. 349 — Second and Third Class Magistrate whether can frame charges.**

A Second or Third Class Magistrate acting under this section is fully competent to frame a charge against an accused person. AIR (V 3) 1916 LB 65 : 17 Cr LJ 201 : 9 Bur LT 213 : 34 Ind Cas 313.

**——S. 349 — Jurisdiction of Magistrate to pass sentence and then refer the case to a superior court to bind down accused under S. 106, Cr P. C.**

If a Magistrate thinks the accused should be bound down under S. 106, Cr. P. C. and he has no power to do so, he should transmit the whole case to a competent Magistrate and not himself pass the sentence and refer the case for action under S. 106, Cr. P. C. (1908) 35 C 1093 (1094) (DB).

**3. Several accused.**

——S. 349 — The characteristic features of section 349 do not fit into a case arising under section 562. There is nothing in the language of section 562 and 380 which prohibits a Magistrate of the second or third class from sending up all the accused, the whole case and the entire proceedings to the Sub Divisional Magistrate in a case where he suggests that action should be under section 562 against only one or few of the accused persons. AIR (V 35) 1948 Mad 86 : 60 MLW 37 : 1947 MWN 106 : 229 Ind Cas 287 : 48 Cr LJ 361 : ILR (1947) Mad 714: (1947) 1 MLJ 17.

**——S. 349 — Several accused — One of them child within meaning of Madras Children Act — Magistrate not empowered to proceed under Act — Procedure.**

When more accused than one are being tried and one of them happens to be a child within the meaning of the Madras Children Act and the Magistrate considers that he himself is not empowered to proceed against him under the Children Act, the Magi - trate shall forward all the accused to the Superior Magistrate, and cannot himself convict any of them. (1945) ILR (1945) Mad 594 : 58 MLW 96 : 1945 MWN 182 : (1945) 1 MLJ 241 (DB).

**——Ss. 349 (1) (a), 562, 380 — Several accused — Sentence of some and reference about others.**

There is a fundamental difference between the position of accused persons dealt with under s. 349 and S. 562, Criminal P. C. Under the former section, they are sent by the Court to the superior Magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior Magistrate to pass judgment upon them according to law. Under S. 562, the accused persons come before the superior Magistrate as convicted persons and he has no other option but to proceed under S. 380 of the Code and pass sentences upon them in accordance with his powers. Section 349 (1) (a) has no application to the procedure under S. 562 of the Code. It is open to the Sub-Magistrate to sentence some of the accused to imprisonment and refer the remainder for the application of S. 562 of the Code. AIR (V 30) 1943 Mad 390 : 56 MLW 69 : (1943) 1 MLJ 126 : 1943 MWN 60 (1) : 44 Cr LJ 568 : 206 Ind Cas 577.

**——S. 349 (1) (a) — Mandatory.**

Where two accused are being tried together for one and the same offence and one of them is a juvenile, the Sub-Magistrate submits the record of the juvenile alone to a competent Court and convicts the other accused himself:

Held, that S. 349 (1) (a) is mandatory and, therefore, the record of both the accused must be submitted to the competent Court. 1941 MWN 768: 1941 M Cr C 281 (2) : 1941 MWN Cr 96.

——S. 349 (1) (a) — Where a Sub-Magistrate convicts one accused and sends the other for being dealt with under S. 562 (1), Cr. P. C.:

Held, that the procedure followed by him is clearly opposed to the provisions contained in S. 349 (1) (a). 1936 MWN 1351.

**——S. 349 — Joint trial — Legality of reference of one.**

The accused were tried before a Magistrate. The Magistrate convicted accused 1 and 2 and sent up accused 3 to the Sub- Divisional Magistrate under S. 349.

Held, that the action of the Magistrate in sending up only one accused under S. 349 was clearly illegal. 109 Ind Cas 816: 10 AI Cr R 273: 1928 MWN 72: 29 Cr LJ 624 : 1 Mad Cr C 32.

**——S. 349 — Reference of one.**

Under S. 349(1) (a) only the case of those accused who are in the opinion of the Magistrate guilty should be forwarded to the Sub-Divisional Magistrate and the rest acquitted. If a Magistrate refers the case of accused who are not guilty also to Sub-Divisional Magistrate his order is illegal and without jurisdiction. AIR (Vol 13) 1926 All 176 : 24 ALJ 80 : 6 LRA Cr 194 : 26 Cri LJ 1630 : 90 Ind Cas 926.

**——S. 349 — Reference should be of all.**

Where two or more accused are tried for an offence and the Magistrate cannot inflict an adequate sentence on one of them he should under S. 349 send up all the accused to the higher Court and not only the one whom he cannot adequately punish. But in such a case if only one accused is sent up he alone may be tried. AIR (V 13) 1926 Sind 48 : 18 SLR 216 : 26 Cr LJ 1363 : 89 Ind Cas 451 (DB).

**——S. 349 — Reference with respect to some.**

It is doubtful whether in a case where adults and adolescents are tried jointly, even if the case of the adolescents could have been validly referred under S. 349, that of the adult accused jointly tried with them can also be referred. AIR (V 11) 1924 Nag 37 : 74 Ind Cas 86 : 22 NLR 166 : 24 Cr LJ 733.

**4. Procedure of Magistrate to whom the case is referred.**

**(a) Further evidence.**
**(b) Retransfer.**
**(c) "Pass such judgment, sentence or order."**

**(a) Further evidence.**

——S. 349 — The only reasonable construction to put upon the second part of the Sub-S. (2) of S. 350 Criminal P. C. would be to say that where proceedings have been submitted to a superior Magistrate under S. 349, the accused may not insist upon a de novo trial. To hold otherwise would be to render S. 349 (2), Criminal P. C. of no effect. AIR (Vol 25) 1938 Cal 415 : 42 CWN 508 : 39 Cr LJ 606 (2) : 175 Ind Cas 537 (DB).

——S. 349 — Summary trial for charge of theft — Reference to District Magistrate for higher sentence — Imposition of higher sentence without hearing case de novo by District Magistrate is illegal inasmuch as the nature of trial which was originally a summary trial was not altered by the mere fact of reference. AIR (V 19) 1932 All 507 : 33 Cr LJ 472 (1) : 137 Ind Cas 208 (1).

**(b) Retransfer.**

**——S. 349 (1) (2) — Magistrate thinking order under S. 106, necessary but not having power to do so submitting proceedings to superior Magistrate — Order unnecessary — Remand.**

Where a Magistrate trying an offence under S. 324, I. P. C. thinks that an order under S. 106, Criminal P. C., should be passed against the accused but he having no power to do it himself submits the proceedings to the Sub-Divisional Magistrate under S. 349 (1), the Sub-Divisional Magistrate should proceed under S. 349 (2) and dispose of the case himself, though, if he considers an order under S. 106, Criminal P. C., unnecessary, he is not obliged to pass such order. He cannot remand the case back to the Subordinate Magistrate for disposal. AIR (V 29) 1942 Mad 281 (2): (1942) 1 MLJ 48 : 55 MLW 40 (1) : 1942 MWN 124 (2) : 43 Cr LJ 457 : 199 Ind Cas 50.

**——S. 349 (2) — Case sent for disposal by Sub-Divisional Magistrate — If can be sent back to the Sub-Magistrate sending it.**

A Sub-Divisional Magistrate to whom a case has been sent for disposal by a Sub-Magistrate must try and dispose of it himself and must not send it back to the Sub-Magistrate. (1913) 36 Mad 470 : (1912) 1 MWN 16 : 13 Cr LJ 16 : 13 Ind Cas 110 (DB).

**——S. 349 — Power of Magistrate to whom the case was referred to send it back.**

A Magistrate to whom a case is submitted under S. 349 has no power to send it back, if he is of opinion that the punishment which the referring Magistrate was competent to inflict would be sufficient. The order referred to in Sub-sec. (2) of S. 349 is ejusdem generis with the words "judgment" and "sentence" which precede it and does not include an order returning the case to the Magis-

trate who submitted it. (1904) AWN 42 : 26 A 344 (345).

**(c) "Pass such judgment, sentence or order."**

**——S. 349 (2) — Magistrate acting under — If required to write judgment.**

It is the duty of a Magistrate to whom a case is sent for action under S. 349 (2), Cr. P. Code, not to pass an "order" but to pass a judgment which must be according to law. A judgment is not according to law unless it complies with the provisions of S. 367 (1), Cr. P. Code. AIR (V 36) 1949 Cal 308 : 50 Cr LJ 563 : 52 CWN 576.

——S. 349 — Judgment.

A case which is subject of a reference under S. 349 is, after the reference, a continuation of the original trial; and the accused have the same rights as they had before the reference. The referee Magistrate is, under the same obligation to hear arguments from the Pleader present and to write a judgment giving his reasons for his order as in an ordinary calendar case tried entirely by him. AIR (V 30) 1943 Mad 345 : (1943) 1 MLJ 248 : 1943 MWN 148 (2) : 56 MLW 251 : 44 Cr LJ 573 : 207 Ind Cas 58.

**——S. 349 — Case referred to superior Magistrate — He must come to independent judgment.**

It is not sufficient for a superior Magistrate, to whom a case has been referred under S. 349, Criminal P. C., to accept the findings of the inferior Magistrate making the reference and he should form his own independent judgment and write a judgment according to the provisions of S. 367, Criminal P. C. When the Magistrate to whom the case is referred merely passes an order without coming to any independent judgment against his order, the proper course for the Appellate Court is to send back the case to him for writing a proper judgment.

(The case, however, was not sent back but the sentence was reduced under S. 147, Criminal P. C. to the term already undergone.) AIR (V 26) 1939 Oudh 35 : 39 Cr LJ 1005 : 1938 AWR 87 : 1938 O WN 1051 : 178 Ind Cas 173.

**——Ss. 349 and 367 — Duty of Magistrate to form his own judgment.**

A Sub-Divisional Magistrate when he receives the records, has to make up his mind whether the accused are guilty or not and exercise his own independent judgment in the matter and to write a judgment conformable to S. 367. AIR (V 7) 1920 Mad 171 : 1920 MWN 120 : 11 LW 308 : 21 Cr LJ 52 : 54 Ind Cas 404 (DB).

——S. 350.

1. Applicability.
2. Case coming again before original Magistrate.
3. De novo trial.
4. Judgment.
5. Procedure.
6. Right of accused.

See also N. 1 and 3.

7. Scope.
8. Setting aside conviction.

1. Applicability.

(a) General.
(a-1) Bench Magistrates.
(b) Trial in Court of Session.
(c) Warrant Trials.
(d) Summary Trials.
(e) Proceedings under S. 145, Cr. P. C.
(f) Security Proceedings.

(a) General.

**——Ss. 350 (1) and 350 (1) Proviso (a) — Distinction between S. 350 (1) and S. 350 (1) Proviso (a) and effect of, explained.**

The effect of an accused person demanding the re-summoning and re-hearing of witnesses under proviso (a) to S. 350 (1), Criminal P. C. is not the same as where a Magistrate himself recommences a trial under Sub-S. (1) of S. 350. When a Magistrate "recommences" a trial under Sub-S. (1) of S. 350, he leaves everything in the previous trial behind, but when he commences proceedings under proviso (a) of S. 350 (1) and the accused demands all or some of the witnesses to be re-summoned or re-heard, he does not do so. He does not recommence the trial. He continues the trial begun by his predecessor. The effect of an accused demanding that the witnesses should be re-summoned and re-heard under proviso (a) is not to annul a charge already framed in previous proceedings; the charge subsists and the accused may be acquitted, they cannot be discharged. No distinction can be drawn between a case where an accused wants all the witnesses re-summoned and re-heard under proviso (a) and a case where an accused wants only some witnesses re-summoned and re-heard. AIR (Vol 28) 1941 Sind 160: ILR (1941) Kar 171: 43 Cr LJ 82: 196 Ind Cas 844 (DB).

**——S. 350 (3) — Case sent from one Magistrate to another for re-trial from particular point as result of order of Sessions Judge — S. 350 (3), if applies.**

Where a case has been sent from one Magistrate to another for re-trial, even if it is only from a particular point in the trial and as a result of the order of the Sessions Court, S. 350 (3), Criminal P. C., will be applicable. A case sent back by the Sessions Court to the District Magistrate for the re-trial of the accused and which is to proceed from a particular point may be tried by the same or another Magistrate, but if the case is transferred by District Magistrate to another Magistrate, S. 350 (3) would be applicable. AIR (Vol 28) 1941 Sind 144: ILR (1941) Kar 167: 42 Cr LJ 837: 196 Ind Cas 275 (DB).

**——S. 350 (1) Proviso Chap. XXXVI — Proceedings against person under Chap. XXXVI — Fresh enquiry — Proviso to S. 350 (1), applicability.**

A person against whom proceedings under Chap-XXXVI, Criminal P. C., are taken, cannot claim under S. 350, of the Code that the enquiry should be commenced afresh as he is not an accused person. The proviso to S. 350 (1), applies only in the case of trials of persons accused of offences alleged to have been committed by them. AIR (Vol 24) 1937 Rang 536: 39 Cr LJ 205: 172 Ind Cas 876.

——S. 350 (1) (a) — The section is applicable to Panchayat Courts also. 1934 MWN 743 (2).

**——S. 350 — U. P. Municipalities Act, S. 247.**

The provisions of S. 350, Cr. P. Code apply to an enquiry under S. 247 of the U. P. Municipalities Act. AIR (Vol 12) 1925 All 245: 25 Cr LJ 651: 81 Ind Cas 139.

**——Ss. 350 and 528 — Part heard case — Transfer of.**

The provisions of S. 350 are not limited to cases where one Magistrate succeeds another, but apply also to cases transferred from one Magistrate to another under S. 528. Where a case is transferred under S. 528 it is usually desirable that the Court to which it is transferred should commence the hearing de novo. AIR (Vol 6) 1919 LB 50: 12 Bur LT 55: 20 Cr LJ 496: 51 Ind Cas 480; AIR (Vol 5) 1918 Nag 142: 20 Cr LJ 41: 48 Ind Cas 681.

**——Ss. 350 and 16 — Difference between the opinions of Honorary Magistrates.**

On a difference of opinion between the Honorary Magistrates, a case was referred back under the rules framed under S. 16 of the Cr. P. Code,

to the Sub-Divisional Officer. The Cr. P. Code applies to the case, and the Magistrate does not act without jurisdiction if in the absence of a demand for a de novo trial by the accused he hears arguments and passes judgment without holding a de novo trial. AIR (Vol 5) 1918 Cal 304: 19 Cr LJ 312: 44 Ind Cas 328 (DB).

**——S. 350 (1) — Death of Magistrate — Case taken up by Dt. Magistrate — If latter succeeds to deceased Magistrate.**

Where on the death of the Magistrate empowered under S. 30, Cr. P. C., the District Magistrate being the only other Magistrate in the District having such powers took upon his file a case which was being tried by the deceased Magistrate: Held, that the Dt. Magistrate succeeded the deceased Magistrate within S. 350. The latter section should be liberally construed. AIR (Vol 4) 1917 Nag 63: 19 Cr LJ 705: 46 Ind Cas 289.

**(a-1) Bench Magistrates.**

**——S. 350 (1) and (3) — Applicability and construction — "Succession" — Bench of magistrates ceasing to have criminal powers in course of hearing — Case transferred to sub-divisional magistrate — Latter if succeeds Bench.**

The succession contemplated by S. 350 (1), Cr. P. Code, is not in respect of the post occupied by the magistrate but of the exercise of jurisdiction in the particular case before him at the time when he ceased to have such jurisdiction. When a Bench of magistrates hearing a case ceased to have any criminal powers, and the case is then transferred to the file of sub-divisional magistrate, who commences to exercise jurisdiction, he succeeds to the Bench within the meaning of S. 350 (1). 230 Ind Cas 324: 13 BR 474: 48 Cr LJ 614: (1947) PWN 29: 1947 AWR (Sup) 81: 1947 OA (Sup) 81.

**——S. 350 — Applicability — If confined to single magistrate succeeding another single magistrate— Bench succeeded by single magistrate — Rule.**

There is no warrant for the view that S. 350, Cr. P. Code, applies only to cases where a magistrate sitting singly is succeeded by another magistrate sitting singly, and not to cases where a Bench of magistrates is succeeded by magistrate sitting singly. In view of the provisions of S. 15 (2), Cr P. Code, there is no distinction between a Bench of magistrates and a magistrate sitting singly, for purposes of S. 350. 230 Ind Cas 324: 13 BR 474: 48 Cr LJ 614: (1947) PWN 29: 1947 AWR (Sup) 81: 1947 OA (Sup) 81.

——S. 350 — One of the U. P. Govt. Rules framed under Ss. 15 and 16, Criminal P. C., laying down that the provisions of S. 350 will apply when the personnel of a Bench is changed during a trial, does not in any way contravene the provisions of the Code. AIR (Vol 30) 1943 All 20: (1942) AWR 325 (1): (1942) ALJ 609: 44 Cr LJ 203: ILR (1943) All 23: 204 Ind Cas 323.

**——S. 350 (1), Proviso (a) — Applicability — Trial by Bench of two Magistrate — Evidence recorded by one — Dissolution of the Bench.**

Section 350, Criminal P. C., refers to cases heard subsisting after transfer of case and discharged by a Magistrate sitting singly, who is succeeded by another Magistrate sitting singly. It contemplates cases in which the second Magistrate is a person other than the first Magistrate and in which the second Magistrate has not had any previous opportunity of hearing the witnesses. Where two Magistrates have heard a case and one of them has recorded the depositions and on the dissolution of the Bench, the Magistrate who has recorded the deposition proceeds with the case, S. 350, Criminal P. C., is not applicable and in such a case, no retrial can be claimed. AIR (Vol 22) 1935 Cal 287: 39 CWN 57: 62 Cal 266: 36 Cr LJ 857: 155 Ind Cas 1003 (DB).

——S. 350 — Summary trial before Bench of Magistrates with first class powers — Charge framed against accused under S. 323, I.P.C. to which accused pleading guilty — Case transferred to Second Class Magistrate — Magistrate discharging accused under S. 259, Criminal P. C., complainant not being present on the date fixed — Charge framed by Bench Court, held could not be deemed to be was legal and second complaint was not barred:

Held, further, that S. 350, Criminal P. C. had no application to the trial of case by Second Class Magistrate. AIR (Vol 19) 1932 Mad 505: 35 MLW 760: (1932) MWN 244: 62 MLJ 738: 55 Mad 795: 33 Cr LJ 653: 138 Ind Cas 581.

**——S. 350 — Bench Magistrates.**

There is ample authority for holding that all criminal cases should be decided by Magistrates who have heard the whole of the evidence, and that S. 350 of the Code does not apply to cases tried by Benches of Magistrates. AIR (Vol 8) 1921 Lah 135: 64 Ind Cas 132: 2 Lah 237: 99 PLR 1921.

**——S. 350 — Benches of Magistrates.**

S. 350 is not applicable to trials by Benches of Magistrates and a case can be decided only by those Bench Magistrates who have heard the whole evidence. AIR (Vol 4) 1917 LB 79: 9 Bur LT 203: 8 LBR 463: 18 Cr LJ 96: 37 Ind Cas 160.

**(b) Trial in Court of Sessions.**

**——S. 350 — Applicability — Trial before Court of Session.**

S. 350, Cr. P. Code, applies only to proceedings before Magistrates and not to a trial by a Court of Session. Therefore, a conviction by a Sessions Judge partly based on evidence not recorded by him but his predecessor, is void. The general principle is that the Judge who convicts must do so on the evidence heard by him and an exception from this rule is justified only when a particular case comes within an exception recognised by statute. AIR (Vol 37) 1950 Lah 173: 51 Cr LJ 1490 (DB).

**——S. 350 — Applicability — Sessions Judge — Jurisdiction to pronounce judgment on evidence recorded by predecessor.**

S. 350, Cr. P. Code, is applicable only to Magistrates, and not to Sessions Judge; consequently a Sessions Judge is not competent to pronounce judgment on evidence recorded by his predecessor or on evidence partly recorded by his predecessor and partly by himself. It makes no difference whether the accused consents or not. Such consent will not give a Sessions Judge jurisdiction to pronounce judgment on evidence recorded by another judge. AIR (Vol 34) 1947 Pat 428: 25 Pat 832 (DB).

**——S. 350 — Applicability — Has no application to cases tried in a Court of Sessions.**

Consent cannot give jurisdiction in a criminal trial. S. 350 only applies to Magistrates and not to cases tried in a Court of Sessions. Where the judgment is written and sentence passed by the Sessions Judge, but practically the whole of the evidence was recorded by the Additional Sessions Judge, the conviction cannot stand even though the accused agrees to the dealing with the case by the Sessions Judge. AIR (Vol 17) 1930 Rang 354: 128 Ind Cas 354: 1930 Cr C 992.

**——S. 350 — Scope — Proviso (a) — "Trial" does not include a register case or preliminary enquiry into a case exclusively triable by the Court of Session.**

The words of S. 350 are applicable to cases in which the case under inquiry or trial is withdrawn from one Magistrate and transferred to another. The word "trial" in proviso (a) does not include a register case or preliminary enquiry into a case triable exclusively by the Court of Session and consequently, when such an enquiry is transferred from one Magistrate to another, the accused cannot claim the privilege conferred by proviso (a). (1908) 32 M 218 (219): 5 MLT 218: 1 Ind Cas 54 (DB).

——**S. 350 — Sessions Judge — Evidence partly recorded by predecessor — Jurisdiction.**

The Cr. P. C. does not empower a Sessions Judge to try a case partly on evidence not recorded by himself, and a consent on the part of the accused to such a trial cannot vest in him a jurisdiction to do so. S. 350 of the Cr. P. C., applies solely to Magistrates. (1901) 3 Bom LR 558 (561): 26 Bom 50 (DB).

**(c) Warrant Trials.**

——**S. 350, Proviso (a) — Applicability — Warrant cases before framing of charges.**

Proviso (a) to S. 350, Cr. P. Code, applies to proceedings in warrant cases before the 'charge' is framed. Case-law reviewed. 1950 ALJ 569 (DB).

——**S. 350 (1), Proviso (a) — Applicability — Proceedings in warrant case before the framing of charge — Nature of.**

Proceedings in warrant cases before a charge is framed only amount to an inquiry. The trial commences from the time that the accused claims to be tried (i.e.) after the charge has been framed. The proviso (a) to S. 350 (1), Cr. P. Code, which applies only to trials cannot apply to proceedings in the nature of an inquiry. AIR (Vol 37) 1950 Raj 34: 51 Cr LJ 1522 (DB).

——**S. 350 — Warrant case.**

Section 350(1)(a), Cr. P. Code, cannot be applied to proceedings in a warrant case before the charge has been framed. At that stage the proceedings is not a trial, but is merely an enquiry. AIR (Vol 10) 1923 Mad 660: 71 Ind Cas 608: 46 Mad 719: 24 Cr LJ 192: 17 MLW 412: 32 MLT 81: 32 MLT 217 (DB).

**(d) Summary Trials.**

——**S. 350 — Applicability to summary trials — Prosecution evidence in extenso in narrative form — Successor can act on this evidence.**

Section 350, Criminal P. C., does not in terms exclude summary trials from its operation. It applies to all enquiries or trials conducted by a Magistrate in which the whole or any part of the evidence has been heard and recorded. It depends on the way in which the evidence has been recorded in each case whether S. 350 would apply or not. In trying a case summarily, it is enough if scanty notes of the evidence are made, and these need not be kept on the record at all. Where such notes are allowed to remain, it would obviously be improper for the Magistrate to rely on such inadequate material. But where the prosecution evidence was recorded by the first Magistrate in extenso in narrative form, at least quite as fully as it would have been in a summons case where, by S. 355, Criminal P. C., a memorandum of the substance is enough, it can not be urged that S. 350 would not apply to such evidence if recorded in a summons case. AIR (Vol 27) 1940 Nag 239: 1940 NLJ 321: 41 Cr LJ 782: 189 Ind Cas 689.

**(e) Proceedings under S. 145 Cr. P. Code.**

——**S. 350** — Section applies to order under S. 145 (6). See (1948) 1 MLJ 396: AIR (Vol 35) 1948 Mad 510.

——**S. 350 — Enquiry under S. 145 — Procedure.**

The terms of S. 350 are wide enough to cover every trial or enquiry under the Code. A proceeding under S. 145 is an enquiry because in it, the Magistrate's duty is to enquire who is in possession of the disputed area; and S. 350 applies wherever a Magistrate has ceased to exercise jurisdiction therein. (1911) 11 Cr LJ 440: 37 C 812: 7 Ind Cas 54 (DB).

——**Ss. 350, 145 — Applicability of S. 350 to enquiry under S. 145.**

Section 350, Cr. P. C., covers an enquiry as to possession under S. 145, Cr. P. C. (1910) 37 C 812 (814): 7 Ind Cas 54 (DB).

**(f) Security Proceedings.**

——**S. 350 — Summons case.**

A person against whom proceedings are taken under S. 107 of the Cr. P. Code, can claim that upon the first Magistrate ceasing to have jurisdiction and a second Magistrate to re-commencing the proceedings, the witnesses or any of them should be heard afresh or summoned, S. 350 is applicable to summons cases as well as warrant cases. AIR (Vol 12) 1925 Oudh 228: 83 Ind Cas 340: 25 Cr LJ 1380: 27 OC 323.

**2. Case coming again before original Magistrate.**

——**S. 350 (1), Proviso (a) — Most of evidence recorded by Magistrate D — Case sent to another Magistrate — Such Magistrate only ordering de novo trial — Case then transferred by High Court to D — Proviso (a) to S. 350 (1), held did not apply.**

Originally most of the evidence in the case had been heard by the Magistrate D but the case went to another Magistrate on account of the transfer of D to another district. Subsequently, however, it was re-transferred to the Court of D under the orders of the High Court with the object of saving the necessity of a de novo trial under S. 350, Criminal P. C. The second Magistrate to whom the case had gone on the transfer of D, had not recorded any evidence at all. All that he had done was to order a de novo trial at the request of the accused:

Held, that as the successor of D had not heard or recorded any evidence in the case at all, the condition laid down in Sub-s. (1) of S. 350 was not fulfilled, and, therefore, the Proviso (a) to that sub-section was also not applicable. AIR (Vol 28) 1941 Lah 322: 43 Cr LJ 165: 43 PLR 436: 197 Ind Cas 413.

——S. 350 — There are two Magistrates contrasted by Sub-s. (1) of S. 350, Criminal P. C. The first Magistrate has two qualifications: (1) he must have heard and recorded the whole or any part of the evidence, and (2) he must have ceased to exercise jurisdiction. The second Magistrate is contrasted with the first as "another Magistrate.". The word "another" means that the second Magistrate should differ from the first both on point (1) and point (2).

Where a Magistrate is transferred from a District after he has examined prosecution witnesses in a case and has recorded the statement of the accused and the case is transferred to other Magistrate but subsequently, the first Magistrate is again re-posted to that district and the case is again transferred to his file, he differs only on point (2) and cannot be considered "another Magistrate" within the meaning of S. 350 (1) because he does not fulfil the two points of difference from the first Magistrate. Therefore, he does not come under S. 350 at all. Moreover, as he has heard all the evidence for the prosecution, there is no power in S. 350 for him to rehear it even if he desired

to do so. Such Magistrate is not, therefore, bound to hear the case de novo. AIR (Vol 25) 1938 All 536: (1938) ALJ 767: 39 Cr LJ 978: 1938 AWR 492: ILR (1938) All 794: 177 Ind Cas 978.

**——S. 350 — Principle of — Transfer of Magistrate — Witnesses re-called by successor — Original Magistrate coming back and refusing to re-call — Irregularity.**

The principle underlying S. 350, Criminal P. C., is that the Magistrate who has heard the evidence should decide the case.

Where on the transfer of a Magistrate, the succeeding Magistrate re-calls the prosecution witnesses under S. 350, but before the witnesses appear, the original Magistrate comes back and resumes the hearing at the stage he left and refuses to re-call prosecution witnesses, there is at the most an irregularity which does not vitiate the trial. (1937) 1937 MWN 1245.

**——S. 350 — Re-transfer to the first Magistrate.**

Where the Magistrate, who has partly tried the case, is transferred and the succeeding Magistrate has taken cognizance of the case de novo, the case cannot again be transferred to the Magistrate who first tried it. AIR (Vol 14) 1927 Mad 81: 24 MLW 640: 99 Ind Cas 55: 38 MLT 137: 28 Cr LJ 23.

**——S. 350 — Re-transfer to original Magistrate — Hardship — Revision.**

The Magistrate who tried the case was transferred when most of the witnesses had been examined. The succeeding Magistrate granted a de novo trial. After this Dt. Magistrate transferred the case to the previous Magistrate who had been transferred, on the ground that the small amount of work that remained to be done could best be done by the same Magistrate who had tried the case so far and that to transfer the case to him was therefore preferable to the whole case being heard again by a new Magistrate.

Held, that even the Magistrate to whom the case was thus transferred could not take up the case from the point at which he had left it and that he must start the case only de novo all the previous proceedings being considered to have been wiped out.

Held, further that the Dt. Magistrate's order of transfer took no notice of the hardship and inconvenience of parties and witnesses by such transfer and that it must be set aside. AIR (Vol 12) 1925 Mad 174: 47 MLJ 926: 85 Ind Cas 254: 26 Cr LJ 510: 20 MLW 847.

**——S. 350 — Transfer of Magistrate — De novo trial — Re-transfer.**

Before the conclusion of a trial the trying Magistrate was transferred and the case was transferred to the file of a superior Magistrate who began to try it de novo. Thereupon the original Magistrate was retransferred and the superior Magistrate transferred the case to him with a direction to proceed from where he had originally left it. Held, that the trial was illegal and must be set aside, and the accused tried de novo. AIR (Vol 6) 1919 Pat 578 (2): 20 Cr LJ 638: 52 Ind Cas 398.

**——S. 350 — Transfer of Magistrate — Trial de novo — Return of Magistrate — Procedure.**

Where on the transfer of a Magistrate, the pending criminal case was taken up by another Magistrate and the trial was started de novo and subsequently the original Magistrate was retransferred: Held, that S. 350, Cr. P. Code, gave no jurisdiction to such Magistrate on his retransfer to the District to proceed with the trial from the point where he had left it. AIR (Vol 6) 1919 Pat 311: 20 Cr LJ 820: 53 Ind Cas 820 (DB).

### 3. De novo trial.

(a) General.
(b) Re-heard and Re-summoned.
(c) New trial—Effect.

#### (a) General.

**——S. 350 — Warrant case — Trial, when commences — De novo trial.**

In a warrant case, the trial commences when the Magistrate starts the inquiry, i.e., takes his seat in Court with the accused in the dock in front of him and not when the charge is framed. Hence when the case was inquired into by a Magistrate who heard one witness and the case was transferred to another Magistrate who continued the inquiry, the accused is entitled to have the witness re-called, and his evidence taken de novo before the new Magistrate. AIR (Vol 31) 1944 Bom 14: 45 Bom LR 962: 45 Cr LJ 287: 210 Ind Cas 516 (DB).

**——S. 350 — Trial de novo by successor — Examination and cross-examination of witness.**

In a de novo trial before the successor of the previous Magistrate, the examination and cross-examination of a witness taken on commission in the previous proceeding is admissible without anything further in subsequent proceedings. AIR (Vol 27) 1940 Sind 193: 42 Cr LJ 80: ILR (1940) Kar 498: 191 Ind Cas 127 (DB).

**——S. 350 — De novo trial — Subsequent failure to examine witnesses — Acquiescence — Estoppel.**

Where in a case, after the framing of the charge and the cross-examination of the prosecution witnesses after the charge, the Magistrate is succeeded by another Magistrate who notes in the order sheet the accused's claim for a de novo trial and orders the witnesses to be re-summoned, the order must be deemed to have directed a de novo trial (including inquiry) and the failure to examine the witnesses-in-chief is a manifest illegality which vitiates the trial. When the accused does not expressly wish that the examination-in-chief of the witnesses recorded by the previous Magistrate should be treated as part of the record of a subsequent de novo trial by the second Magistrate, the accused is not estopped from raising the plea of the illegality of the trial by reason of his acquiescence in the procedure adopted by the Magistrate. AIR (Vol 25) 1938 Nag 493: 40 Cr LJ 73: 1938 NLJ 309: ILR (1941) Nag 496: 178 Ind Cas 465.

**——S. 350 — De novo trial in transferee Court.**

Where after framing of charge, a warrant case is transferred, the transferee Court can hear the case de novo. AIR (Vol 24) 1937 Bom 55: 38 Bom LR 1189: 38 Cr LJ 250: ILR (1937) Bom 211: 166 Ind Cas 598 (DB).

**——S. 350 — De novo trial, meaning of.**

What is called a trial de novo, is not strictly speaking a new or fresh trial. All that it means is that the accused has the right to have all or any of the witnesses re-summoned or re-heard by the new Magistrate. AIR (Vol 24) 1937 Mad 448: 45 MLW 240: (1937) MWN 173: (1937) 1 MLJ 338: 38 Cr LJ 537: 168 Ind Cas 291.

——S. 350 — Case transferred after recording full evidence under S. 110, Criminal P. C. — The party proceeded against is entitled to have inquiry against it to begin anew. (1937) 20 NLJ 117.

**——S. 350 — Trial de novo — Magistrate transferred — Another Magistrate summoning prosecution witnesses on trial de novo being claimed — Discharge order — Effect.**

Where in a complaint under S. 420, I.P.C., the Magistrate framed charges against the accused and the case was then taken up by another Magistrate

who recorded that the accused claimed trial de novo before him and the claim was allowed and on the transfer of this Magistrate, the case continued before another Magistrate who also noted that the accused claimed a de novo trial, and he re-summoned the prosecution witnesses accordingly and after hearing them passed an order of discharge:

Held, that by ordering a de novo trial, the Magistrate must be deemed in this case to have acted under S. 350 (1) of the Criminal P. C. and that by de novo trial, he meant what is technically de novo inquiry plus trial. The procedure followed in re-hearing the case from the beginning and ignoring all previous proceedings including the charge showed that this was the option he adopted. The legal result was that the previous charge was no longer in force and therefore, the order was one of discharge and not of acquittal. AIR (Vol 23) 1938 Nag 153: 37 Cr LJ 983: ILR (1936) Nag 92: 19 NLJ 115: 164 Ind Cas 744.

——**S. 350 — Trial de novo — Duty of Magistrate.**

In some cases to which S. 350, Criminal P. C., applies the previous charge is blotted out and in some cases not. It depends on which option the Magistrate adopts. The accused can, in no case insist on a clean slate; and the Magistrate cannot ignore although he may amend the previous charge, if he decides to make use of any of the evidence previously recorded; but if he decides to wipe out all the previous evidence, the former charge is also wiped out.

Section 350, Criminal P. C., in effect lays down that the enquiry or trial has to be commenced de novo if the succeeding Magistrate in his discretion desires that it should be so, with the necessary implication that the charge already framed has to be ignored. In such cases, Magistrates should make it clear whether they are starting fresh proceedings altogether or are merely re-hearing the witnesses to the extent demanded by the accused. AIR (Vol 23) 1936 Nag 153: 37 Cr LJ 983: ILR (1936) Nag 92: 19 NLJ 115: 164 Ind Cas 744.

——**S. 350 — Ss. 350, 253 — Charge framed — De novo trial ordered — Charge, if can be ignored.**

Where a Magistrate framed charges against an accused person and was succeeded by another Bench of Magistrates who recommenced the case under S. 350, Criminal P. C., and upon re-examining the complainant discharged the accused under S. 253, the accused is acquitted and no further enquiry can be held into the case. Even if a de novo trial is ordered and the Bench proceeds under S. 350, Criminal P. C., they cannot in doing so, ignore the charge which had been drawn by their predecessor. AIR (Vol 22) 1935 All 834: 36 Cr LJ 912: 1935 AWR 789: (1935) ALJ 1022: 156 Ind Cas 186.

——**S. 350 — De novo trial, effect of.**

The grant of a de novo trial by the successor of the Magistrate has the effect of wiping out the prior proceedings and hence even the old Magistrate cannot proceed with the trial from the point where he had left it. Where the succeeding Magistrate on taking charge issues summons to the prosecution witnesses, he must be held to have taken cognizance of the case that whoever is to hear the case, in such circumstances, must hear it de novo. AIR (Vol 21) 1934 Mad 475: (1934) MWN 369: 67 MLJ 293: 35 Cr LJ 1363: 40 MLW 832: 57 Mad 1019: 151 Ind Cas 309.

——**S. 350 (1) (a) — Re-calling witnesses at accused's request — Trial, if de novo — Fresh charge.**

Where the trying Magistrate acting not suo motu but at the request of one of the accused under S. 350 (1) (a), Criminal P. C., re-calls certain witnesses, the trial cannot be regarded as a de novo trial and the charge already framed need not be considered to be wiped out. AIR (Vol 20) 1933 Oudh 86: 9 OWN 1136: 34 Cr LJ 124: 8 Luck 286: 141 Ind Cas 192.

——S. 350 — Framing of charge — Charge in constitution of Bench — De novo trial of accused under S. 350 — Discharge of accused under S. 259 due to absence of complainant — Fresh trial on fresh complaint, held was not barred. AIR (V 20) 1933 Pesh 78 : 35 Cr LJ 170 : 146 Ind Cas 443 (DB).

——S. 350 — When a case has been submitted to a First Class Magistrate on the stay of its proceedings before the Second Class Magistrate under S. 376, Criminal P. C., the First Class Magistrate is bound to try it de novo. His failure to re-hear vitiates the trial. AIR (V 20) 1933 Sind 191 : 34 Cr LJ 749 : 27 SLR 266 : 144 Ind Cas 231 (DB).

——S. 350 — Where proceedings are in the nature not of a trial but merely of an enquiry preparatory to commitment, the necessity of any provision for de novo trial does not exist. AIR (V 17) 1930 Cal 666 : 1930 Cr C 1058 (DB).

——**S. 350 — Condition as to de novo trial.**

The District Magistrate cannot impose, without the consent of the accused while transferring a case, a condition that there would be no de novo trial, the right being recognized by S. 350 (1). AIR (V 17) 1930 Lah 168 : 1930 Cr C 176 : 31 Cr LJ 257 : 121 Ind Cas 374.

——**S. 350 — Permitting cross-examination alone.**

De novo trial means a new trial from the very beginning of the case. The object of granting a de novo trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him to mark their demeanour, and thereby to be in a position to judge of their credibility. That object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of S. 350. AIR (V 12) 1925 Mad 1280 : 49 MLJ 423 : 1925 MWN 652 : 26 Cr LJ 1596 : 90 Ind Cas 668.

——**S. 350 — Arguments not finished.**

Under S. 350, accused cannot demand a de novo trial on transfer of a trying Magistrate, on the ground that the trying Magistrate had not heard his counsel. AIR (V 12) 1925 Oudh 62 : 11 OLJ 725 : 25 Cr LJ 1075 : 28 OC 109 : 81 Ind Cas 899.

——**S. 350 — Trial de novo — Case of defamation — Final orders should be by Magistrate who examines complainant — Exclusion of documentary evidence — Probative value — Inspection.**

When on a transfer of a case the accused do not apply for a trial de novo, the action of the Magistrate in convicting the accused on the evidence recorded partly by the former Magistrate and partly by himself, is not strictly without jurisdiction. It is most desirable, however, in a case of defamation that the examination and cross-examination of the complainant should be held in the presence of the Magistrate who has seized of the case and passes final orders therein. A piece of documentary evidence should not be excluded merely on the ground that it is of little evidentiary value and without being looked into by the Court. (1909) 13 CWN 550 (551): 4 Ind Cas 67 (DB).

——**S. 350 — De novo trial.**

The provisions of S. 350, Cr. P. C., apply to all cases in which cases are transferred for whatever reasons from the file of one Magistrate to that of another. When a case is transferred under S. 520, Cr. P. C., from the file of one Magistrate to that of another, the former ceases to exercise jurisdiction in the case and is succeeded by the latter in the exercise of the jurisdiction within the meaning of

S. 350, Cr. P. C. (1908) 12 CWN 416 (418) : 7 CLJ 488 : 35 Cal 457 (DB).

**——S. 350 — De novo trial — Omission to examine afresh the prosecution witnesses — Prejudice to the accused.**

Where after the prosecution witnesses were examined and cross examined before a Magistrate, the case against the accused was made over to another Magistrate and a de novo trial was commenced before the latter in which the prosecution witnesses were not again examined but they were only cross-examined by the defence without any objection.

Held, that the trial was not in due compliance with the provisions of S. 350, Cr. P. C., and ought to be set aside. (1908) 12 CWN 138 (139) (DB).

**(b) Re-heard and Re-summoned.**

**——S. 350 (1) and Proviso (a) — Scope — Rights of Magistrate and of accused — Accused demanding de novo trial — Previous proceedings — Previous evidence of witnesses re-summoned and re-heard — If substantive evidence — Use of to contradict witnesses.**

Section 350, Criminal P. C., gives rights both to the Magistrate and to the accused. The Magistrate may proceed on the evidence already recorded by his predecessor, supplemented or not by evidence recorded by himself or if he does not wish to decide the case on the evidence partly or wholly recorded by his predecessor, he may resummon the witnesses and re-commence the inquiry or trial. His right to proceed with the case on the evidence already recorded is, however, subject to the right of the accused to demand that all some of the witnesses should be re-summoned and re-heard. The accused's right under proviso (a) to the section is, however, only to have the witnesses re-called and re-heard and not to demand an entirely de novo trial. When, therefore, the accused claims the privilege of re-summoning and re-hearing the witnesses what has taken place previously is not completely wiped out. The previous proceedings cannot, in any case, be completely wiped out, when the accused exercises his right of re-calling the witnesses only with regard to some of them. As, therefore, the whole evidence of a witness who is re-summoned is to be recorded against his previous deposition before another Magistrate cannot be treated as substantive evidence in the case although it may be used for contradicting any fresh evidence given by him under S. 145, Evidence Act. AIR (Vol 37) 1950 Bom 14 : ILR (1949) Bom 581 : 51 Cr LJ 233 : 51 Bom LR 671 (DB).

**——S. 350 (1) Proviso (a) — "Re-heard" — Meaning and import of — Exhibition of prior deposition of witness or reading it over to him and asking further questions — If amounts to "re-hearing."**

The word "re-heard" in proviso (a) to S. 350 (1), Criminal P. C., means that the whole of the evidence of the witnesses is to be recorded again, i.e., he should be examined in chief, cross-examined and re-examined. Merely exhibiting the previous deposition of a witness or reading it over to him and asking him some further questions will not amount to re-hearing a witness, and cannot be a sufficient compliance with the requirements of proviso (a) to S. 350 (1). AIR (Vol 37) 1950 Bom 14 : ILR (1949) Bom 581 : 51 Cr LJ 233 : 51 Bom LR 671 (DB).

**——S. 350 (1), Proviso (a) — Scope — Commencement of proceedings before succeeding Magistrate — Crucial date — Right of accused to have witness re-summoned re-heard — Long lapse of time between date of offence and setting aside of conviction on ground of illegality in procedure — If ground for not ordering a re-trial.**

Commencement of proceedings within the meaning of proviso (a) to S. 350 (1) of the Criminal P. C., means an effective commencement of the proceedings and not a mere posting of the case from the date to another. When the trial is effectively commenced the accused may demand that the witnesses or any of them may be re-summoned and re-heard.

Long lapse of time between the setting aside of a conviction on the ground of illegality of procedure and the date of the offence is not a ground for not ordering a re-trial. AIR (Vol 34) 1947 Mad 413 : ILR (1948) Mad 209 : 60 LW 175 : 1947 MWN 156 : (1947) 1 MLJ 186.

**——S. 350 (1) — "Re-heard" — Meaning of.**

"Re-heard" means that the witnesses are to be heard again as their hearing on the first occasion consisted of the usual examination, i.e., examination in-chief, cross-examination and re-examination. It is clear that the second examination must be equally complete. Further cross-examination or a reading of or a summary of the previous evidence will not do. There must be a fresh start to enable the succeeding Magistrate to hear the connected narrative of the witnesses in examination-in-chief and their replies when under the fire of cross-examination and to observe their demeanour throughout. AIR (Vol 32) 1945 Nag 127 : ILR (1945) Nag 419 : 1945 NLJ 122 : 47 Cr LJ 240 : 222 Ind Cas 31.

——S. 350 (1), Proviso (a) — "Reheard" — Meaning of AIR (V 32) 1945 Nag 207 : 222 Ind Cas 310 : 47 Cr. LJ 418.

**——S. 350 — Fresh interrogatories — Interrogatories already answered, if should be excluded from evidence.**

Where interrogatories have been served and answered and subsequently a trial de novo under S. 350 is demanded and granted, it is not necessary that a fresh set of interrogatories should be issued; nor the interrogatories which have already been answered can be excluded from evidence in the case.

The object of re-summoning witnesses who have already been examined is that the Magistrate may see their demeanour in the witness box. This does not apply in the case of interrogatories. Therefore the answers given to the interrogatories before trial de novo can be considered as evidence in the case during trial de novo. AIR (V 27) 1940 Pesh 17 : 41 Cr LJ 681 : 188 Ind Cas 770.

**——Ss. 350, 195 — "Re-summoned and re-heard" in proviso (a) to S. 350, significance of — Object of S. 350 — Interrogatories — De novo trial — Further commission.**

The words 're-summoned and re-heard' used in proviso (a) S. 350, Criminal P. C., pre-suppose that the witnesses have already been summoned and heard. Section 350, Criminal P.C., is inserted in order that an accused should not be prejudiced by a Magistrate relying on evidence which he did not himself record.

Where, therefore, in a prosecution under Ss. 193, 467, and 471, I.P.C., after the Govt. Examiner of Questioned Documents was examined on commission, on the transfer of the Magistrate, a de novo trial is commenced and the second Magistrate records again the evidence of all witnesses but no commission is issued a second time to examine the Expert, S. 350 does not apply, inasmuch as in case of witnesses examined by interrogatories, there would be no point whatever in the second Magistrate issuing further commission for interrogatories and hence there would be no irregularity in the trial

AIR (V 24) 1937 Pesh 67 : 38 Cr. LJ 748 : 1937 Pesh LJ 67 : 169 Ind Cas 44.

(c) New trial — Effect.

——S. 350 — Granting of de novo trial, if wipes out charge already framed. See AIR (V 34) 1947 Mad 245 : (1946) 2 MLJ 251.

——S. 350 — Charge framed before proceedings recommenced under S. 250 — Discharge thereafter amounts to acquittal. 1940 MWN 962 : 52 MLW 348.

——S. 350 — Prior to the framing of the charge, an accused is not entitled under S. 350, to have a de novo trial. AIR (V 25) 1938 Mad 742: (1933) MWN 587 : 48 MLW 136 : 39 Cr. LJ 828 : (1933) 2 MLJ 222 : 176 Ind Cas 879 (2).

**——S. 350—Trial when commences.**

The trial of an accused person for the purposes of S. 350, Criminal P. C. does not commence at the charge, but commences as stated in Chap. XXI, when the accused appears before the Court. AIR (V 21) 1934 Sind 106 : 35 Cr. LJ 1261 : 28 SLR 239 : 151 Ind Cas 213 (DB).

**——Ss. 350, 346 and 537 — Trial of case — Original — Magistrate not competent to try.**

Where a case is transferred from the file of a Magistrate not competent to try it, there should be a trial de novo. In such a case the accused cannot waive his right to a de novo trial. Failure to hold a de novo trial is an irregularity which vitiates the trial and is not curable by S. 537 of the Code. AIR (V 5) 1918 Pat 676 : 5 PLW 40: 19 Cr. LJ 625 : 45 Ind Cas 673.

**——S. 350 — New trial — Order passed — Whether acquittal.**

New trial held under S. 350, does not imply the cancellation of charge previously framed against the accused and an order subsequently passed letting off the accused one of acquittal and not if discharge. AIR (V 3) 1916 Mad 1048 : 17 Cr. LJ 1 : 2 LW 1244 : 32 Ind Cas 129.

4. Judgment.

**——S. 350 — Judgment — Validity.**

Judgment written after the transfer and the handing over of his charge by the Magistrate who had heard the evidence in the case, is invalid. 1942 NLJ 302.

**——Ss. 350, 537 — Judgment written by Magistrate while under orders of transfer — Irregularity, if cured by S. 537.**

Where a judgment written by a Magistrate who was under orders of transfer and expected to be relieved before the date fixed for pronouncing the judgment, is delivered on the date so fixed, by his successor, there being no demand for trial de novo by the accused, the irregularity, if any, is cured by S. 537, Criminal P. C. AIR (V 27) 1940 Lah 289: 42 PLR 240 : 41 Cr. LJ 808 : 189 Ind Cas 826.

**——S. 350 — Succeeding Magistrate delivering judgment written by his predecessor without adopting it as his own — Defect, if curable under S. 537.**

It is quite possible under S. 350, Criminal P. C. that the succeeding Magistrate may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case, if there is no demand for new trial on the part of the accused, he may deliver that judgment as his own. In fact by so doing, it becomes his own judgment. But if the succeeding Magistrate has delivered judgment not as his own but as that of his predecessor without signing it himself or dating it, the defect in the delivery of such judgment goes beyond a mere irregularity curable under S. 537. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own, and if he does so, it is not an irregularity in the form of delivery; it is not delivering judgment at all. AIR (V 26) 1939 Rang 249 : 40 Cr. LJ 829 : 1939 Rang 570 : 183 Ind Cas 216 (DB).

**——S. 350 — One of Magistrates not present on all hearings but only on the date when judgment was delivered — Signing judgment — Failure of justice.**

The question whether in any particular case, a substantial failure of justice has been occasioned is a question of fact and not of law and each case must be decided upon its own merits. Where one of the three Honorary Magistrates, constituting the Bench was not present on all the hearings of the case, but was present on the date when the judgment was delivered and he inadvertently signs it and he has taken no real part, it cannot be said that any failure of justice has taken place. AIR (V 22) 1935 All 814 : 36 Cr. LJ 907 : 1935 A WR 942 : (1935) ALJ 969 : 156 Ind Cas 101.

**——S. 350 — Magistrate not hearing evidence — Whether can convict accused.**

A judgment must be delivered by the Judge who has heard the evidence and an accused person has a right not to be convicted by a Magistrate who has not heard the evidence, subject to the exception given in S. 350, Cl. 1, Criminal P. C. AIR (V 21) 1934 Sind 106: 35 Cr LJ 1261: 28 SLR 239: 151 Ind Cas 213 (DB).

**——S. 350 — Consideration of evidence.**

S. 350 authorizes a Magistrate to try a case on evidence recorded by his predecessor, but he cannot deliver a judgment written out by his predecessor without considering the evidence on the record and without hearing the arguments, if any, on behalf of the accused. AIR (V 13) 1926 Cal. 537 : 43 Cr. LJ 100: 27 Cr LJ 406: 93 Ind Cas 17 (DB).

**——S. 350 — By predecessor — Jurisdiction.**

The Cr. P. Code makes no provision for delivery of judgment written by the Magistrate who heard the case after he had ceased to have jurisdiction in the district. Even if the Magistrate after his transfer, himself delivers judgment, he would act without jurisdiction. S. 350 does, under certain circumstances, give the Magistrate jurisdiction to decide the case on evidence recorded by his predecessor, but it does not give him jurisdiction to deliver a judgment written by his predecessor. AIR (V 11) 1924 Cal 55 : 72 Ind Cas 953 : 38 CLJ 202 : 50 Cal 664 : 24 Cr. LJ 489. (DB).

**——S. 350 — General rule — Exception — Bench Magistrates.**

S. 350 is the only exception to the rule that the same Magistrate should hear the evidence and decide the case. If a Bench of two Magistrates hear a case, and one of them with a third one who has not heard the evidence deliver the judgment, the procedure is illegal. AIR (V 6) 1919 UB 29 : 3 UBR (1918) 118 : 20 Cr. LJ 336 : 50 Ind Cas 672.

**——Ss. 350 and 366 —Judgment written by Officer, while on leave, legality of.**

A judgment written and signed by a Magistrate on leave and having no right to excercise jurisdiction in the case, is no judgment in law. AIR (V 4) 1917 Cal 310 : 21 CWN 755 : 18 Cr. LJ 10 : 36 Ind Cas 842 (DB).

**——S. 350 — Magistrate pronouncing a judgment of his predecessor.**

A Magistrate may date and deliver a judgment written and signed by his predecessor in office or

to hold a de novo trial; such a magistrate pronouncing a judgment of his predecessor is not the mouth-piece of the latter and he is deemed to have adopted the judgment as his own. AIR (V 4) 1917 Mad 340 : 40 M 108 : 3 LW 46 : (1916) 1 MWN 372 : 17 Cr LJ 166 : 32 MLJ 81 : 33 Ind Cas 646 (DB).

**——Ss. 350 and 357 — Bench of Honorary Magistrates — Judgment — Validity — Each Magistrate not present at hearing when evidence recorded — Objection as to irregularity.**

The criterion of validity of a judgment passed by a Bench of Honorary Magistrates is not that each Magistrate has heard whole of the evidence but that whether substantial justice has been done. That each Magistrate has not heard the whole of the evidence is a trifling irregularity curable by S. 537 and objection should be taken before the Appellate Court at the latest; S. 350 provides for cases where the judicial officer decides the case without himself hearing whole of the evidence. AIR (V 1) 1914 Oudh 345 : 17 OC 142 : 15 Cr. LJ 516 : 24 Ind Cas 604.

## 5. Procedure.

**(a) General.**
**(b) Reference.**
**(c) Defamation case.**

### (a) General.

——S. 350 — Once Magistrate signs the judgment written by him, he delivers it under S. 366 (5) and the trial is over. Mere pronouncement of it by his successor makes no difference. Section 350 has no application in such case and the accused cannot claim de novo trial. AIR (Vol 26) 1939 Lah 21 : 40 PLR 996 : ILR (1938) Lah 567 : 40 Cr LJ 288 : 179 Ind Cas 990.

**——Ss. 350 (1) (a), 227 (1)—Framing of new charge — Charge framed against accused under S. 454, Penal Code — Transfer of case and fresh charges framed under Ss. 454 and 411 — Case again transferred and again fresh charges framed under Ss. 454 and 411.**

In a case governed by S. 350 (1) (a), Criminal P. C., that is to say, where the accused demands that the prosecution witnesses or any of them be re-summoned and re-heard, it is not necessary for the Magistrate to frame a new charge at the request of the accused. If, however, he does frame a new charge, the accused cannot have any cause for grievance.

Under S. 227 (1) of the Criminal P. C., a Court can alter or add to any charge at any time before judgment is pronounced.

Where, therefore, in a case, a charge is framed against an accused under S. 454, I. P. C., but the case is subsequently transferred to another Magistrate who frames a fresh charge under Ss. 411 and 454 and the case is again transferred to a third Magistrate who re-commences the trial and again frames charges under Ss. 411 and 454, I. P. C., there is absolutely no irregularity in framing charges afresh as the first Magistrate could have added a charge under S. 411 at any time, nor is the accused in any manner prejudiced, the more so when the accused himself applies for a de novo trial before the subsequent Magistrate. AIR (Vol 25) 1938 Oudh 247 : 39 Cr LJ 849 : 1938 OWN 898 : 177 Ind Cas 193.

**——S. 350 — Succeeding Magistrate summoned all prosecution witnesses, as required by the accused, in a de novo trial—Only one witness cross-examined by the defence when the witnesses appeared—Decision based partly on evidence recorded by his predecessor—Magistrate did not commit any illegality or irregularily under S. 350, Criminal P. C.** 1936 MWN 639 (2).

**——Ss. 350, 263, 264 — S. 263, scope of — Error in jurisdiction, if mere irregularity.**

Section 263, Criminal P. C., does not prevent a Magistrate who tried a case in a summary way from recording evidence; it merely says that he need not, but if he does, it cannot, by reason of S. 264, form part of the record, and the evidence so recorded does not come within the meaning of S. 350. Section 350 relates to jurisdiction and an error in jurisdiction is not a mere irregularity. AIR (Vol 23) 1936 Sind 40 : 37 Cr LJ 455 : 161 Ind Cas 267 (DB).

**——S. 350 — Accused, if can consent to do things not authorised by law.**

A prisoner can consent to do nothing which is not authorized by law and the consent of Counsel for an accused person cannot validate a course of procedure which the law does not authorise.

Previous depositions of particular witnesses taken as part of record with express consent of accused's Pleader and after due consideration, if accused would be prejudiced by such a course :

Held, that there was no illegality. AIR (Vol 21) 1934 Nag 209 : 36 Cr LJ 41 : 31 NLR 117 : 152 Ind Cas 236.

**——Ss. 350, 436 — Order for further inquiry — Procedure, legality of.**

The Sessions Judge directed a further inquiry under S. 436, Criminal P. C. and returned the case to the original Court. Meanwhile there had been a change of Magistrates and the new Magistrate framed a charge without re-examining the witnesses already examined. The District Magistrate transferred the case holding that the procedure adopted by the new Magistrate was illegal :

Held, (i) that the inquiry before the new Magistrate was still the same inquiry and the procedure adopted by the new Magistrate was not in any way illegal;

(ii) that as there had been an error in the District Magistrate's order, it was better to set aside his order and restore status quo ante though no hardship had been caused to any party. AIR (Vol 18) 1931 Mad 488 (2) : 32 Cr LJ 635 : 33 MLW 336 : (1931) MWN 179 : 60 MLJ 524 : 54 Mad 512 : 131 Ind Cas 5.

**——S. 350 — Power to summon witnesses afresh.**

The Sessions Judge sitting in revision against an order of discharge directed further inquiry for finding out whether the offence was committed on the evidence already adduced and further directed that the inquiry should be made by the same Magistrate who originally tried the case. Eventually, however, the District Magistrate had to transfer the case to another Magistrate, who proceeded to examine the witnesses afresh.

Held further, that the Magistrate to whom the case was transferred could summon the witnesses afresh in the exercise of the discretion vested in him under S. 350 (1). AIR (Vol 17) 1930 Mad 983 : 1930 MWN 911 : 1930 Cr C 1199 : 32 MLW 782.

——S. 350 — Use of records of the former trial.

Magistrate retrying whole case transferred to him —Using both his own record and that of his predecessor is illegal. AIR (Vol 14) 1927 Lah 238 : 28 Cr LJ 302 : 100 Ind Cas 382 : 8 AI Cr R 109.

——S. 350 — Case transferred after charge framed.

Where after hearing the evidence for the prosecution, the Magistrate frames a charge against the accused and transfers the case to another Magistrate, and where the accused claims what is usually known as a de novo trial, what the latter under S. 350 can legally do is to recommence the trial and not merely to allow further cross-examination of the complainant and the other prosecution witnesses, and generally to proceed with the case from the stage where the charge was framed. AIR (Vol 13) 1926 Sind 158 : 20 SLR 50 : 27 Cr LJ 332 : 92 Ind Cas 748 (DB).

——S. 350 — Commencement of trial — When accused demands de novo trial.

For the purposes of S. 350, a trial cannot be said to commence only when a charge is framed and the accused has the right to demand that the witnesses shall be re-summoned and re-heard, not only in warrant cases but also in the cases of summary trials of summons cases, and the time when he must exercise the right is when the second Magistrate commences his proceedings and not when a charge is framed. Where the accused exercises his right of re-summoning witnesses, and the prosecution witnesses retract their former statements made before the first Magistrate who tried the case, their former statements are not evidence in the case as the trial commences only when the new Magistrate starts the proceedings. AIR (Vol 9) 1922 Lah 49 : 66 Ind Cas 826 : 3 Lah 115 : 10 PWR Cr 1922 : 23 Cr LJ 330 (DB).

——S. 350 — Failure to comply — Acquittal.

Where the successor in office of trying Magistrate failed, notwithstanding the demand of the accused, to recall and re-hear the witnesses examined by his predecessor, and the trial continued and ended in an acquittal.

Held, that the Magistrate having acted in violation of the provisions of S. 350 of the Cr. P. Code the order of acquittal was an absolutely illegal order. AIR (Vol 8) 1921 All 35 : 63 Ind Cas 460 : 19 ALJ 856 : 22 Cr LJ 668.

——S. 350 — Recalling prosecution witnesses.

When a new Magistrate continues the part-heard case of his predecessor, the accused must be clearly informed of his right of calling prosecution witnesses again, under proviso of S. 350. AIR (Vol 4) 1917 LB 11 : 2 UBR 108 : 10 Bur LT 73 : 17 Cr LJ 401 : 35 Ind Cas 961.

——Ss. 350, 253 (2), 258 — Trial again — Charge, if cancelled — Discharge — Acquittal.

The nature or stage of an inquiry is not modified by a re-commencement thereof under S. 350. A charge once framed therefore cannot be cancelled by reason of the re-commencement under S. 350 and the only order which the Magistrate can pass is that of acquittal under S. 258 and not discharge under S. 253 (2). AIR (Vol 2) 1915 Mad 23 : 15 Cr LJ 673 : 27 MLJ 589 : 25 Ind Cas 1001 : 38 Mad 585 : 1914 MWN 646 : 16 MLT 303 (DB).

——Ss. 350 and 544 — Recalling witnesses.

On the transfer of a trying Magistrate, where the accused claims to have the witnesses re-examined by the succeeding Magistrate under S. 350, the witnesses should be resummoned without payment of fees. AIR (Vol 2) 1915 LB 107 : 4 Bur LT 43 : 15 Cr LJ 687 : 26 Ind Cas 135.

——S. 350 — Rehearing of evidence — Prejudice to accused.

The provisions of S. 350 are applicable where a case is withdrawn from one Magistrate and is transferred to another Magistrate but the accused is not entitled in such a case to a rehearing of the evidence. Even if a Register case is treated as a warrant case, the accused is not prejudiced by failure to rehear the evidence, as he can still, after the charge is framed, recall the prosecution witness for cross-examination. (1909) 32 M 218 : 5 MLT 218 : 9 Cr LJ 146 : 1 Ind Cas 54 (DB).

(b) Reference.

——S. 350 — S. 349, Cr. P. Code.

Under S. 350, cl. (2) a Magistrate to whom an accused is sent up under S. 349 need not hold a trial de novo. AIR (Vol 13) 1926 Sind 48 : 18 SLR 216 : 26 Cr LJ 1363 : 89 Ind Cas 451 (DB).

(c) Defamation case.

——S. 350 — Defamation case — New trial.

Where no application is made for a new trial, a Magistrate can convict upon evidence partly recorded by his predecessor in Office, but in a charge of defamation it is desirable that the examination of the complainant should be held in the presence of the Magistrate who decides the case. (1909) 10 Cr LJ 492 : 13 CWN 550 : 4 Ind Cas 67 (DB).

6. Right of accused.

See also N. 1 and 3.

(a) General.
(b) Discretion of Court.
(c) On transfer of Magistrate.

(a) General.

——S. 350 (1), Proviso (a) — Right of accused to re-summon and re-hear witnesses.

Section 350 (1), Proviso (a) is a provision inserted for the benefit of the accused. It gives the accused a right to have the whole trial before the Judge or Magistrate who eventually decides the case whenever the accused so desires. He can, of course, waive the right if he wants, but if he does not want to waive it, then he can insist that the witnesses be re-summoned and re-heard. The proviso requires that the witnesses should be heard afresh from the start. It is not enough merely to allow him to be cross-examined. To further cross-examine does not mean merely to cross-examine in respect of matters not already touched in the previous cross-examination, as it will be only a partial hearing of the witness and a very partial hearing at that, in most cases. AIR (Vol 32) 1945 Nag 207 : 1945 NLJ 201 : ILR (1945) Nag 605 : 47 Cr LJ 418 : 222 Ind Cas 310.

——S. 350 — Each transfer gives accused fresh opportunity to exercise his right under Proviso to S. 350 — 'Predecessor', meaning of.

Each transfer of a case gives an accused a fresh opportunity of exercising his right under the Proviso to S. 350, Criminal P. C. The word 'predecessor' should be taken to mean 'predecessors' where there is more than one. It could not mean that a

third Magistrate could act only on the evidence recorded by his predecessor, the second Magistrate, and not also on the evidence recorded by the first Magistrate who handled the case.

The accused can also change his mind in this matter. AIR (Vol 25) 1938 Nag 288 : 1938 NLJ 96 : ILR (1939) Nag 79 : 39 Cr LJ 815 : 176 Ind Cas 808.

——**S. 350 (1) (a) — Right of accused and complainant to insist that there shall not be de novo trial or inquiry.**

The accused has no right under S. 350 (1) (a), Criminal P. C., to insist that there shall not be a de novo trial or inquiry. The Magistrate beginning the proceedings anew against the wishes of the accused is not acting without jurisdiction. Section 350 (1) (a), has no application in a case in which the second Magistrate decides to re-summon the witnesses and re-commence the inquiry or trial. The proviso gives the accused a right at the time of the commencement of the proceedings before the second Magistrate to demand that the witnesses or any of them be re-summoned and re-heard, and it does not give him any other right. It would be difficult to say that there can, in any judicial sense, be prejudice to the interest of the accused by the Magistrate who is to try the case, re-summoning the witnesses and re-commencing the trial. It may be that the effect of such an order will be that the trial will be protracted somewhat longer than it might otherwise have been and it may be that the Magistrate may decide to frame further charges in addition to the charge or charges, if any, framed by the first Magistrate, but that is a matter which would have been within his competence in any case under the provisions of S. 227, Criminal P. S. No question of prejudice therefore, really arises.

**Obiter.**—The complainant can, of course, put before the Magistrate reasons why it is desirable under S. 350, Criminal P. C. that the witnesses should be re-summoned and the inquiry or trial re-commenced, but he has no right to demand that the witnesses be re-summoned or to claim a de novo trial from the beginning. AIR (Vol 25) 1938 Oudh 218 : 1938 OWN 841 : 39 Cr LJ 858 : 14 Luck 156 : 177 Ind Cas 250 (DB).

——**S. 350 (1) — Accused, if can compel prosecution to produce witness examined in first Court but whom they do not wish to produce in second Court.**

No doubt the provisions of S. 350 (1), Criminal P. C. are mandatory but that section does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce though produced before the first Court should also be produced in the second Court. Where the trial in the Court of the second Magistrate is de novo, the proceedings taken in the first Court should be ignored. This being so, the prosecution are at perfect liberty to produce whichever witness they like and they cannot be compelled to produce at the instance of the accused, a witness on whose evidence they do not rely. Of course, the Court will consider the effect of the prosecution not producing a witness previously examined by them and if he should happen to be one named in the first information report, the circumstance will go against the prosecution: but S. 350 (1) (a) does not authorise an accused person to compel the prosecution to produce a witness whom they do not wish to produce. AIR (Vol 25) 1938 Oudh 212 : 39 Cr LJ 854 : 1938 OWN 881 : 14 Luck 172 : 177 Ind Cas 200.

——**Ss. 350, 110 — Inquiry under S. 110 made partly by one Magistrate — Another Magistrate succeeding — Re-summoning and re-hearing of prosecution witnesses.**

Clause 1 of S. 350, Criminal P. C. gives a discretion to the trial Magistrate while Proviso (a) gives a right to the accused. One of the objects of this section is to give the trial Magistrate an opportunity to watch and observe the demeanour of a witness which is a very important factor in assessing the value of his evidence and in deciding the question as to how far reliance can be placed on him. There is no reason why in an enquiry in a case under S. 110, Criminal P. C. which vitally affects an accused, he should be deprived of the right given to him in Proviso (a) to ask the Magistrate who succeeds the Magistrate who has made a part of the inquiry to see for himself the demeanour of the witness and to have a first-hand impression of the witness and his evidence by recalling the prosecution witness and re-hearing him. AIR (Vol 24) 1937 All 438 : (1937) ALJ 373 : 1937 AWR 382 : 38 Cr LJ 804 : 169 Ind Cas 833.

——**S. 350 — Transfer — Accused, if can insist that there shall not be de novo trial.**

It is clearly desirable for the proper administration of justice that normally the Magistrate who passes the final order should be the Magistrate who has heard all the evidence, and in order that there should be no prejudice to the accused, it is expressly provided that, in cases where the Magistrate does not propose to follow this procedure, the accused is entitled to demand that this procedure shall be followed.

Where a case is transferred to another Magistrate on the ground of the apprehension of accused that he would not get a fair trial, the accused cannot insist that there shall not be a de novo trial or enquiry or that the Magistrate was acting without jurisdiction in beginning the proceedings anew when the accused did not so desire. Section 350 of the Criminal P. C. lays down that one Magistrate succeeding another may either act on the evidence heard partly by his predecessor or he may re-summon the witnesses and re-commence the inquiry or trial. The discretion is in the Magistrate and his action is only limited in the trial by proviso (a). There is no proviso that the accused may demand that witnesses examined by the Magistrate who has ceased to exercise jurisdiction shall not be re-summoned and re-heard. AIR (Vol 24) 1937 Nag 147 : ILR (1937) Nag 538 : 38 Cr LJ 697 : 169 Ind Cas 47.

——**S. 350 (1), proviso (a) — Accused's right under when arises — Effect of Magistrate's action — De novo trial.**

Whereas the accused's right under S. 350 (1), proviso (a), Criminal P. C. arises only when the case is at the stage of trial, the Magistrate is not so bound and may re-commence the case under S. 350 (1) even when it has not reached the stage of trial. When this is done, this has the effect of wiping out the former proceedings. AIR (Vol 23) 1936 Nag 220 : 38 Cr LJ 15 : ILR (1937) Nag 135 : 165 Ind Cas 830.

——S. 350 — Right of accused under S. 350 — Nature of — Option of Magistrate.

Under S. 350 (1), Criminal P. C. the right of the accused is not to demand a re-trial as such, but simply that any or all of the witnesses should be re-summoned and re-heard. Subject to giving effect to that right, the option lies with the Magistrate to start the inquiry or trial all over again, or not. AIR (Vol 23) 1936 Nag 153 : 37 Cr LJ 983 : ILR (1936) Nag 92 : 19 NLJ 115 : 164 Ind Cas 744.

——S. 350 — Accused not wanting to examine witness after putting forward demand for re-hearing — Accused not protesting against action of prosecution in dispensing with one witness—Interference.

If the accused after putting forward his demand for the re-hearing of the witnesses, says he does not want any particular witness to be heard, the Magistrate has no power to order that the evidence of that witness shall be taken afresh. But the Magistrate as well as the accused has a privilege under S. 350, Criminal P. C. If he does not like the idea of giving judgment on evidence partly or wholly recorded, he may decide to re-summon the witnesses and re-commence the inquiry or trial. If he exercises that option, the accused cannot object to the examination afresh of any witness.

Where it is not known whether the Magistrate was exercising his own option to re-commence the trial (at the suggestion of the accused) or whether he thought he was granting the accused's request for the re-summoning and re-hearing of the witnesses and the accused has not protested against the action of the prosecution in dispensing with a prosecution witness, the action, though irregular, cannot be a ground for interference with the conviction unless prejudice has been caused. AIR (Vol 22) 1935 Mad 318 (2) : (1935) MWN 179 : 36 Cr LJ 1265 : 157 Ind Cas 1020.

——S. 350 — Accused whether entitled to further opportunity of cross-examination after charge is read over to him by second Magistrate.

A Magistrate commenced the trial of a case after a charge had been framed by his predecessor-in-office, whereupon the accused claimed to exercise the right conferred upon him by the first part of S. 350, Criminal P. C. of demanding fresh examination and cross-examination of the witnesses. The Magistrate re-summoned and re-heard the evidence. The accused then claimed that as the charge was confirmed by the new Magistrate and read over to him, he must have a further opportunity of re-summoning witnesses for the prosecution for cross-examining them :

Held, that the accused was not entitled to a further opportunity to cross-examine as claimed by him. Section 350 (1) had been sufficiently complied with by the new Magistrate when he first re-summoned the witnesses. AIR (Vol 22) 1935 Mad 258 : 37 Cr LJ 150 (1) : 159 Ind Cas 663.

——Ss. 350 (1), 544 — Right of accused to claim de novo trial — — Right if can be limited by imposing condition that accused should pay process fees.

Under proviso (a) to S. 350 (1), Criminal P. C., the accused has an absolute statutory right to claim a 'de novo' trial, and the Magistrate has no authority to limit that right by imposing any condition on its exercise (i.e., by asking accused to pay fees for issue of process to witness). Processes issued under such circumstances fall within cl. (2) of Sub-R. (1), R. 18 of the Process Fees Rules, (para. 1046, Burma Courts Manual) and should be issued free of charge, and the Magistrate should order the expenses of witnesses, recalled in the exercise of this statutory right, to be paid by Govt. under the discretion conferred upon him by S. 544, Criminal P. C. AIR (Vol 22) 1935 Rang 108: 38 Cr LJ 953: 13 R 297: 156 Ind Cas 441.

——S. 350 (1) (a) — De novo trial.

Accused has a right to re-summon and re-hear prosecution witnesses when the case is withdrawn by the Sub-Divisional Magistrate to his own file from that of a Sub-Magistrate. (1934) 1934 MWN 999.

——S. 350 — Object of — Witnesses called under S. 350 — Accused, if can waive examination.

The object of S. 350, Criminal P. C., is that an accused person, if he so wishes, is entitled to obtain the decision of the Magistrate trying him on the evidence heard by that Magistrate alone. Where, however, the witnesses are re-called at the instance of the accused, they are at liberty in respect of particular witnesses, to waive their examination or a part of it. There is, therefore, nothing illegal when the previous depositions are treated as part of the record, at the express wish of the accused's Counsel and after due consideration by the Court, whether any prejudice would arise to the accused by such action. AIR (Vol 21) 1934 Nag 209: 36 Cr LJ 41: 31 NLR 117: 152 Ind Cas 236.

——S. 350 — Right of accused to insist upon his case being decided on evidence already recorded by first Magistrate.

It is true that S. 350 of the Criminal P. C. does enable a Magistrate to re-summon the witnesses and re-commence the enquiry or trial, but that right of the Magistrate is subject to the proviso that the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard. Consequently, if the accused does not wish to have a fresh trial, he can insist upon his case being decided upon the evidence already recorded by the first Magistrate. AIR (Vol 21) 1934 Oudh 324: 11 OWN 825: 35 Cr LJ 1147: 150 Ind Cas 857.

——S. 350 — Remand.

When a case is remanded for taking of further evidence to the trial Court, and where it is found that when the case returns to the trial Court the Magistrate or the Officer trying the case has been transferred and a new Judicial Officer has taken his place, the latter is bound to accede to the request of the accused to try the case 'de novo'. AIR (Vol 14) 1927 Pat 5: 27 Cr LJ 1125: 8 PLT 181: 97 Ind Cas 645.

——S. 350 — Evidence — Right only to the accused.

Under proviso (a) the right given to an accused person is the right of demanding that the prosecution witnesses, or any or them, be re-summoned and re-heard. It does not say that the trial must be begun again, from the beginning. The provision is one entirely in the interests of an accused person and when the accused is exercising his right under the proviso, the complainant cannot claim that he must demand a 'de novo' trial from the beginning. Where the accused exercises his right under proviso (a) he has every option of withdrawing from the exercise of that right. AIR (Vol 12) 1925 Mad 317: 26 Cr LJ 526: 20 MLW 916: 85 Ind Cas 366.

——S. 350 — When accused does not want.

Where the accused persons do not insist upon a 'de novo' trial, the Magistrate succeeding another Magistrate is entitled to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. AIR (V 8) 1921 Pat 472.

——S. 350 — Retrial.

An accused has a perfect right under S. 350 that all the prosecution witnesses be re-summoned and re-heard, i.e., their evidence should be recorded anew. To read out to them their previous statements and getting admission from them that they are correct and putting them such questions as the new Magistrate thinks necessary are not sufficient compliance with the requirements of the said section. AIR (Vol 7) 1920 Lah 344: 22 Cr LJ 119: 16 PWR (Cr) 1919: 59 Ind Cas 551.

——S. 350 — Case transferred — Evidence — Trial 'de novo'.

An accused is entiled to a trial 'de novo' if his case is transferred from the file of one Magistrate to another. There is no estoppel in Criminal Law preventing an accused from claiming his rights given by law. S. 350 introduces an exception to the general rule of a 'de novo' trial and the exception should not receive a more extended interpretation. AIR (Vol 5) 1918 Nag 22: 19 Cr LJ 657: 45 Ind Cas 993.

(b) Discretion of Court.

——S. 350 (1), Proviso (a) — Re-examination of witnesses — Discretion of Court.

Even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined.

But there is nothing in S. 350, Criminal P. C., which prohibits the Magistrate from exercising his discretion of examining all the witnesses again, merely because the accused has exercised his right under Proviso (a) to S. 350. AIR (Vol 28) 1941 Mad 825: (1941) 2 MLJ 401: 54 MLW 307: 1941 MWN 1077: 43 Cr LJ 218: ILR (1942) Mad 410: 197 Ind Cas 583.

——Ss. 350, 257, 507 (2) — Purpose of S. 350 — Trial de novo — Accused demanding in de novo trial by successor that witness be re-summoned and re-heard — Discretion of Magistrate.

The purpose of S. 350, Criminal P. C., clearly is to provide that the Magistrate should, if the circumstances so require, decide the case only on evidence that he has himself recorded upon the evidence of witness that he has seen. In a trial 'de novo' by the successor of the Magistrate, the purpose which governs S. 350, cannot be assisted by the cross-examination upon commission of a witness whose evidence has been recorded upon commission and whom the Magistrate has never seen. The proviso to Sub-S. (1) of S. 350, Criminal P. C., applies where the accused himself has demanded in a 'de novo' trial by the succeeding Magistrate that the witnesses should be re-summoned and re-heard. But a demand of this sort cannot apply to a case of a witness who has never been summoned, never been heard by the Court and whose evidence has only been taken upon commission. Under S. 257, the Magistrate has a discretion and it cannot be said that he exercised the discretion wrongly in refusing to compel the attendance of the witness. AIR (Vol 27) 1940 Sind 193: 42 Cr LJ 80: ILR (1940) Kar 498: 191 Ind Cas 127 (DB).

——S. 350 — Discretion given to a Magistrate to act or not to act upon evidence recorded by his predecessor is controlled by proviso (1) to S. 350 — Option is given to accused and it can be exercised only once when second Magistrate commences proceedings. AIR (Vol 17) 1930 Nag 59: 1930 Cr C 147: 31 Cr LJ 282: 121 Ind Cas 646.

(c) On transfer of Magistrate

——S. 350 (1) and Proviso (a) — Procedure — De novo trial — Witnesses re-called and re-heard — Previous evidence of — if can be acted upon by succeeding Magistrate as substantive evidence.

The previous evidence of a witness who is re-summoned and re-heard under S. 350 (1), Cr. P. Code, and Proviso (a) thereto, recorded before a Magistrate who has ceased to exercise jurisdiction in the case by reason of transfer, retirement or otherwise, cannot be treated as substantive evidence in the case commenced by the succeeding Magistrate. Where, however the accused has exercised his option under proviso (a) only with regard to some of the witnesses, the evidence previously recorded of those witnesses, in regard to whom the accused has not made a demand for re-summoning and re-hearing will of course have to be treated as part of the evidence in the case, and the succeeding Magistrate would be competent to act on that evidence. AIR (Vol 37) 1950 Bom 14: 51 Cr LJ 233: 51 Bom LR 671: ILR (1949) Bom 581 (DB).

——S. 350 — Transfer of Magistrate — De novo trial — Right of accused.

Whenever a Magistrate is transferred and a new Magistrate takes his place, the accused has a right to demand trial 'de novo' and the Magistrate is bound to comply with such request. AIR (Vol 36) 1949 Kut 8: 50 Cr LJ 969.

——S. 350 — Procedure — Proceedings under S. 145 — Evidence recorded and arguments heard by magistrate — Subsequent transfer — Order by successor two months later without even hearing arguments — Legality.

A magistrate may no doubt act in suitable cases on evidence recorded by his predecessor, but he cannot act upon arguments made before predecessor which he has never heard. Where proceedings under S. 145 were pending before a magistrate for about six months and he is transferred after taking evidence and hearing arguments, an order passed in such proceedings by the succeeding magistrate nearly two months later, without even hearing arguments afresh, cannot be upheld. In such case, the order has to be set aside and 'de novo' proceedings should be started, in case of any imminent breach of the peace. AIR (Vol 35) 1948 Pat 414: 49 Cr LJ 704.

——S. 350 — De novo trial.

Where the Magistrate who has recorded the evidence of witnesses in a warrant case, is transferred before he has framed the charge, the accused has a right to have the witnesses re-called and examined 'de novo'. AIR (Vol 21) 1934 Sind 106: 35 Cr LJ 1261: 28 SLR 239: 151 Ind Cas 213 (DB).

——S. 350 (1) (a) — Transfer of Magistrate after framing of charge — Further cross-examination.

Where a Magistrate is transferred after he has heard the prosecution case and framed a charge, it

is not open to his successor to ignore the charge. The accused are only entitled in such circumstances to demand under S. 350 (1) (a) that the witnesses or any of them be re-summoned and re-heard. They cannot have them re-called and re-heard a second time. AIR (Vol 20) 1933 Mad 841: (1933) MWN 94: 35 Cr LJ 79 (1): 65 MLJ 791: 38 MLW 995: 146 Ind Cas 523 (2).

——S. 350 — Right of accused.

The accused under S. 350, Cr. P. Code, has a right to demand that the witnesses or any of them be re-summoned and re-examined when the case will be tried by the Magistrate to whom it will be transferred for trial. 9 AI Cr R 486: 29 Cr LJ 229: 107 Ind Cas 160 (DB).

——S. 350 — Right only to the accused.

After a case was charged, there was a transfer of Magistrate, and in exercise of his privilege under S. 350, Cr. P. Code, the accused asked that the prosecution witnesses might be re-summoned and re-heard. When they appeared, he said he would be content to cross-examine them.

Held, that the accused could change his mind and leave the Court free to exercise its statutory option and act upon the evidence recorded by its predecessor. The complainant has no privilege under S. 350, and if the accused declines to act under sub-cl. 1(a), the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded. AIR (Vol 13) 1926 Mad 815: 27 Cr LJ 659: 94 Ind Cas 707.

——Ss. 350 and 537 — Transfer of Magistrate — Change of date — No notice to pleader of accused — Irregularity — Right of accused to re-summon and examine witnesses.

It is irregular and unfair to take up the case against accused person on a date other than that fixed for his hearing in his counsel's presence and thus deprive him of the benefit of legal advice, unless his counsel has been duly informed of change of the date beforehand. An accused has a perfect right under S. 350 that all the prosecution witnesses be re-summoned and re-heard, i.e., their evidence should be recorded anew. To read out to them their previous statements and getting admission from them that they are correct and putting them such questions as the new Magistrate thinks necessary, are not sufficient compliance with the requirements of the said section. AIR (Vol 7) 1920 Lah 344 : 59 Ind Cas 551 (2) : 22 Cr LJ 119 : 16 PWR (Cr) 1919.

——S. 350 — Proceedings under S. 107 — Transfer of Magistrate — De novo trial.

S. 350 (1) proviso (a) applies to proceedings under S. 107 and the accused in a security case is entitled to a trial de novo on the Magistrate being transferred. (1920) 43 M 510 (FB).

——S. 350 — Magistrates — Transfer — Case transferred from one Magistrate to another — De novo trial — Jurisdiction.

S. 350 of the Cr. P. Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular question is concerned by reason of its transfer to another Court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. AIR (Vol 5) 1918 All 279 : 40 All 307 : 16 ALJ 217 : 19 Cr LJ 378 : 44 Ind Cas 682 (DB).

——S. 350 — Transfer of Magistrate — De novo trial.

On the transfer of a Magistrate who had heard the whole prosecution evidence and framed a charge, the accused claimed a trial de novo before the succeeding Magistrate, the witnesses were re-summoned, their statements were read over to them and they were further cross-examined. No fresh charge was framed nor was the accused examined by the Magistrate.

Held, that the provisions of S. 350 were not complied with and a new trial must be ordered. AIR (Vol 5) 1918 LB 63 : 11 Bur LT 58 : 9 LBR 92 : 19 Cr LJ 321: 44 Ind Cas 337.

7. Scope.

——S. 350, Proviso — Duty of a Magistrate receiving a part-heard case — Proviso to section when comes into operation — Charge which had been framed how affected.

When a Court receives a part-heard case from another Court, it is empowered by S. 350, Cr. P. Code, to act on the evidence recorded by the previous Court or to resummon the witnesses and recommence the enquiry or trial, provided that in any trial the accused may demand that the witnesses or any of them may be resummoned and reheard. So the first act to be done by a Court on receipt of a part-heard case is to decide whether to act on the evidence already recorded or to resummon the witnesses and recommence the enquiry or trial. If it decides to resummon the witnesses and recommence the enquiry or trial there would arise no question of applying the proviso. The proviso would apply only when the Court exercises the first option of acting on the evidence recorded by the other Court. In such a case the Court must give some indication of its decision to the accused so that he may decide as to whether he should avail himself of the proviso or not.

If the Court decides to resummon the witnesses and recommence the inquiry or trial, all the proceedings held in the previous Court are wiped off. The effect is the same as if the proceedings were never held. If the previous Court framed a charge against the accused, the charge also would be wiped off.

The resummoning and rehearing of witnesses on the accused's demand, which can take place only when the Court elects to act on the evidence already recorded, does not amount to recommencement of the inquiry or trial and does not blot out all the previous proceedings. The effect of the demand is to maintain intact the previous proceedings particularly the charge, if any was framed.

Where after the framing of a charge a case is transferred and the accused claims a de novo trial and the case is adjourned to another date for that purpose but the complainant does not appear on the adjourned date and the complaint is dismissed and the accused discharged and a fresh complaint is filed on the same facts, it cannot be pleaded by the accused that the fresh complaint was barred under the principle of autrefois acquit because, the prior discharge is not an acquittal. Case-law fully

discussed. AIR (Vol 37) 1950 A 669 : 1950 ALJ 599 (DB).

**——Ss. 350 (3) and 528 (2) — Order of transfer — When takes effect — Conviction after the passing of an order of transfer — Jurisdiction.**

An order of transfer takes effect as soon as it is pronounced and after that a Magistrate has no jurisdiction to go on with the case. An order convicting the accused after the case has been transferred would be without jurisdiction. It would be so even if the accused takes further steps and addresses arguments after the order of transfer as that would not confer jurisdiction upon the Court. AIR (Vol 37) 1950 All 478 : 1950 AWR 425 : 1950 ALJ 323 : 51 Cr LJ 1281.

**——S. 350 (3) — Cessation of jurisdiction on order of transfer — Point of time.**

The general rule is that the jurisdiction of a Court continues so long as it is not taken away and when a superior Court transfers a case from one Court to another, that jurisdiction ceases. The language of S. 350 (3), Cr. P. Code, suggests that the cessation of jurisdiction comes into existence when the order of transfer is passed. An order of transfer takes effect as soon as it is pronounced and not from the date of its communication which is only a ministerial act. AIR (Vol 37) 1950 A 478 : 1950 AWR 425 : 51 Cr LJ 1281 : 1950 ALJ 323.

**——S. 350 (1), Provisos (a) and (b) — Distinction between.**

Provisos (a) and (b) to S. 350 are distinct Proviso (a) confers a benefit and a privilege on the accused and uses the strong and emphatic word 'demand'. Proviso (b) enables the High Court or the District Magistrate in certain cases to intervene even in cases when the accused has not claimed his rights under proviso (a). But in that case, intervention is limited to cases in which there has been material prejudice. AIR (Vol 32) 1945 Nag 207 : 1945 NLJ 201 : ILR (1945) Nag 605 : 47 Cr LJ 418 : 222 Ind Cas 310

——S. 350 — Application for de novo trial — Opinion of Magistrate. See AIR (Vol 32) 1945 Nag 127 : 222 Ind Cas 31 : 47 Cr LJ 240.

——S. 350 — Section 350-A, Criminal P. C., is not intended to affect the other section of the Code, for instance S. 350. AIR (Vol 30) 1943 All 20 : (1942) ALJ 609 : 44 Cr LJ 203 : ILR (1943) All 23 : 1942 AWR 325 (1) : 204 Ind Cas 323.

**——Ss. 350, 123 (b) — Scope of Ss. 350 and 123 (3).**

Section 350, Criminal P. C. does not apply to a case when the Sessions Judge acts under S. 123 (3). AIR (Vol 29) 1942 Sind 122 : ILR (1942) Kar 252 : 44 Cr LJ 367 : 205 Ind Cas 309 (DB).

**——S. 350 (2) — Interpretation.**

Per Khundkar, J. — (concurring). — The first part of Sub-S. (2) of S. 350, Criminal P. C., was intended to provide that where proceedings have been stayed under S. 346, the Magistrate by whom the case is subsequently taken up is to hold a de novo trial. The only reasonable construction to put upon the second part of the sub-section would be to say that where proceedings have been submitted to a superior Magistrate under S. 349, the accused may not insist upon a de novo trial. To hold otherwise would be to render S. 349, Sub-S. (2) of no effect. AIR (Vol 25) 1938 Cal 415 : 42 CWN 508 : 39 Cr LJ 606 (2) : 175 Ind Cas 537 (DB).

——S. 350 — The words 'the manner herein after prescribed for conducting trials and recording evidence in warrant cases in cl. (2), S. 117, Criminal P. C.," are wide enough to cover the special procedure laid down for the trials of summons or warrant cases in Chaps. XX and XXI, as well as general provisions as to inquiries and trials contained in Chap. XXIV. AIR (Vol 24) 1937 All 436 : (1937) ALJ 373 : 1937 AWR 382 : 38 Cr LJ 804 : 169 Ind Cas 833.

——Ss. 350, 258 (1) — Section 258 (1), Criminal P. C., must be read in the light of S. 350, Criminal P. C. AIR (Vol 23) 1936 Nag 153 : 37 Cr LJ 983 : ILR (1936) Nag 92 : 19 NLJ 115 : 164 Ind Cas 744.

**——S. 350 — Further inquiry by same Magistrate — Power of Magistrate to summon witnesses.**

The Sessions Judge sitting in revision against an order of discharge directed further inquiry for finding out whether the offence was committed on the evidence already adduced and further directed that the inquiry should be made by the same Magistrate who originally tried the case. Eventually, however, the District Magistrate had to transfer the case to another Magistrate, who proceeded to examine the witnesses afresh.

Held (Obiter) that the order of the Sessions Judge directing inquiry by the same Magistrate was not quite in consonance with S. 436. 10 Cal. 207, Rel. on.

Held further, that the Magistrate to whom the case was transferred could summon the witnesses afresh in the exercise of the discretion vested in him under S. 350 (1). AIR (Vol 17) 1930 Mad 983: 1930 MWN 911 : 1930 Cr C 1199 : 32 MLW 782.

**——S. 350 — Evidence Act — Evidence Act, S. 33.**

The general provisions of S. 33 of the Evidence Act are in no way affected by S. 350 of the Cr. P. Code. AIR (Vol 14) 1927 Lah 332 : 101 Ind Cas 483 : 28 PLR 199 : 28 Cr LJ 451 : 8 AI Cr R 83 : 8 Lah 570 (DB).

**——S. 350 — Commitment — Admissibility of statement before first Magistrate.**

Where the Magistrate, who recorded the statement of the accused, was transferred, and the case was eventually committed to the Court of Sessions by his successor,

Held, that the statement was admissible in evidence under S. 287, in view of S. 350 of the Code. AIR (Vol 13) 1926 Lah 271 : 7 Lah 70 : 27 Cr LJ 627 : 27 PLR 534 : 94 Ind Cas 403 (DB).

**——S. 350 — More than two successive Magistrates.**

Section 350 (a) applies at the time when the succeeding Magistrate begins to exercise jurisdiction that is every time another Magistrate takes cognizance of a matter which has been begun or continued by his predecessor. On principle if a second magistrate can act on evidence recorded wholly or partly by his prodecessor and partly by himself there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors. AIR (Vol 11) 1924 Mad 227 : 81 Ind Cas 54 : 47 Mad 245 : 18 MLW 949 : 33 MLT 189 : 1923 MWN 815 : 25 Cr LJ 566 : 45 MLJ 808 (DB).

**——S. 350 — S. 145, Cr. P. Code.**

S. 350 applies only in part to proceedings under S. 145; consequently an order on evidence partly

recorded by the magistrate's predecessor and partly by himself is valid notwithstanding demand for a de novo trial by one of the parties. AIR (Vol 11) 1924 Pat 786 : 76 Ind Cas 25 : 5 Pat LT 237 : 2 Pat LR Cr 108 : 25 Cr LJ 89.

——**S. 350 — Construction — S. 145, Cr. P. Code.**

The wording of the principal clause of S. 350 is very different from that in proviso (a). In the main body reference is made to an enquiry or trial; proviso (a) is limited to trial and also makes reference to an accused a word which does not appear in the preceding part of the section. The intention of the legislature was to limit the application of proviso (a) to criminal trial and not to extend that proviso to enquiries such as a proceeding under S. 145, Cr. P. Code which are also covered by the first portion of the section. AIR (Vol 10) 1923 Cal 483 : 73 Ind Cas 265 : 37 CLJ 128 : 24 Cr LJ 569 (DB).

——**S. 350 — Jurisdiction — Power to try case by a Magistrate after handing over charge.**

A Magistrate's jurisdiction to try a case ceases with handing over charge to his successor. (1913) 14 Cr LJ 239 : 19 Ind Cas 335 (All).

——**Ss. 350 and 537 — Omission of Magistrate to ask accused to cross-examine — Rehearing of evidence — Powers of Magistrate.**

S. 350 of the Cr. P. C. confers on an accused the right to demand a re-hearing of evidence; but it does not prescribe that the Magistrate shall ask the accused if he wants a re-hearing. Where there is neither demand nor refusal, the accused is not necessarily materially prejudiced. The error, if any, is curable under S. 537, Cr. P. C. A Magistrate is not debarred from acting under S. 350, Cr. P. Code, by the mere fact that the accused stated before his predecessor at the time of the framing of the charge that he did not wish the witness to be recalled. UBR (1912) 149 : 14 Cr LJ 175 : 19 Ind Cas 175.

——**S. 350 — "Ceases to exercise jurisdiction" — Meaning of.**

The words "ceases to exercise jurisdiction" means "on the inquiry or trial" and so where a case which was tried by one Magistrate was transferred to another, because the former was busily engaged and the entire case for the defence was conducted before the second Magistrate, held that such a trial was not illegal. The word "succeeded" in the section should not be construed narrowly. 12 A. 66 not Appr. (1912) 39 C 781 : 13 Cr LJ 218 : 14 Ind Cas 314 (DB).

——**S. 350 — Construction.**

S. 350 ought to be construed liberally. (1909) 13 CWN 420 : 9 Cr LJ 278 : 1 Ind Cas 336 (DB).

8. Setting aside conviction.

——S. 350 Proviso (b) — Where all the witnesses were further cross-examined before the Magistrate the accused cannot be said to have been prejudiced by the refusal of the Magistrate to re-summon and re-hear the witnesses and the conviction cannot be set aside on this ground. AIR (Vol 25) 1938 Mad 724 : (1938) MWN 320 : 39 Cr LJ 932 : (1938) 2 MLJ 41 : 48 MLW 248 : 177 Ind Cas 598.

——S. 350 — Trial, when vitiated.

A contravention of the provisions of S. 350 (1) (a) will vitiate the trial only when there is a refusal on the Magistrate's part to re-summon and re-hear the witnesses or when the evidence of witnesses examined against the provisions of cl. (a) is relied upon by the Court. Where a witness is only cross-examined in the second Court but not examined-in-chief by the prosecution, there is a clear breach of the section. But where the Court discards the evidence of such a witness, there can be no prejudice to the accused, and the defects in procedure which do not cause any prejudice to the accused do not vitiate the trial. AIR (Vol 25) 1938 Oudh 212 : 39 Cr LJ 854 : 1938 OWN 881 : 14 Luck 172 : 177 Ind Cas 200.

——**S. 350 — Bench Magistrates.**

The trial of an accused person by a Bench of Magistrates in which one of the magistrates composing the Bench is not present and does not hear the entire evidence, is bad in law and a conviction by such Bench must be set aside. Section 350 of the Code has no application to cases tried by Benches of Magistrates. AIR (Vol 9) 1922 Lah 137 : 62 Ind Cas 335 : 1 PLR 1922 : 22 Cr LJ 511.

——**S. 350 — Waiver.**

Where on an application for transfer under S. 528 of the Cr. P. Code, the case was transferred to another Magistrate who completed the remaining evidence in the case and convicted the accused without a de novo trial which was not pressed for by the accused, held, that though the Magistrate from whose file the case was transferred was still in the same district, as he had lost the jurisdiction over the district after it was withdrawn from his file, the provisions of S. 350 apply and in the absence of a demand for a de novo trial, the conviction is not illegal. AIR (Vol 7) 1920 Pat 693 : 59 Ind Cas 370 : 22 Cr LJ 82 : 1 Pat LT 679.

——**S. 350-A.**

——**S. 350-A — Judgment of Bench of Magistrates — Validity — Some of Magistrates not present throughout proceedings.**

A judgment or order passed by a Bench of Magistrates is invalid if some of those Magistrates were not present throughout the proceedings of the case. (1948) 50 PLR 184.

——**S. 350-A — Magistrates constituting the Bench not present throughout — Judgment — Validity.**

Applying the maxim expressio unius est exclusio alterius to S. 350-A of the Cr. P. Code, it follows that where the Magistrates constituting the Bench have not been present throughout the proceedings their judgment or order cannot be valid. This is in accord with the general principle of law that only the Magistrate who had heard the evidence in the case is competent to decide the same. AIR (V 35) 1943 A 411: 49 Cr LJ 717: 1948 AWR (HC) 174.

——**Ss. 350-A and 350 and 16 and R. 3 of the Rules for Guidance of Benches of Honorary Magistrates — Scope and effect of S. 350-A — Applicability to a case of an addition or substitution of a Magistrate to a Bench during pendency of case — S. 350, if can be applicable by reason of R. 3 of the Rules made under S. 16 of the Cr. P. Code.**

Section 350-A of the Cr. P. Code is a saving section and hence where not saved, the ordinary principle would apply. It cannot apply to a case in which there has been either a substitution or an addition in or to the constitution of a Bench of Magistrates during the pendency of a case. S. 350 can have no reference, in terms, to such a case. Nor could it be made applicable by reason of R. 16 of the Rules for guidance of Benches of Honorary Magistrates the reason being that it is not open

to the Rule to vary the substantive sections of the Code. AIR (V 34) 1947 All 123 : 1946 ALJ 495 : 1946 AWR (HC) 639 : 48 Cr LJ 431 : 1946 ALW 447 : 229 Ind Cas 609.

**——S. 350-A — Scope of S. 350-A.**

Section 350-A, Criminal P. C., does not say in what circumstances a judgment shall be invalid. It says that in certain circumstances, it shall be valid. It refers only to a case where the whole constitution of a Bench has been changed during the time when the trial was pending. The section makes a provision that its terms will apply if the members of the particular Bench have been constant throughout. It is not intended to affect the other sections of the Code, for instance, S. 350. AIR (V 30) 1943 All 20: 44 Cr LJ 203: (1942) ALJ 609 : 19[illegible] WR 325 (1) : ILR (1943) All 23 : 204 Ind Cas 323.

**——Ss. 350-A, 537 — Scope of S. 350-A — Judgment pronounced in absence of Magistrate — Defect — Bench of three Magistrates — Absence of one — All joining in deliberations and signing judgment — Conviction — Legality of.**

Section 350-A, Criminal P. C., is intended to apply to only such cases where one or more members drop out altogether and the remaining Magistrates who constitute the Bench which passes the order or judgment have been present on the Bench throughout the proceedings. If any of the Magistrates constituting the Bench which pronounces the judgment or the order, has not been present throughout the proceedings then S. 350-A is not complied with. In such a case, there would at least be an irregularity in the trial. The defect is not such as involves a direct infringement of any specific provisions of the Act, but is contrary to the spirit and the principle underlying S. 350-A and cannot be regarded as anything more than an irregularity in the judgment or proceedings within the meaning of S. 537 of the Act.

Where an Honorary Magistrate who has not heard the whole evidence and has not throughout the proceedings taken part in the deliberation and joins the others in arriving at the final decision, there is every likelihood of his influencing his colleagues. By virtue of his absence on some of the material dates, he becomes incompetent to form a true opinion on the merits of the case and if he joins in the deliberations, there is likelihood of a failure of justice. A conviction made by them will therefore be illegal. AIR (V 21) 1934 All 144: (1934) ALJ 376 : 36 Cr LJ 38 : 4 AWR 1552 : 56 All 599 : 152 Ind Cas 158 (DB).

**——Ss. 350-A, 439 (4) (as amended by Act XVIII of 1923) — One member of Bench that passed order not present throughout proceedings — Validity of order — Power of High Court to interfere — Discretion.**

Where, in a trial by a Bench of Magistrates, one of the Magistrates constituting the Bench that passed the order was not present throughout the proceedings:

Held, that the order was invalid according to the provisions of S. 350-A, Criminal P. C., and that inasmuch as the complainant had not had a fair hearing and one member of the Court which decided the case did not hear whole evidence, a re-trial should be ordered.

The High Court has power to interfere with an order of acquittal in revision. The question is one of discretion as to whether in any particular case, the High Court should or should not order a re-trial. AIR (Vol 19) 1932 All 191: (1932) ALJ 166: 54 All 413: 33 Cr LJ 885: 140 Ind Cas 122.

**——S. 350-A — Bench Magistrates — Evidence taken in the absence of some members:**

Held, that the conviction was not valid. AIR (Vol 19) 1932 All 127: (1932) ALJ 42: 33 Cr LJ 200: 135 Ind Cas 835.

**——S. 350-A — Bench of Magistrates — One member absent throughout but assisting in delivering judgment.**

Where, in a trial by a Bench of Magistrates, a Magistrate who was not present throughout the trial assisted in delivering the judgment and signed it:

Held, that the trial was illegal and that the accused must have been seriously prejudiced. AIR (Vol 19) 1932 Nag 95: 15 NLJ 11: 33 Cr LJ 559: 28 Nag LR 190: 138 Ind Cas 175.

**——S. 350-A — Presence at trial — Bench Magistrates.**

Where out of three Magistrates constituting the Bench only one is present on all hearings throughout the trial, sitting sometimes with one, sometimes with the other and sometimes with both, the trial is bad as it contravenes the provisions of S. 350-A, even though the quorum consisted of two. 4 OWN 1240: 107 Ind Cas 875: 9 AI Cr R 414: 29 Cr LJ 310: AIR (Vol 15) 1928 Oudh 212.

——S. 350-A — A trial by a Bench of Magistrates is bad if the quorum of Magistrates constituting the Bench is not present throughout the whole of the proceedings. 7 Lah 122: 27 Cr LJ 463: 27 PLR 131: 93 Ind Cas 255: AIR (Vol 13) 1926 Lah 304.

**——S. 351.**

**——S. 351 — Prayer for action under against witness — Rejection — If amounts to a discharge — That witness subsequently charg-sheeted along with the accused — Legality.**

Where an application by the prosecuting Inspector to take action against a witness under S. 351, Cr. P. Code, is rejected by the Magistrate it does not amount to a discharge of that witness who is not before the Court as an accused. Hence such an order cannot be pleaded as a bar to that witness being charge-sheeted along with the accused. AIR (Vol 37) 1950 A 483: 1950 AWR 422: 1950 ALJ 324: 51 Cr LJ 1291.

**——S. 351 — Applicability — Conditions for proceeding under — Cognizance — If to be taken of offence.**

It cannot be held that a magistrate proceeding under S. 351, Cr. P. Code, need not at all take cognizance of the offence. The only effect of S. 351, is that the preliminary procedure of issuing processes under S. 204 is dispensed with. The section in terms says that the offence must be one of which the Court can take cognizance. There is no justification for reading into S. 351 the meaning that it is sufficient merely that it should be such that the Court can take cognizance of and that it is not necessary for the Court to take cognizance. AIR (Vol 37) 1950 Cal 138: 51 Cr LJ 636 (DB).

**——S. 351 — Detention under — Power of Court not taking cognizance of offence.**

S. 351, Cr. P. Code, does not make it a condition that the Court passing the order for detention must itself take cognizance of the offence. For power to detain the party, all that is required is that the Court should be one possessing the power to take cognizance of the offence. (1950) 2 D. R. 71 (DB).

**——Ss. 351, 6 — Sessions Court is Criminal Court within S. 6 — Generality of expressions "Criminal Court" and "trial" in S. 351 is subject to other provisions of Code.**

It is true that Courts of Session are among the classes of Criminal Courts in British India set out in S. 6 of the Criminal P. C. But if, by reason of other provisions of the Code, a Court of Ses-

sion has not power to try any person, save in certain exceptional circumstances such as when contempt is committed before it, unless an order of commitment has been made in respect of such person, then, the generality of the expressions 'a Criminal Court' in S. 351 must be held to be limited by those provisions. It is also true that S. 351, refers generally to inquiries and trials, but here again there is no difficulty in limiting the meaning of the word 'trial' if the other provisions of the Code so require. AIR (Vol 29) 1942 Sind 161: ILR (1942) Kar 323: 44 Cr LJ 137: 204 Ind Cas 31 (DB).

——**Ss. 351, 190 — Magistrate, if can add a person as accused — Person to be added as accused present in Court — Action under S. 351 — Such person not present in Court — Procedure.**

The wording of S. 351, Criminal P. C., which is a disabling section, differs materially from that of S. 190, which gives jurisdiction to Magistrates to take cognizance of offences. Section 190, does not mention the accused. A Magistrate takes cognizance of offence not of the offenders, and a Magistrate, therefore, may add a person or persons to those accused mentioned in the complaint or Police report upon which cognizance of the offence has been taken by him. If a person to be added as an accused is present in the Court, the Magistrate may act under S. 351, but if he is not present, the Magistrate will proceed in the ordinary way by issue of summons or warrant. AIR (Vol 29) 1942 Sind 161: ILR (1942) Kar 323: 44 Cr LJ 137: 204 Ind Cas 31 (DB).

——**Ss. 351, 190 — Sessions Judge, when can join a person as co-accused — Judge considering that proceedings should be started against a person — Proper procedure.**

Section 351, must be read subject to S. 190. A Sessions Judge has no power to join a person as a co-accused in the case before him, whether he happened to attend the Court or not, when no inquiry of any sort had been held by a Magistrate into charges against him. If the Judge considers by reason of facts disclosed in the trial, that proceedings should be initiated against such person or against any other person, it is open to him to express his opinion in his judgment, and to invite the Public Prosecutor and the District Magistrate to consider the advisability of taking action in the matter. AIR (Vol 29) 1942 Sind 161: 44 Cr LJ 137: ILR (1942) Kar 323: 204 Ind Cas 31 (DB).

——**Ss. 351, 191, 190 (c) — During trial of one person, another person detained and made co-accused — S. 351, if applies — S. 191, if bar to jurisdiction of Magistrate.**

After a Magistrate has taken cognizance of offence in one of the three methods mentioned in S. 190, Criminal P. C., he gets the seisin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted. Where, during the trial of a person, the Magistrate detains another person who is present in the Court and makes him co-accused, S. 351 applies to such a case and not S. 190 (c) and S. 191 is not a bar to the jurisdiction of the Magistrate to try such person. AIR (Vol 28) 1941 Rang 30: 42 Cr LJ 244: 1940 Rang LR 676: 191 Ind Cas 894.

——S. 351 — On the addition of a new accused in a case, he is not entitled as of right to have the case tried by another Court under S. 191. It is open to the Magistrate to act under S. 351. AIR (Vol 21) 1934 Rang 193: 35 Cr LJ 1312: 151 Ind Cas 406.

——**S. 351 — Scope — S. 190 (b), Cr. P. Code.**

Where after the close of a theft case the Magistrate ordered the police to send up a charge-sheet in respect of one of the prosecution witnesses in the case for an offence under S. 414, Penal Code, and after the police made a report, tried the case and convicted the accused,

Held that the Magistrate took cognizance of the case under S. 190 (b) and not under S. 190 (c) or S. 351. 62 Ind Cas 875: 23 Bom LR 842: 22 Cr LJ 603: AIR (Vol 8) 1921 Bom 365 (DB).

——**Ss. 351 and 190 — Power of Magistrate to take cognizance of offence against person and sent up for trial — 'Complaint' — Meaning.**

A Magistrate is empowered to take cognizance of an offence against a person attending his Court who though not sent up for trial, appears to him to be implicated in a case under trial before him. (1910) 4 SLR 258: 12 Cr LJ 399: 11 Ind Cas 583 (DB).

——**S. 352.**

——**S. 352 — Venue of trial — Power of Magistrate to select — Consideration that should weigh in the matter of selection — Holding trial in the recreation room of Central Jail in respect of offences alleged to have been committed within the precincts of the jail — Legality and propriety.**

S. 352 of the Criminal Procedure Code clearly presupposes the power in the presiding Judge or Magistrate trying a criminal case to decide on the venue of trial and once he had decided the place, that place where the Court is held must be deemed to be an open Court. The only condition is that, just like all Courts of law, it should be accessible to the public, and the place where the Court is held should be a place to which the public may have access, subject, however, to the condition that only such members of the public would be admitted as the place so selected could conveniently contain. Accordingly, it would be competent to a Magistrate to select a place for trial even though it is within the jail compound and it cannot be said that he cannot do so when the offences are alleged to have been committed within the jail premises. There is no warrant for reading S. 352 in such a restricted manner. (1950) 1 MLJ 344, overruled. 63 LW 564: AIR (Vol 37) 1950 Mad 696: 1950 MWN 424: (1950) 1 MLJ 745 (DB).

——**S. 352 — Venue of trial — Powers of trying Magistrates to fix — Trial inside jail premises — Propriety.**

Though the presiding Judge or Magistrate has himself to decide the venue of trial, there is nothing in law to prevent him from consulting his superior officer or even others likely to suitable advice before arriving at his decision. So long as he decides for himself finally about the venue without being fettered by the advice of any unauthorised person there is nothing wrong about it.

Generally the Courts should, under the law of our land and under S. 352, Cr. P. Code, be held only in an open and public place to which the public generally may have access, so far as the place can conveniently contain them, provided of course that the presiding Judge may exclude the public at any stage. A trial in the jail premises should only be held in the most exceptional circumstances where the needs of the situation are imperative and afford no alternative consistent with the safety of the prisoners and the need to save the Government from extravagant and unnecessary expenditure.

Where the offences alleged against the accused are admitted to have taken place against jail officials and inside jail premises, it is desirable that some place outside the jail premises and outside the control of the jail authorities should be chosen for trying such cases.

Usually the trial should not be held inside jail premises leading to the apprehension that the trial hall is only the ante-chamber to the jail close by.

A Court is not allowed to be held anywhere within the Magistrate's jurisdiction. It is desirable for a Magistrate whenever he has a Court building to record his reasons for holding the trial outside such building in another place. 63 LW 187: 1950 MWN 137: AIR (Vol 37) 1950 Mad 441: 51 Cr LJ 1032: (1950) 1 MLJ 344.

**(Overruled in AIR (Vol 37) 1950 Mad 696 (DB) ).**

**——S. 352 — Enquiry in jail — Duty of Magistrates.**

Though it is not illegal for a magistrate to hold an enquiry in jail or anywhere else, the magistrate must have regard to the fact that the place where the inquiry is held must be deemed to be an open Court where the public as such have a right to attend. Such right may be controlled in a proper case on special grounds by the Court & not by the jail rules or by the officer in charge of the jail. If the magistrate cannot have the absolute right to regulate the proceedings at the place where he is holding the trial, he ought not to hold the trial or enquiry at such a place. ILR (1947) All 657: 1947 ALJ 253: 1947 AWR (HC) 266: 48 Cr LJ 868: AIR (Vol 34) 1947 A 436.

**——S. 352 — Opinion of assessors to be delivered in open Court — Maxim, "omnia praesumuntur rite acta" — Opinion not delivered in open Court — Effect — Miscarriage of justice — Swaziland High Court Proclamation (No. 65 of 1938), Ss. 7, 8 and 10 (1).**

The presumption of the kind mentioned in the maxim "omnia praesumuntur rite acta" cannot be relied in a capital case. Where by the rules of procedure the assessors are to give opinions in open Court, and there are no indications in record that they were so given, it can be presumed that they were so given.

Prima facie, the failure to hold the whole of the proceedings in public as required by the rules of the procedure must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by the Privy Council in dealing with criminal appeals. There may, no doubt, be cases where the guilt of the accused is so apparent that in spite of the disregard of this essential need for publicity, the Board would not consider it right to grant leave to appeal. But where a particular native custom formed an important consideration upon which it was essential that the proclaimed necessity for publicity should be observed, the failure to observe the rules of publicity would lead to substantial and grave injustice.

According to plain meaning of Ss. 7 and 8 read with S. 10 of Swaziland High Court Proclamation, 1938, the giving of the opinions by the assessors is part of the proceedings of the High Court, which are to be carried on in open Court. The giving of the opinions must, therefore, take place in open Court. This plain meaning cannot be disregarded on the ground that so far as the native assessor was concerned if his opinion had to be given in public, he might feel constrained to decide in favour of a native accused, whereas, in the privacy of the Judge's room and in company only of the Judge and the administrative officers, he would be more likely to give an honest independent opinion.

(Necessity and importance of publicity of opinion by the assessors in criminal trials pointed out.) AIR (Vol 30) 1943 PC 4: 44 Cr LJ 1: 9 BR 102: (1942) ALJ 714: 56 MLW 47: 203 Ind Cas 453.

**——S. 352 — Court room is a public place.**

A Court room is a public place and unless the proceedings are held in camera or the Court for some other valid reason issues a prohibition beforehand, any person can enter it without any permit and remain there so long as he does not misbehave. AIR (Vol 30) 1943 Lah 14: 44 PLR 511: 44 Cr LJ 181: ILR (1943) Lah 791: 204 Ind Cas 299.

**——S. 352 — Holding of trial at place other than Court house — Procedure.**

Whether the Magistrate should hold the trial at a place other than his Court-house is a matter purely within the discretion of the Magistrate himself. Where he decides to hold the trial in the jail premises, he must pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise if accused persons consider that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his Court-house. If, however, the District Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Local Government himself straightway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial should be held elsewhere. It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside of it. If the Magistrate then wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the necessary authorities who are in control of the premises in which the Magistrate desires to hold the trial. AIR (Vol 27) 1940 Rang 72: 1940 Rang LR 122: 41 Cr LJ 497: 187 Ind Cas 640.

**——S. 352 — Trial conducted in camera — No objection — Proceedings, when can be upset.**

Where a Magistrate conducts a trial in camera in the exercise of his own discretion, as he was entitled to do by the proviso to S. 352, Criminal P. C., and no objection to this course was made at the time by the applicant, the proceedings of the Magistrate cannot be upset on this ground unless the applicant can show that he was in fact prejudiced by the case not being tried in open Court. AIR (Vol 23) 1936 Rang 471: 38 Cr LJ 48: 165 Ind Cas 596.

**——S. 352 — Examination of prosecution witness in jail — Propriety of.**

A Magistrate should not treat a prosecution witness as an accused person and record her evidence in jail instead of examining her in open Court at his own house if he found that more convenient. AIR (Vol 20) 1933 Oudh 265: 34 Cr LJ 1009: 10 OWN 1108: 145 Ind Cas 470 (DB).

——S. 352 — Atmosphere of a Criminal Court should be as scientific as that of hospital or lecture room — Jail is a place of corruption rather than of correction. 1931 MWN 1152.

**——S. 352 — Police officer.**

Police officer can be ordered to be absent from Court room — Accused objecting to his presence — Reasonableness of his fear is guiding factor and not the convenience of prosecution. 88 Ind Cas 362: 8 NLJ 95: 26 Cr LJ 1130: AIR (Vol 12) 1925 Nag 296.

**——S. 352 — Trial in jail, legality of.**

The whole trial held in a jail is not illegal when there is nothing to show that admittance was re-

fused to any one who desired it or that prisoner was unable to communicate with his friends or to counsel but such trials are usually undesirable. 21 PWR 1917, Cr: 18 Cr LJ 852: 41 Ind Cas 820. : AIR (V 4) 1917 Lah 311.

——S. 352 — **Criminal trial — Waiver by accused — Accused throwing himself on Court's mercy — Illegal gratification payment of, under compulsion.**

Except where the law expressly permits waiver the rights of an accused should not be held to be lost by his consent to a procedure or to admission of evidence which the law does not authorise. The prisoner on his trial can consent to nothing. It is the duty of the Magistrate and all Criminal Courts to follow the procedure prescribed by law, and the consent of the accused cannot be invoked against irregularity in procedure. Where after several witnesses were examined the case was transferred to another Magistrate the latter acted irregularly in convicting the accused on evidence partly recorded by the former Magistrate. S. 350, Cr. P. C., not being applicable to such a case, the irregularity could not be waived by the accused. (1906) 12 CWN 140 (143, 144) (DB).

——S. 352 — **Hearing Magistrate disposing of case in private room without hearing complainant or pleader.**

It is improper for a Magistrate to dismiss a complaint while sitting in his private room and without giving the complainant or his pleader an opportunty of being heard. (1906) 10 CWN 1086 (1087) (DB).

——S. 353.

1. **Scope and applicability.**
2. **Presence of the accused.**
3. **Personal attendance dispensed with.**
4. **Cross cases.**

### 1. Scope and applicability.

——S. 353 — **Recording of evidence in accused's presence — Rule and exceptions.**

S. 353, Cr. P. Code, provides that all evidence in enquiries and trials should, except as otherwise expressly provided, be taken in the presence of the accused. The exceptions to this rule are contained in Ss. 205, 428, 509, 510, 512 and 540-A, Cr. P. Code. For other exceptions to this rule reference may be made to the provisions of Ss. 32 and 33, Evidence Act and S. 17 of the Extradition Act. Subject to the exceptions enumerated above the rule enacted in S. 353 is imperative that all evidence in any enquiry or trial shall be taken in the presence of the accused. That being so, it is not sufficient under the section to read out to a witness his previous deposition in a former case and ask him if the statements made therein are true nor is it permissible to consider at all the evidence given in one case for the purpose of reaching conclusions in another case. The two cases should be tried independently and determined on evidence recorded in each case. AIR (V 38) 1951 Simla 178 : 4 AI Cr D 551 : 52 PLR 248 (DB).

——Ss. 353 and 205 — **Scope of**

Difference in the stages contemplated by Ss. 205 and 353. Sec. 205 deals with initial appearance of the accused before the magistrate while S. 353 deals with the presence of the accused during the trial or enquiry. Therefore, where though the magistrate does not issue Summons, he has power to entertain the application and grant the exemption from appearance. AIR (V 34) 1947 Mad 433 : (1947) 2 MLJ 142.

### 2. Presence of the accused.

——S. 353 — **Examination of ladies.**

Examination should be conducted in Court precincts where possible and the Magistrate who tries the case should himself see the witness. Ladies may be examined in chambers in the presence of the parties. AIR (V 23) 1936 Sind 221 : 30 S LR 366 : 38 Cr LJ 127 : 166 Ind Cas 45 (DB).

——S. 353 — **Examination-in-chief of prosecution witnesses in absence of accused — Cross-examination in his presence — Defect.**

It is an elementary principle of criminal trials that all evidence should be recorded in the presence of the accused and any breach of this rule vitiates the trial altogeher. Where, therefore, the examination-in-chief of the prosecution witnesses takes place in the absence of the accused, the defect vitiates the trial altogether, even though the cross-examination is held in his presence. AIR (V 22) 1935 Oudh 488 : 11 Luck 343 : 36 Cr LJ 1198 : 1935 OWN 922 : 157 Ind Cas 378.

——S. 353 — **Witness examined in the absence of the accused not deposing against him — Accused stating he did not wish to examine him — Examination in his absence — Trial if vitiated.**

Where a witness gave no evidence which was, or could be, used against an absent accused, and at a latter date that accused put in a statement that he did not wish to examine that witness the examination of that witness in the absence of the accused did not vitiate the trial. AIR (V 16) 1929 Mad 201 : 56 MLJ 216 : 52 Mad 355 : 29 MLW 108 : 1929 MWN 60 : 2 M Cr C 1 : 118 Ind Cas 274 : 30 Cr LJ 908.

——S. 353 — **Charge for two offences — Witnesses same — Evidence let in one case — Copies of the evidence recorded in the other — Procedure illegal.**

A person was charged with two offences namely under S. 307, I. P. C., and under S. 20, Indian Arms Act. The witnesses in the two cases were more or less the same. The trying Magistrate recorded the evidence of the witnesses in the case under S. 307 and copies of the evidence of these witnesses were placed on the record of the case under S. 20, Arms Act except the case of one witness who did not appear in the case under S. 307.

Held, that the procedure was illegal and the trial was vitiated. The general rule in the case of criminal trial is that there should be a separate trial with respect of each distinct offence. The object evidently is that the attention of the trial Court should be directed to the evidence relating to the charge under inquiry and irrelevant matter should be excluded. This object is not achieved but defeated by placing on the record mere copies of the statements of witnesses recorded during the course of a trial relating to another charge. AIR (V 15) 1928 Lah 34 : 9 LLJ 329 : 29 Cr LJ 521 : 109 Ind Cas 345.

——S. 353 — **Illegality.**

The provisions of S. 353 require that with certain exceptions the evidence should be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. A contravention of this express provision does not come within the description of error, omission or irregularity and the waiver of any objection by the accused's pleader on this score does not improve the case for the prosecution. AIR (Vol 15) 1928 Pat 143 : 6 Pat 691: 107 Ind Cas 530: 29 Cr LJ 260: 9 PLT 327: 9AI Cr R 450 (DB).

——S. 353 — **Absent witness.**

A and B were jointly tried. Prior to this another criminal proceeding was going on between B and the present complainant. The Magistrate admitted depositions of three witnesses in the previous proceedings in the present trial although A was not a party to those proceedings, at the

request of the accused counsel or at least with his consent.

Held, further, A was entitled to have had the evidence of the absent witnesses recorded in his presence under the provisions of S. 353, Cr. P. C. His conviction was based partially on testimony which was not evidence against him and since it was impossible to say how far the Magistrate was impressed by such testimony in the conclusion he arrived at, it was impossible to say that A has not been prejudiced by the illegal admission of evidence against him. AIR (Vol 15) 1928 Rang 284: 30 Cr LJ 736: 117 Ind Cas 241.

—— S. 353 — Three pesons were prosecuted and tried for murder of two persons in two trials. The defence evidence given by the accused in the first trial was, with their consent, treated as evidence in the second.

Held, that the defence evidence in the second trial was not duly recorded as required by S. 353, that the fact of the accused consenting to the irregularity would not give the procedure legal sanction and that the irregularity vitiated the trial. AIR (Vol 14) 1927 Lah 781: 28 Cr LJ 771: 104 Ind Cas 99 (DB).

——S. 353 — **Prosecution witnesses examined in the absence of the accused — No chance given for cross -examining them — Conviction invalid.**

Where important prosecution witnesses who have been examined in the absence of accused, were never called again, or examined in his presence, nor was he allowed any chance of cross-examining them and yet he had been convicted, Held, that the convicion was illegal. AIR (Vol 14) 1927 Oudh 353: 103 Ind Cas 836: 8 AI Cr R 566: 28 Cr LJ 756.

—— S. 353 — An order is wholly illegal if it is based on evidence which is recorded behind the back of a party at a time when he was not a party to the proceedings at all. AIR (Vol 12) 1925 Nag 457 : 89 Ind Cas 153 : 26 Cr LJ 1289.

—— **S. 353 — De novo trial — Witness not examined — Deposition in previous trial exhibited — Proceedings vitiated — Consent no cure.**

Where in a trial de novo the depositions of witnesses examined at the previous trial were exhibited without the witnesses being examined de novo, Held, there has been a deviation from the rule that "in cases of life no evidence is to be given against a prisoner but in his presence" and that such deviation will vitiate the proceedings. The consent of the accused will not cure the irregularity in the reception of evidence not taken in his presence at the trial. AIR (Vol 10) 1923 Mad 32: 43 MLJ 659: 69 Ind Cas 636: 16 MLW 697: 1922 MWN 644: 23 Cr LJ 748: 46 Mad 117 (DB).

——Ss. 353 and 537 — **Recording defence evidence in the absence of accused — Irregularity.**

S. 353 lays down that all evidence shall be taken in the presence of the accused, i. e., the evidence for the defence as well as for the prosecution. Contravention of this rule is not curable by S. 537. UBR (1912) 152 : 14 Cr LJ 287 : 19 Ind Cas 719.

3. **Personal attendance dispensed with.**

—— **Ss. 353, 366 and 540-A — Trial of accused in his absence — Legality — His attendance dispensed with on his own application.**

The trial of an accused person in his absence cannot be held to be null and void if his attendance is dispensed with by the Court on his own application and if he is represented by a pleader of his choice during such absence. AIR (Vol 35) 1948 A. 393: 1948 OA (HC) 102: ILR (1948) All 331: 1948 AWR (HC) 102: 1948 ALJ 130: 3 DLR (All) 5: 1948 ALW 207: 49 CrLJ 573(DB).

—— **S. 353 — Scope of the power conferred by — Difference in the stages contemplated by S. 205 and S. 353.**

S. 353 Criminal Procedure Code, by necessary implication confers a power on the presiding officer whether he is a Magistrate or a Sessions Judge or a Judge of the High Court to dispense with the personal attendance of an accused person during the trial of a case or enquiry. The presiding officer can entertain an application purporting to be made under S. 205, Cr. P. C. to dispense with the personal attendance of the accused. (1947) 2 MLJ 142 : AIR (V 34) 1947 Mad 433.

—— **S. 353 — Pardanashin lady.**

There is nothing in the Code of Criminal Procedure to prevent the Sessions Judge from dispensing with the attendance of the accused in a Sessions Trial. AIR(Vol 9) 1922 Mad 79: 42 MLJ 337: 66 Ind Cas 330: 1922 MWN 165: 15 MLW 550: 45 Mad 359: 30 MLT 346: 23 CrLJ 266.

—— **S. 353 — High Court — Power to dispense with attendance of accused in Court.**

Under S. 353, the High Court can dispense with the attendance of an accused, during his trial before the High Court, on the ground of his ill-health. (1912) 14 Bom LR 236: 13 CrLJ 464: 15 Ind Cas 96.

4. **Cross cases.**

—— S. 353 — Per Digby, J. — Mode of taking evidence is usually regarded as purely procedural matter. AIR (Vol 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 NLJ 16: 44 CrLJ 237: 205 Ind Cas 161 (DB).

—— **Ss. 353, 357 — Cross cases — Evidence in one relied upon in other, irregularity.**

Where two cross-cases are tried by the same Magistrate and the evidence recorded in one case is relied upon in the other, there in an irregularity and unless the accused has been prejudiced by reason of the evidence in the cross case being acted upon, the trial should not be set aside. AIR (Vol 29) 1942 Oudh 444: 1942 OWN 440: 1942 AWR 286: 43 CrLJ 781: 201 Ind Cas 791.

——S. 353 — **Cross-cases heard by same set of assessors and decided by same judgment — Legality of procedure — Evidence in one case imported into another — Effect.**

The procedure by which two cross-cases, tried separately, are heard by the same set of assessors and decided by the same judgment is not illegal; but the danger is that by adopting this method, the Courts are liable to mix up the evidence in the two records. If they do so, the procedure is irregular and it is difficult to hold that the irregularity is one that can be condoned by reason of absence of prejudice to the accused. It is almost inevitable that in such cases, there must be prejudice to the accused. AIR (Vol 27) 1940 Lah 466: 42 PLR 809: ILR (1941) Lah 66: 42 CrLJ 151 : 191 Ind Cas 332 (DB).

—— **Ss. 353, 537 — Cross cases— Evidence not recorded in accordance with S. 353 — Procedure followed at request of accused — Irregularity.**

There were two cross-cases. When the accused in the one case came to give their evidence in defence, they only asked their witnesses or some of them a few questions and then got their statements as prosecution witnesses in the cross-case brought on the record as their substantive statements in the case. In the case of one witness, what happened was that he made some statement in examination-in-chief and when he was cross-examined, the prosecution Counsel, after putting

a question or two, asked him whether he had made in the cross-case, the whole statement in cross-examination recorded in that case. That statement was then apparently brought on the record or at any rate utilised. The copies of statements in the cross-cases were not brought on the record and thus there was a contravention of S. 353, Criminal P. C. :

Held, that the procedure having been adopted at the request of the accused, there could not have been any prejudice to the accused. Though the procedure adopted by the trial Court was clearly irregular yet as the accused could not be heard to say that they were prejudiced by this procedure. The trial of the case could not, therefore, be held to have been so vitiated that the irregularity could not be cured by the application of S. 537 of the Criminal P. C. AIR (Vol 25) 1938 Oudh 253: 1938 AWR 96: 40 CrLJ 1: 1938 OWN 1064: 178 Ind Cas 169.

——S. 353 — **Cross-cases — Evidence for prosecution copied word for word in other case for defence and vice versa—Trial, whether vitiated.**

Where in two cross-cases, the evidence for the prosecution in one case has been recorded practically word for word as the evidence for the defence in the other and vice versa and the evidence has been copied so exactly that in places, the words "present accused" have been included where they are inappropriate because the evidence is taken bodily from the other case, there is a serious defect in the procedure vitiating the whole trial. AIR (Vol 24) 1937 Rang 100: 38 Cr LJ 641: 168 Ind Cas 713.

—— S. 353 — **Incidental reference to prosecution evidence in counter-case — Accused not prejudiced Failure of justice not caused — Trial, if vitiated.**

Where two cases are tried side by side and the Magistrate disposes them of together, it is generally not possible for him, while disposing of one case, to refrain from taking impressions from the evidence in the other case. Consequently, where a Magistrate, while discussing the accused's evidence makes an incidental reference to the prosecution evidence in the counter-case but no prejudice to the accused or failure of justice is caused thereby, the trial is not vitiated. AIR (V 21) 1934 All 651 : 35 Cr LJ 1415 : 3 AWR 458 : 151 Ind Cas 812.

—— S. 353 — **Observations in other cases — Caution to be exercised in applying them.**

It is always dangerous to take certain observations made in a certain case with reference to the particular facts of that case, and apply them indiscriminately to the facts of some other case that is being tried. AIR (Vol 21) 1934 Oudh 485: 11 OWN 1224 : 35 Cr LJ 1489 : 152 Ind Cas 85 (DB).

——S. 353 — **Counter-cases — Procedure to be adopted.**

With regard to the procedure to be followed at the trial of counter-cases, no hard and fast rule can be laid down. There is nothing irregular in the Judge trying each case to the conclusion and then pronouncing judgment in both. But (1) the trial must be separate, i. e.. before different assessors and separate judgments must be delivered, (2) the conclusions in each case must be founded on, and only on the evidence in each case and (3) the Judge considers himself unable to detach himself from extraneous considerations, a transfer may be necessary to deliver the Judge from this embarrassment. AIR (Vol 20) 1933 Mad 367 (2) : 37 MLW 101 : 34 Cr LJ 175 : 64 MLJ 150 : (1933) MWN 98 : 56 Mad 159 : 141 Ind Cas 539 (FB).

—— S. 353 — **Cross cases — Whether should be tried by same Court.**

There is no rule of law that all charges and counter charges must be tried by the same Court and in the circumstances of the case, the proper course for the Magistrate was to try the cross-case as a warrant case. AIR (Vol 19) 1932 Mad 502: (1932) MWN 634: 63 MLJ 101: 36 MLW 390: 33 Cr LJ 765: 139 Ind Cas 343.

——S. 355

——S. 355 — **Applicability — Summons case tried by Sessions Judge.**

Section 355, Cr.P. Code, prescribes the mode of taking and recording evidence "in summons cases tried before a Magistrate", not in such cases when tried before a Sessions Judge. AIR (V 37) 1950 Lah 123 : 51 Cr LJ 1022 : Pak LR (1950) Lah 209 (DB).

——S. 355 — Section 263, Criminal P. C. must be read as an exception to the general provision contained in S. 355 (1), Criminal P. C. AIR (V 27) 1940 Pat 272: 41 Cr LJ 283: 6 BR 337: 186 Ind Cas 312.

——Ss. 355, 356 — **Pressure of work, whether an inability within S. 356, sub-cl. 4, to making memoranda of evidence.**

It cannot possibly be conceded that a Magistrate is entitled to attend to other work during the hearing of a case, and to plead that other work as the reason of his inability to comply with the requirements of S. 353, Criminal P. C. with regard to the recording of evidence. This is an irregularity of much more than a technical nature; when a Magistrate is engaged in the trial of a case, it is his duty to give his undivided attention to it. AIR (V 24) 1937 Oudh 126 : 38 Cr LJ 150 : 1937 OWN 56: 166 Ind Cas 224.

——S. 355—There are certain offences which a Magistrate may try summarily under S. 260, Criminal P. C. If he does so try them, he is not required to make any memorandum of evidence at all. If he does not try them, under provisions of S. 260, but tries them in the ordinary course, he is required under S. 355, Criminal P. C. to make a memorandum of evidence. AIR (V 23) 1936 All 319 : (1936) ALJ 274 : 1936 AWR 375 : 37 Cr. LJ 710 : 162 Ind Cas 758.

——S. 355, **whether applies to summary trial under Chap. XXII.**

Section 355, Criminal P. C. has no application to summary trial of a case under Chap. XXII of the Code. AIR (V 22) 1935 Rang 106 : 13 Rang 225 : 36 Cr. LJ 892 : 156 Ind Cas 183 (DB).

——Ss. 355, 263, 264, 250 — **Summary case — Magistrate, if bound to record notes of evidence — Procedure.**

In summary cases the recording of evidence is governed by Ss. 263 and 264, Criminal P. C., and S. 355 has no application to summary cases. Consequently, a Magistrate trying a summary case is not bound to record any notes of his evidence and it is no objection to his decision under S. 250 that he destroyed any notes he did take of the original hearing. AIR (V 21) 1934 Bom 157 : 36 Bom LR 212 : 35 Cr. LJ 841 : 58 Bom 293 : 148 Ind Cas 1006 (DB).

——Ss. 355, 362, 488 — **Application for maintenance —Duty of Presidency Magistrate.**

In a case under S. 488, Criminal P. C. before a Presidency Magistrate, if it appears to him that he cannot finish the case at one hearing and he finds that he is obliged to put off the decision for a considerable time, he should, in the exercise of his wide discretion make notes so as to enable him at the time of judgment to remember what evidence has been recorded. In the same way, when he is

not able to give judgment immediately after hearing the evidence, he should give his reasons for his decision in such details as to make it clear to the parties as well as to the High Court that his judgment is based on a proper consideration of the evidence which has been given in the case.

Per Madgavkar, J.—In applications under S. 488, Criminal P.C., Presidency Magistrates are bound to record evidence in writing in the manner they record evidence in summons cases. AIR (V 18) 1931 Bom 142 : 32 Bom LR 1499 : 32 Cr. LJ 276 : 129 Ind Cas 339 (DB).

——**S. 355 —Scope —Ss. 263 and 264, Cr. P. Code.**

The provisions of Ss. 263 and 264, in cases in which these sections are applicable, are not controlled by S. 355. In cases in which Ss. 263 and 264 are applicable, the Magistrate is perfectly free to take such notes as he pleases, or, if he prefers, to take none at all and if he takes down any notes for his own use they form no part of the record and are the private property of the Magistrate. AIR (V 8) 1921 Cal 165, Diss from. AIR (V 14) 1927 All 124 : 49 All 261 : 8 LRA Cr. 12 : 25 ALJ 140 : 28 Cr. LJ 97: 99 Ind Cas 225: 7 AI Cr R 131 (DB).

——**S. 355—Applicability.**

Section 355 does not apply to offences coming under S. 261, Cl. (b). AIR (V 14) 1927 Bom 426 : 102 Ind Cas 345 : 29 Bom LR 710 : 28 Cr. LJ 537 : 8 AI Cr. R. 168.

——S. 355 — In a case of theft under S. 379 in which the value of property stolen does not exceed Rs. 50 the procedure at the trial is regulated by S. 355 and not S. 356. AIR (V 10) 1923 All 432 : 21 ALJ 276 : 4 LRA Cr. 87.

——**S. 355 — Summary trial.**

S. 355 does not require that the evidence of witnesses should be read over to them in a case triable summarily. AIR (V 10) 1923 Pat 157: 65 Ind Cas 552: 23 Cr LJ 120: 1 Pat LR Cr 159.

——**S. 355 — Signature.**

Where the substance of the evidence taken by the Magistrate was very careful and complete, but was not signed,

Held, that the error vitiated the trial. AIR (V 9) 1922 Pat 5: 65 Ind Cas 546: 3 Pat LT 322: 23 Cr LJ 114.

——S. 356.

**1. Scope and application.**
**2. Recording evidence — Duty of Court.**
**3. Evidence must be in the language of Court.**
**4. Evidence is part of record.**
**5. Irregularities.**

**1. Scope and application.**

**(a) General.**
**(b) Provisions mandatory.**

**(a) General.**

——S. 356 — The provisions of S. 356, Criminal P. C. apply only to cases to which the provisions of S. 355, Criminal P. C. do not apply. AIR (V 23) 1936 All 319: (1936) ALJ 274: 1936 AWR 375: 37 Cr LJ 710: 162 Ind Cas 758.

——**S. 356 — S. 145, Cr. P. Code.**

The proceedings under S. 145 are of a quasi civil nature and the procedure prescribed in S. 356 applies for taking evidence in such cases. AIR (V 12) 1925 Oudh 286: 83 Ind Cas 630: 26 Cr LJ 70.

**(b) Provisions mandatory.**

——**S. 356 — Non-compliance with provisions — Order of acquittal — If liable to set aside.**

If a Magistrate has not complied with the imperative provisions of S. 356, Cr. P. Code, an order of acquittal passed by him is liable to be set aside in revision. AIR (V 37) 1950 Lah 249: Pak LR (1950) Lah 396.

——S. 356 — Committal on memoranda of evidence in preliminary enquiry is prejudicial to the accused. (1934) MWN 1093.

——**S. 356 — Inquiries under Chap. XII, if governed by S. 356 — Nature of provisions of S. 356.**

Inquiries under Chap. XII, Criminal P. C. are governed by S. 356 and the Magistrate is bound to record evidence as prescribed in S. 356. The provisions of S. 356 are mandatory and the omission of the Magistrate to record evidence as prescribed in the section constitutes a material error sufficient to set aside the proceedings. AIR (V 19) 1932 Sind 145: 26 SLR 353: 34 Cr LJ 216: 141 Ind Cas 628 (DB).

——**Ss. 356 and 145 — Proceedings under S. 145 — Procedure.**

The provisions of S. 356, sub-s. (3) apply only to cases in which the evidence recorded under Sub-Section (1) is not recorded in the Magistrate's own hand. The provisions of sub-section (1) are imperative and non-compliance therewith cannot be condoned. A making of memorandum by the trying Magistrate as per terms of Sub-Section (3) is not a sufficient compliance. AIR (V 2) 1915 Cal 664: 16 Cr LJ 192: 19 CWN 124: 42 C. 381: 27 Ind Cas 672 (DB).

**2. Recording evidence — Duty of Court.**

——**S. 356 — Mode of taking evidence is procedure.**

Per Digby, J.— The mode of taking evidence is usually regarded as purely procedural matter. AIR (V 30) 1943 Nag 36: 1943 NLJ 16: ILR (1943) Nag 73: 44 Cr LJ 237: 205 Ind Cas 161 (DB).

——**S. 356 — Evidence — Recording of — Duty of Court.**

The tendency of Judges in the lower Courts to look upon themseves as mere recording machines and failing to take an intelligent interest in the cases before them or to ask necessary questions to clear up doubtful points disapproved. (1937) 166 Ind Cas 848: 17 Lah 541: 38 PLR 954: 38 Cri LJ 314.

——S. 356 — Ordinary deposition of witnesses should be recorded in their language. AIR (V 24) 1937 Oudh 425: 38 Cr LJ 169: 1937 OWN 37: 166 Ind Cas 280(2).

——S. 356 — It cannot be concluded that a Magistrate is entitled to attend to other work during the hearing of a case and to plead that other work as the reason of his inability to comply with the requirements of S. 355, Criminal P. C., with regard to the recording of evidence. This is an irregularity of much more than a technical nature; when a Magistrate is engaged in the trial of a case, it is his duty to give his undivided attention to it. AIR (V 24) 1937 Oudh 126: 38 Cr LJ 150: 1937 OWN 56: 166 Ind Cas 224.

——S. 356 — When the Magistrate did not allow more cross-examination than he considered necessary, the procedure held, was illegal and conviction set aside. 1936 ALJ 667: 1936 AWR 295.

**3. Evidence must be in the language of Court.**

——**Ss. 356, 357 — Under S. 357, Local Government empowering Court of Session to record evidence in English — S. 356(2), does not come into operation.**

Sub-section (2) of S. 356, Criminal P. C. must be governed by S. 357. Under S. 357 of the Code, the Local Govt. (Bengal) has empowered Courts of Session to record evidence in the English language. Hence if a witness happens to depose in English, there is no occassion to call in aid the provisions of S. 356 (2) to justify recording of that evidence in English and hence the requirements of S. 356(2) of an authenticated transla-

tion of such evidence in Bengali, cannot operate. AIR (V 30) 1943 Cal 32: ILR (1942) 2 Cal 136: 44 Cr LJ 386: 205 Ind Cas 459 (DB).

——S. 356 — Under S. 356(1) in a proceeding under S. 145 the evidence of each witness must be taken down in vernacular by Magistrate himself or under his superintendence. AIR (V 18) 1931 All 3: (1930) ALJ 1504: 32 Cr LJ 372: 53 All 172: 129 Ind Cas 269.

——Ss. 356 and 537 — **Vernacular record of evidence — Irregularity.**

When the Magistrate did not record the statements in vernacular the irregularity vitiates the trial. AIR (V 6) 1919 All 64: 17 All LJ 1146: 21 Cr LJ 28: 54 Ind Cas 172.

——Ss. 356 and 537 — **Recording of evidence — Illegality.**

The direction contained in S. 356 is mandatory. The recording of evidence, therefore, in a language of the Court is not merely an irregularity but an illegality which vitiates the trial. Even if it is an irregularity it is so grave and material that it cannot be cured by S. 537 of the Code. AIR (V 4) 1917 Pat 41(1): 19 Cr LJ 235: 43 Ind Cas 827.

**4. Evidence is part of record.**

——S. 356 — **Destruction — Revision.**

The record of the evidence if taken becomes part of the record of the case and must not be destroyed. Where the evidence was recorded and was subsequently destroyed, as the High Court was not in a position to form an opinion on the propriety of the conviction, the conviction in revision was set aside. AIR (V 8) 1921 Cal 165 : 61 Ind Cas 846 : 48 Cal 280 : 22 Cr LJ 462 (DB).

**5. Irregularities.**

——Ss. 356 and 537 — **Non-compliance — Irregularity, if curable.**

Where a Sessions Judge neither records the evidence himself nor makes a memorandum of the substance of what the witnesses deposed as required by S. 356(3), Cr P. Code, but the evidence has been taken down in the presence and hearing and under the personal direction and superintendence of the Judge, the irregularity is curable under S. 537, Cr. P. Code. AIR (V 37) 1950 Lah 123 : 51 Cr LJ 1022 : Pak LR (1950) Lah 209 (DB).

——Ss. 356, 537 — **Evidence — Depositions not taken down by Sessions Judge — Irregularity, if cured by S. 537.**

If a particular rule has been prescribed for achieving a particular object and that object has not been defeated by reason of the breach of that rule, it cannot be said that the accused had not a fair trial. Where, therefore, the Sessions Judge does not take down the depositions of witnesses in writing by himself or to make a memorandum of their substance as required by S. 356, cl. (3), Criminal P. C., but the evidence is taken down in the presence and hearing and personal direction of the Judge and the depositions read over and interpreted in the presence of the accused and their Pleader and admitted to be correct, the irregularity does not vitiate the trial but is cured by S. 537, Criminal P. C. AIR (V 21) 1934 Cal 636: 38 CWN 659: 61 Cal 399: 35 Cr LJ 1479: 152 Ind Cas 44 (DB).

——S. 356 — The mere fact that an imperative statutory rule of procedure has been broken is not enough to vitiate the trial of proceeding. The Courts should consider the gravity of the irregularity or the omission and whether it might have worked actual injustice to the accused. Where the Magistrate recorded the evidence in English but it appeared that the accused were not prejudiced thereby.

Held, that the non-compliance with S. 356 was a mere irregularity. AIR (V 18) 1931 All 3: 1930 ALJ 1504: 1931 Cr C. 3.

——S. 356 — Proceeding under S. 145, Criminal P. C. — Failure to record evidence in vernacular according to S. 356 is mere irregularity curable by S. 537. AIR (V 18) 1931 All 2: 32 Cr LJ 368: 129 Ind Cas 265.

——S. 356 — **Non-compliance — Irregularity.**

An error in procedure, which neither goes to the root of the trial nor prejudices the parties, does not vitiate the trial and is curable under S. 537. Where in an enquiry under S. 145, the Magistrate failed to comply with the provisions of S. 356, in recording evidence.

Held, that the error in procedure, did not vitiate the enquiry. AIR (V 18) 1931 All 2: 1931 Cr C 2.

——S. 356 — **Non-compliance — When there is no failure of justice.**

Where the evidence was recorded in the language of the Court by Magistrate's reader and the Magistrate did not make a memorandum of the statement of each witness, but he applied his mind to the evidence, and took considerable care in sifting the evidence and arrived at a correct conclusion,

Held, that in the circumstances the irregularity did not occasion a failure of justice and was covered by the provisions of S. 537, Cr. P. Code. AIR (V 15) 1928 Oudh 112: 4 OWN 1200: 29 Cr LJ 70: 106 Ind Cas 582: 9 AICr R 372.

——S. 357.

——S. 357 — Under S. 357, Local Govt. empowering Court to record evidence in English — Section 356 (2), Criminal P. C. does not come into operation. AIR (Vol 30) 1943 Cal 32: ILR (1942) 2 Cal 136: 44 Cr LJ 386: 205 Ind Cas 459 (DB).

——S. 357 — **Signature — Several judges.**

It cannot be contended that, where a Court is composed of more than one Judge, the deposition of a witness must necessarily be signed by all the Judges of the Court before whom the witness is examined, and that, if it is signed by only one of them that irregularity alone vitiates the deposition. AIR (Vol 15) 1928 Lah 125: 29 PLR 14: 107 Ind Cas 100: 29 Cr LJ 212: 9 AI Cr R 505.

——S. 359.

——S. 359 — **Questions disallowed in cross-examination, whether must be noted by Magistrate.**

Where the cross-examination is irrelevant and unnecessarily lengthy, Magistrates are justified in disallowing questions. If they note on the record each question which is disallowed, the procedure defeats its own object which is to get on with the case. When a question disallowed is important or there is reasonable doubt whether it should not be allowed, it may be useful for the Magistrate to note the question and his reasons for disallowing it. AIR (Vol 27) 1940 Lah 527: 42 PLR 589: 42 Cr LJ 284: 192 Ind Cas 347.

——S. 359 — **Child witness — Recording of his evidence.**

Where the guilt or innocence of the accused depends almost wholly upon the evidence of one small boy, it is desirable that the lower Court takes that evidence down in the form of question and answer. AIR (Vol 24) 1937 Pat 662: 18 PLT 857: 39 Cr LJ 156: 4 BR 165: 172 Ind Cas 780 (DB).

——S. 359 — Questions put and extracts included from depositions during trial — Whether should be included in record.

If questions are put and extracts included from depositions during the trial of a case, it must be obvious that evidence has been admitted by the Judge and it must form part of the record, whether technically speaking it has been properly tendered or not. AIR (Vol 21) 1934 Cal 169: 37 CWN 1061: 35 Cr LJ 601: 148 Ind Cas 172 (SB).

——S. 360.

1. Applicability and object.
2. Provisions — Mandatory.
3. Reading over of deposition.
4. Non-compliance with the section—Effect of.
5. Admissibility in evidence at subsequent trials — Non-compliance with the section.
6. Perjury.
7. Sufficient compliance.
8. Explaining discrepancies.
9. Interpretation.
10. Presumption about verification.
11. Objection.

1. Applicability and object.

——S. 360 (1) and (3) — Scope and object of — Procedure for reading and interpreting depositions of witnesses.

S. 360 (3) has to be read with S. 360 (1), and when so read, it is clear that the evidence of each witness is to be read over and interpreted to him after it is completed and not at the end of the day after all the witnesses have been examined. The object is to obtain an accurate record of his evidence and to give the witness an opportunity of correcting the words which the Magistrate has taken down. It is not to enable the accused or his Advocate to suggest corrections. The section is intended to protect the accused as well as witnesses. AIR (Vol 33) 1946 Nag 321: ILR (1946) Nag 946: 47 Cr LJ 918: 226 Ind Cas 377: 1946 NLJ 656 (DB).

——S. 360 — Applicability.

S. 360 applies to proceedings before Commissioners under Defence of India Act. AIR (V 15) 1928 Lah 125: 29 PLR 14: 107 Ind Cas 100: 29 Cr LJ 212: 9 AI Cr R 505.

——S. 360 — Intention.

The object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections. AIR (Vol 14) 1927 PC 44: 52 MLJ 585: 5 Rang 53: 54 IA 96: 25 ALJ 117: 31 CWN 271: 1927 MWN 103: 38 M L T 64: 4 O W N 283: 8 PLT 155: 100 Ind Cas 227: 28 Cr LJ 259: 6 Bur LJ 65: 29 Bom LR 813 : 45 CLJ 441 : 7 AI Cr R 362.

——S. 360 — Ch. 12, Cr. P. Code.

The parties to proceedings under Chap. 12 of Cr. P. Code are not persons referred to by the words "the accused" in S. 360 (1) of that Act. S. 360 has no application to proceedings under Chap. 12, and in such proceedings it is not obligatory on the Court to read over the depositions to the witnesses. (Suhrawardy, J. dissenting).

Meaning of the word "accused" discussed. AIR (Vol 12) 1925 Cal 1040: 86 Ind Cas 979: 41 CLJ 357: 29 CWN 475: 26 Cr LJ 915 (FB).

——S. 360 — Per majority of the F. B. — The provisions of S. 360, Cr. P. Code, apply to proceedings under S. 145, Cr. P. Code, to this extent at least, that as the evidence of each witness is completed it must be read over to him. But the parties to the proceedings are not "accused" and their attendance at the reading over is not necessary. AIR (Vol 12) 1925 Cal 822: 88 Ind Cas 714: 41 CLJ 479: 29 CWN 701: 52 Cal 721: 26 Cr LJ 1194 (FB).

——S. 360 — S. 117, Cr. P. Code.

The provisions of S. 360, Cr. P. Code, are applicable to proceedings under S. 117 when a person is called upon to show cause why he should not furnish security for good behaviour and failure to comply with the provisions of that section would vitiate the enquiry or trial which has resulted in an order under S. 118 of the Code.

Per B. B. Ghose, J. — There is considerable doubt whether S. 360, Cr. P. Code, applies to proceedings under Chap. VIII of that Code. AIR (Vol 12) 1925 Cal 720: 88 Ind Cas 856: 52 Cal 632: 41 CLJ 352: 26 Cr LJ 1240 (DB).

——S. 360 — Ch. 12, Cr. P. Code.

The word "accused" in S. 360, sub-S. (1) means a person over whom a Criminal Court is exercising jurisdiction. S. 360, Cr. P. Code, is applicable to enquiries held under Ch. XII. AIR (Vol 12) 1925 Cal 673: 86 Ind Cas 978: 52 Cal 437: 29 CWN 474: 26 Cr LJ 914 (DB).

2. Provisions — Mandatory.

——S. 360 — Provisions mandatory.

In a criminal trial the deposition of each of the prosecution witnesses was not read over or explained to him after it had been recorded but the depositions of the witnesses examined on the day were read to them after the close of the day's proceedings.

Held, that that is not sufficient compliance with the provisions of S. 360. S. 360 is mandatory and its provision must be strictly complied with. This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of the deposition. AIR (Vol 13) 1926 Cal 157: 42 CLJ 585: 30 CWN 644: 27 Cr LJ 375: 92 Ind Cas 837 (DB).

——S. 360 — Section is mandatory.

The provisions of S. 360 are mandatory and their intention is to protect the witnesses as also to help the accused. But the absence of a memorandum sub-joined to a deposition and stating the fact of compliance does not itself prove that the provisions of the section have not been observed. AIR (Vol 12) 1925 Pat 378: 86 Ind Cas 996: 26 Cr LJ 932: 4 Pat 231: 6 PLT 73 (DB).

——S. 360 — Construction.

S. 360 of the Cr. P. Code is mandatory. AIR (Vol 8) 1921 Pat 149: 62 Ind Cas 584: 2 PLT 380: 22 Cr LJ 568: 1921 PHCC 139.

——S. 360 — No charge can be based on it.

S. 360 of the Code of Criminal Procedure is mandatory. For the purposes of a prosecution under S. 193 depositions to which the procedure laid down in S. 360 has not been applied, cannot be properly used. S. 360 applies equally to accused as well as witnesses. AIR (Vol 8) 1921 Pat 149: 62 Ind Cas 584: 2 PLT 380: 22 Cr LJ 568: 1921 PHCC 139.

——S. 360 — Admissibility of record.

The provisions of S. 360 are mandatory. But non-compliance does not legally result in the total inadmissibility of the record of evidence and in the absence of any definite provision of law entailing inadmissibility, each case of non-compliance must be considered by the Court on its own merits and the document which purports to be the record can be admitted, but without the presumption laid down in S. 80 of the Evidence Act, and, therefore, open to question by the defence and appraisal by the Court. AIR (Vol 8) 1921 Sind 151: 86 Ind Cas 33: 26 Cr LJ 657: 16 SLR 255.

——S. 360 — Provisions mandatory.

The evidence of each witness ought to be read over to him as it is completed under S. 360 of the Code. This procedure must be strictly observed. It is not sufficient that each sentence is read out as it is being recorded. AIR (Vol 1) 1914 Cal 572: 63 Ind Cas 461: 22 Cr LJ 669: 3 UPDR (Lah) 78.

——S. 360 — Reading over of evidence to the witness.

The provisions of S. 360, Cr. P. C. are obligatory and not directory; the evidence given by a witness should in all cases be read over to him in the presence of the accused or his pleader. (1909) 36 C 955: 14 CWN 82: 10 Cr LJ 581: 4 Ind Cas 416 (DB).

3. Reading over of deposition.

(a) In presence of accused.
(b) When magistrate is taking other evidence.
(c) As and when each witness is closed.
(d) By witness himself.

(a) In presence of accused.

——S. 360 — Endorsement and party's presence — Right of accused to read over.

The provisions of S. 360 do not require that an endorsement or certificate should be given that the statement of a witness was read over to him. Further, the section does not lay down that the deposition should be read over to the witness within the hearing of the accused. The purpose of the section is to enable the witness to safeguard himself. If the accused or his pleader is doubtful as to the manner in which statements of a witness have been recorded or as to any point in the deposition, they would have a right to ask that the deposition should be read over to them, so that they can satisfy themselves as to what has been actually recorded, but that demand should be made at once. AIR (Vol 14) 1927 Pat 100: 99 Ind Cas 109: 8 PLT 166: 28 Cr LJ 77.

——S. 360 — Presence of accused.

If the accused is in attendance the evidence must be read over in his presence; it is only when the accused appears by a pleader that reading over of the evidence in the presence of the accused's pleader is sufficient. AIR (Vol 13) 1926 Cal 528: 93 Ind Cas 973: 30 CWN 336: 27 Cr LJ 509 (DB).

(b) When magistrate is taking other evidence.

——S. 360 — Reading over while magistrate is taking other evidence.

After depositions of some of the witnesses are completed, their being read over to the witnesses by the Bench Clerk and witnesses' signature taken while the Court is recording the examination of other witnesses, is a procedure not warranted by the law and it is not a compliance with the provisions of S. 360. AIR (Vol 13) 1926 Cal 423: 87 Ind Cas 840: 26 Cr LJ 1016 (DB).

——S. 360 — Reading over when magistrate is taking other evidence.

At the hearing of a case before the committing Magistrate, though the depositions of the witnesses were read over to them as required by S. 360, Cr. P. Code this was done while the other witnesses were being examined.

Held, that commitment should be quashed as this is not sufficient compliance with the provisions of S. 360, Cr. P. Code, since the object of that section is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded.

Held, further that this is of great importance in an enquiry with a view to commitment, since under certain circumstances the evidence then taken may be used as evidence against him at the trial. AIR (V 12) 1925 Cal 933 : 88 Ind Cas 1043 : 41 CLJ 393: 26 Cr LJ 1267 (DB).

——S. 360 — Reading over while Magistrate is taking other evidence.

Where while evidence of one witness is being read over to him the evidence of another witness is taken in the Court, there can be said to be no sufficient compliance with S. 360 and retrial should be ordered. AIR (V 12) 1925 Cal 831 : 88 Ind Cas 733: 52 Cal 499: 26 Cr LJ 1213 (DB).

——S. 360 — Time and occasion for reading deposition.

Deposition of a witness in criminal proceedings is none the less admissible because another witness was being examined while the deposition was being read to the accused. (1911) 9 MLT 325: 21 MLJ 411: 12 Cr LJ 44: 9 Ind Cas 262 (DB).

(c) As and when each witness is closed.

——S. 360, Sub-ss. (1) and (3) — Scope of — Deposition of witness read over or interpreted to him at end of day after all witnesses are examined — Section not complied with.

Sub-s. (3) of S. 360 has to be read with Sub-s. (1) thereof. The two sub-sections when read together make it clear that the evidence of each witness is to be interpreted to him after it is completed, when the impressions are fresh so that the accuracy of the record is better ensured. Taking down depositions of all the witnesses one after the other and then at the end of the day reading out the depositions or interpreting them to the witness, though in the presence of the accused, is not strict compliance with S. 360. AIR (Vol 33) 1946 Nag 321: ILR (1946) Nag 946: 47 Cr LJ 918: 1946 NLJ 656: 226 Ind Cas 377 (DB).

——S. 360 — Failure to read over as and when each witness is closed.

Where the witnesses were examined one after another until the midday adjournment, when their depositions were read over to them during the interval, and the depositions of the witnesses examined one after another in the afternoon were similarly read over to them in the afternoon after the close of the day,

Held, that the trial was vitiated by the irregularity. AIR (Vol 13) 1926 Cal 563: 94 Ind Cas 736: 53 Cal 129: 27 Cr LJ 688 (DB).

——S. 360 — Reading depositions of witnesses after the examination of all is over — Procedure is illegal and not only irregular. AIR (Vol 12) 1925 Mad 1206: 49 MLJ 421: 90 Ind Cas 659: 1925 MWN 795: 26 Cr LJ 1587: 49 Mad 71: 22 MLW 339.

——S. 360 — Depositions — Reading over of — Time for.

It is not necessary that the deposition should be read over after the examination in chief is over. There is nothing in S. 360 to indicate the exact time when the deposition should be read over. If the deposition is read over at the close of the cross-examination, it fulfils the requirements of the section which is to give an opportunity to the witnesses to explain or correct the statements made by them. AIR (Vol 5) 1918 Pat 448: (1918) Pat 13: 4 PLW 44: 19 Cr LJ 169: 43 Ind Cas 585.

(d) By witness himself.

——S. 360 — Where the witness reads himself.

Although the deposition of a witness is not read over to him, but the witness reads it himself still the deposition is legal evidence. AIR (Vol 13) 1926 Pat 232: 93 Ind Cas 884: 5 Pat 63: 7 PLT 396: 27 Cr LJ 484 (DB).

——S. 360 — Where the witness reads himself.

Reading the deposition by a witness himself and an admission by him that it was correct is not by itself a sufficient compliance. AIR (Vol 12) 1925 Cal 1120: 87 Ind Cas 103: 26 Cr LJ 951 (DB).

——S. 360 — Reading over of the evidence by witness himself.

Under S. 360 the witnesses whose statements have been recorded and the accused who is on trial are to be given an opportunity of knowing what has been recorded and a mere reading over of the evidence by the witnesses themselves cannot convey to the accused what has been recorded as the evidence given by the witnesses. Evidence not duly recorded as required by S. 360 cannot be used as the foundation of a conviction. AIR (Vol 12) 1925 Cal 782: 88 Ind Cas 602: 52 Cal 431: 29 CWN 650: 26 Cr LJ 1178 (DB).

——S. 360 — Depositions being read by witnesses themselves is not sufficient. They should be read over in accused's presence. Recording of the fact of the deposition having been read over is not imperative but desirable. AIR (Vol 12) 1925 Pat 723: 86 Ind Cas 991 : 6 PLT 493 : 26 Cr LJ 927.

**——S. 360 (1) — Deposition — Read by witness himself — Admissibility in evidence.**

It is not sufficient under S. 360 (1) of the Code to hand over a witness's deposition to him to read it over himself and such deposition is not admissible in evidence against him on a charge of perjury. AIR (V 1) 1914 Cal 789 : 42 Cal 240 : 18 CWN 1242: 15 Cr LJ 483: 24 Ind Cas 571 (DB).

**4. Non-compliance with the section — Effect of.**

**(a) Mere irregularity — Curable if failure of justice is not caused.**

**(b) Material irregularity — Not curable.**

**(a) Mere irregularity — Curable if failure of justice is not caused.**

——S. 360 — A mere omission or irregularity to comply with S. 360 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction. AIR (Vol 14) 1927 PC 44 : 52 MLJ 585 : 100 Ind Cas 227 : 31 CWN 271 : 25 ALJ 117: 1927 MWN 103: 38 MLT 64: 4 OWN 283: 8 PLT 155: 54 IA 96: 28 Cr LJ 259: 5 Rang 53: 6 Bur LJ 65: 29 Bom LR 813: 45 CLJ 441: 7 AI Cr R 362.

——S. 360 — An omission to comply with the terms of S. 360 only amounts to an irregularity which if a failure of justice has not been caused, will not necessitate the setting aside of the proceedings. However, Magistrates should follow the procedure strictly. AIR (V 14) 1927 All 764 : 7 AI Cr R 530 : 8 LRA Cr 78: 102 Ind Cas 210: 28 Cr LJ 514 (DB).

——S. 360 — When depositions are not read over to the witnesses as required by S. 360, Cr. P. Code, trial is not vitiated unless the omission to read over the evidence to the witnesses did in fact occasion a failure of justice. AIR (Vol 14) 1927 All 757: 8 AI Cr R 145: 8 LRA Cr 117: 28 Cr LJ 596: 102 Ind Cas 772.

——S. 360 — Non-compliance with the strict provisions of S. 360 only amounts to an irregularity and is cured by S. 537 of the Code. AIR (V 14) 1927 All 755: 8 AI Cr R 108: 8 LRA Cr 110: 102 Ind Cas 782: 28 Cr LJ 606.

——S. 360 — Any non-compliance with provisions of S. 360 which has not resulted in any failure of justice does not vitiate the trial. AIR (Vol 14) 1927 Cal 575 : 31 CWN 691 : 103 Ind Cas 799 : 28 Cr LJ 751: 8 AI Cr R 380 (DB).

**——S. 360 — Accuracy challenged — Retrial.**

Failure to read over the evidence of a witness does not necessarily vitiate the trial. Where the accuracy of the record had been challenged, and a statement of one of the witnesses which was relevant to the case was omitted from the record,

Held, that the proceeding must be quashed and a new trial ordered. AIR (Vol 13) 1926 Rang 78: 3 Rang 612: 4 Bur LJ 257: 27 Cr LJ 857: 95 Ind Cas 937.

**——S. 360 — Failure to comply — Irregularity.**

Per Maung Ba, J. — The sole object of this provision of the law seems to be to ensure the accuracy of the record. A proposition that failure to strictly comply with the provisions of S. 360 will under any circumstances vitiate a trial, no matter whether it has caused a failure of justice or not, is too broad. Failure to strictly comply with the provision of S. 360 should be considered as a mere irregularity curable by S. 537 if no prejudice is caused. Each case should be decided on its own merits.

Per Doyle, J. — Disobedience of S. 360 of the Code of Criminal Procedure is an irregularity not amounting to an illegality. The convenience of advocates or a desire to accelerate the disposal of a case are not sufficient reasons for disobeying a mandatory injunction. Expediency per se has never been regarded as a warrant for a deliberate violation of law. AIR (Vol 13) 1926 Rang 53: 94 Ind Cas 717 : 4 Bur LJ 213 : 27 Cr LJ 669 (DB).

**——S. 360 — Test for illegality.**

When the question arises, whether the violation of S. 360 will vitiate the trial, the test will be whether the accused has been prejudiced. If the accused is not prejudiced, nothing short of an illegal or irregular exercise of jurisdiction would vitiate the trial. AIR (Vol 12) 1925 Pat 414: 36 Ind Cas 459: 4 Pat 488: 3 Pat LR Cr 110: 6 PLT 154: 26 Cr LJ 811: 1925 PHCC 112 (DB).

——S. 360 — Omission to read over the evidence to the witness does not vitiate the order under S. 145. AIR (Vol 11) 1924 Pat 786: 76 Ind Cas 25: 5 PLT 237: 2 Pat LR Cr 108: 25 Cr LJ 89.

——S. 360 — The word "accused" in S. 360 does include persons against whom an order under S. 145 (1) has been drawn up and in the case of proceedings under Chapter XII the evidence must be read over to the witnesses. But the omission to do so cannot make the Magistrate's order based thereon ultra vires, though it may exempt the witnesses from prosecution for perjury. AIR (Vol 9) 1922 Pat 371: 65 Ind Cas 557: 3 Pat LT 291: 23 Cr LJ 125.

**(b) Material irregularity — Not curable.**

**——S. 360 — Scope — Strict compliance — Necessity.**

S. 360, Cr. P. Code, must be strictly complied with; in criminal cases it is dangerous to accept equivalents. AIR (Vol 33) 1946 Nag 321: ILR (1946) Nag 946 : 226 Ind Cas 377 : 47 Cr LJ 918 : 1946 NLJ 656 (DB).

——S. 360 — It is dangerous in cases of criminal law to accept equivalents, and except in cases where reading over to the witness would be absurd, as, for example, with a stone deaf person, the provision should be complied with. AIR (Vol 14) 1927 PC 44: 52 MLJ 585: 5 Rang 53: 54 IA 96: 25 ALJ 117: 31 CWN 271: 1927 MWN 103: 38 MLT 64: 4 OWN 283: 8 PLT 155: 100 Ind Cas 227: 28 Cr LJ 259: 6 Bur LJ 65: 29 Bom LR 813: 45 CLJ 441: 7 AI Cr R 362.

**——S. 360 — Illegal.**

Non-compliance with the provisions of S. 360 vitiates trial. AIR (Vol 13) 1926 Cal 423: 26 Cr LJ 1016: 87 Ind Cas 840 (DB).

**——S. 360 — Illegality.**

The non-compliance with the provisions of S. 360 vitiates the proceedings under S. 110. AIR (Vol 12) 1925 Cal 816: 88 Ind Cas 849: 26 Cr LJ 1233: 52 Cal 470 (DB).

——S. 360 — The violation of S. 360 vitiates the trial. AIR (Vol 11) 1924 Cal 889: 83 Ind Cas 905: 52 Cal 159: 28 CWN 968: 26 Cr LJ 201: 41 CLJ 224 (DB).

**——S. 360 — Illegality.**

The omission to comply with the provisions of

the section, is an irregularity which is not curable by the provisions of S. 537. AIR (Vol 11) 1924 Cal 182: 76 Ind Cas 961: 28 CWN 119: 38 CLJ 281: 25 Cr LJ 289 (DB).

——S. 360 — **Deposition of witness to be read out in presence of accused — Direction, if may be disregarded — Practice.**

The disregard at trials in the mofussil of the provisions of S. 360 of the Criminal Procedure Code which requires that the deposition of a witness should be read over to him in the presence of the accused or his pleader, condemned. (1909) 14 CWN 82 (85): 36 Cal 955: 4 Ind Cas 416 (DB).

### 5. Admissibility in evidence at subsequent trials — Non-compliance with the section.

——S. 360 — **Whether failure to comply with provisions would make evidence inadmissible under S. 288 (Quaere).**

Whether failure to comply strictly with the terms of S. 360 would make recorded evidence as not "duly recorded" within the meaning of S. 288 so as to prevent it from being admitted in evidence under that section. AIR (V 33) 1946 Nag 321: ILR (1946) Nag 946: 1946 NLJ 656: 47 Cr LJ 918: 226 Ind Cas 377 (DB).

——S. 360 — **Plea of accused if charge is based on the record.**

Any irregularity in recording the statement under S. 360 will not render it totally inadmissible in evidence. If a statement is properly recorded under S. 360 then under S. 80 of the Evidence Act a strong presumption arises that the deponent stated in his evidence what appears in the deposition. If however, S. 360 is not complied with, that presumption does not arise, and it is necessary for the person who alleges that the memorandum, which purports to be a deposition, but has been irregularly recorded, is accurate, to prove that it is accurate, if its accuracy is challenged. Where therefore a deponent is being tried for making a false deposition and where the provisions of S. 360 have not been strictly complied with, it would always be open for the deponent to say that it was unjust that he should be prosecuted for a perjured statement because if he had been given full opportunity he would have stated the truth in Court. But this sort of plea will not avail an abettor. AIR (V 8) 1921 Sind 16: 88 Ind Cas 449: 26 Cr LJ 1137: 18 SLR 342 (DB).

——S. 360 — **Effect of non-compliance — Non-compliance in general — Admissibility of subsequent trial.**

An omission to comply with the provisions of S. 360, Cr. P. Code, in recording depositions in a former case is a bar to the use of such deposition as evidence in any subsequent proceedings (e. g., trial under S. 211, Penal Code.) AIR (V 15) 1928 Cal 271 (DB).

——S. 360 — **Evidence Act, S. 145 — Admissibility of evidence — Subsequent trial.**

Depositions of the witnesses in a previous case in which there has been no compliance with the provisions of S. 360 may not possibly be used as evidence in the case in which they were made, but nevertheless they can be used on a subsequent occasion to contradict the witnesses under S. 145, Evidence Act. AIR (V 14) 1927 Pat 315: 104 Ind Cas 100: 6 Pat 478: 8 PLT 773: 8 AI Cr R 555: 28 Cr LJ 772 (DB).

——S. 360 — **Non-compliance with, effect of — Evidence Act, Ss. 91, 80 — Proof of statement.**

A deposition not read over to the deponent in accordance with S. 360, Cr. P. C., is not admissible in evidence and no other evidence is admissible in proof of the statements made therein. (1908) 12 CWN 845 (847) (DB.)

### 6. Perjury.

——S. 360 — S. 200, **Cr. P. Code.**

The principle underlying S. 360, cl. (i) should be made applicable on grounds of public policy to the substance of the examination of the complainant on oath, if the accuracy of the record of such examination is to be vouchsafed, particularly when it is to be utilized as a basis for a possible perjury in future; for it would be unsafe to use against a complainant what on the face of it purports to be only a substance and not the full version of his examination without some such sufficient and adequate safeguards as to its completeness and accuracy. AIR (V 13) 1926 Nag 141: 26 Cr LJ 1401: 89 Ind Cas 713.

——S. 360 — Deposition not read over to witness — Effect — Prosecution for perjury — Expediency. See AIR (V 33) 1946 Nag 38.

——S. 360 — Tribunal of 3 Commissioners under Defence of India Act — The mere circumstance that the deposition was signed by only one of the three Commissioners does not render it inadmissible in evidence. But the deposition not read over to a witness cannot be used against him on a charge of perjury. (1934) 36 PLR 527.

——S. 360 — **Effect of non-compliance — Failure to read over.**

When a deposition is not read over to witness in accordance with the requirements of the law under which it was taken, it cannot be used against him on a charge of perjury. AIR (V 15) 1928 Lah 125: 29 PLR 14: 107 Ind Cas 100: 29 Cr LJ 212: 9 AI Cr R 505.

——S. 360 — **Deposition not read over — Effect of.**

A Magistrate must read or have read over to witnesses their recorded depositions with a view to correct any errors which may require correction not only in the presence of the accused but also of his pleader, so that the latter may have an opportunity of checking their correctness. A statement not read over and corrected as aforesaid is not taken in accordance with law and therefore is inadmissible in evidence against the person making it. (1912) (1912) 1 UBR 123: 13 Cr LJ 569: 15 Ind Cas 985.

——S. 360 — **Irregularity in taking down a deposition — Conviction for perjury.**

A deposition not recorded in compliance with S. 360 is not always void. A conviction for perjury may be upheld if the deposition had been read over to the witness and acknowledged by him to be correct, though the reading over was not in the presence of the Judge and of the accused and of the pleaders for prosecution and defence as required by law. (1910) 34 Mad 141: 20 MLJ 943 : 8 MLT 117 : (1940) MWN 435 : 11 Cr LJ 482 : 7 Ind Cas 414.

——S. 360 — **Deposition of prosecution witness read only in the presence of one of several accused — Admissibility — Prosecution for perjury.**

Where a number of accused are tried together, the deposition of a prosecution witness read over to him in the presence of only the pleader of one of the accused is sufficient compliance with S. 360, Cr. P. C., to render the deposition admissible against the witness on a charge under S. 193, I. P.C. (1909) 13 CWN 942: 36 C. 808 (815): 2 Ind Cas 697: 9 CLJ 690 (DB).

### 7. Sufficient compliance.

——S. 360 — Reading over to a witness his evidence even after some days of his examination-in-chief but immediately after his cross-examination is sufficient compliance with S. 360. AIR (V 16)

1929 Cal 390: 122 Ind Cas 209: 31 Cr LJ 373: 33 CWN 664: 1929 Cr C 26 (DB).

——S. 360 — Accused absent.

When accused is absent, the reading over of a deposition in the presence of a pleader during the temporary absence of the prisoner represented by such pleader, is a sufficient compliance with the provisions of S. 360. AIR (V 15) 1928 Cal 27: 106 Ind Cas 545: 46 CLJ 368: 29 Cr LJ 49: 9 AI Cr R 228 (DB).

**8. Explaining discrepancies.**

——S. 360 — When can be made.

There is no provision of law which requires that a witness should be given an opportunity to explain discrepancies in his evidence. But it is open to a witness if he wishes to do so to explain at the time when the deposition is read out to him. AIR (V 16) 1929 Cal 390: 122 Ind Cas 209: 31 Cr LJ 373: 33 CWN 664: 1929 Cr C 26 (DB).

**9. Interpretation.**

——S. 360 — Deposition in Vernacular.

Sub-S. (3) of S. 360 does not require that the deposition recorded in English should be translated into the vernacular to a witness who has deposed in the vernacular, after having first been read over to him in English. If such had been the intention of the legislature, one would have expected the word "also" to stand between the words "shall" and "be interpreted" in sub-s. (3). AIR (V 15) 1928 Cal 27: 106 Ind Cas 545: 46 CLJ 368: 29 Cr LJ 49: 9 AICr R 228 (DB).

——S. 360 — Translating it to accused.

Where the accused does not understand either the language of Court or of the witness, there is no provision for the deposition of a witness being interpreted to the accused after it has been read over and interpreted to the witness. AIR (V 14) 1927 PC 44: 52 MLJ 585: 100 Ind Cas 227: 5 Rang 53: 54 IA 96: 25 ALJ 117: 31 CWN 271: 1927 MWN 103: 38 MLT 64: 4 OWN 283: 8 PLT 155: 28 Cr LJ 259 : 6 Bur LJ 65 : 29 Bom LR 813 : 45 CLJ 441: 7 AICrR 362.

**10. Presumption about verification.**

——S. 360 — Deposition — Verification that deposition has been read over to witness must be signed by presiding officer of Court — Presumption.

The essential feature in verifying that a deposition has been read over and interpreted to a witness is the certificate signed by the presiding officer of the Court. This is a statutory provision. Any initialling by the Reader prior to the signature by the Judge is unessential and is merely done for the Reader's own convenience or for the more certain satisfaction of the Judge but, when the Judge has certified that the evidence has been read over to the witness, it must be presumed until the contrary is shown that this has been done. AIR (V 25) 1938 Nag 487: (1938) NLJ 265: ILR (1939) Nag 338: 40 Cr LJ 388: 180 Ind Cas 577.

**11. Objection.**

——S. 360 — When to be raised.

If an objection is taken on the ground that the provisions of S. 360 have not been observed, that objection should be taken at once after there has been a neglect of the provisions of the law. Such objection cannot be raised for the first time in revision. AIR (V 14) 1927 Pat 100: 99 Ind Cas 109: 8 PLT 166: 28 Cr LJ 77.

——S. 361.

——S. 361 — Interpreter — Witness, if can be appointed his own interpreter.

When an accused person does not understand the language of the Court, according to the Code the services of an interpreter should be placed at his disposal so that he may know what the witnesses state and be in a position to suggest questions for cross-examination. By the very nature of things, the interpreter must be a person other than the witness whose evidence is to be interpreted, otherwise, the procedure of appointing an interpreter would be nothing but a farce. To allow a witness to interpret his own evidence is to place the accused entirely at his mercy. 49 Cr LJ 433: AIR (Vol 35) 1948 Lah 97.

——S. 361 — Translation.

An accused person is often in a much better position than his pleader to allow the drift of the evidence and it is obvious that he ought to be kept informed of what is being said. Where, therefore, certain witnesses at the original trial give evidence in English, translation of such evidence should be made, for the first two paragraphs of S. 361 are not mutually exclusive. AIR (Vol 15) 1928 Cal 27. Diss. from. 125 Ind Cas 253: 31 Cr LJ 327: 1930 Cr C 186: 31 MLW 336: 1929 MWN 898: 2 M Cr C 252: AIR (Vol 17) 1930 Mad 186.

——S. 361 — Interpreter — Who can be.

Interpretation of evidence to accused — Witness taking active part during proceedings previous to the trial and ever ready to depose in the Sessions Court as prosecution witness should not be chosen to be interpreter. 95 Ind Cas 469: 53 Cal 659: 30 CWN 696: 27 Cr LJ 805: AIR (Vol 13) 1926 Cal 922 (DB).

——S. 362.

——Ss. 362, 364, 365 and 366 — Offence of abduction.

S. 362, I. P. Code, merely defines what "abduction" is. It does not define an offence. Abduction becomes an offence only when it is accompanied by one of the three intentions described in Ss. 364, 365 and 366, I. P. Code. 51 Cr LJ 403: AIR (Vol 37) 1950 Assam 37 (DB).

——S. 362 — Appealable sentence — Duty of Magistrate to take down evidence which should form part of the record — Failure to record evidence — Trial, if vitiated.

Where an appealable sentence has to be awarded in a case, under S. 362 (1) of the Cr. P. C., the Magistrate is bound to take down the evidence of the witnesses and such evidence must form part of the record.

Where such procedure was not followed and when an application was made by the Advocate on behalf of the accused for a copy of the evidence he was informed that the evidence was not recorded as the case was being heard summarily.

Held, that the trial was bad and must be set aside and there should be a new trial. 49 Cr LJ 50 (2): AIR (Vol 35) 1948 Mad 102 (2): 60 LW 601 (1): 1947 MWN 612: (1947) 2 MLJ 307.

——S. 362 — Discretion of magistrate — Cases under Hoarding and Profiteering Prevention Ordinance — Duty to record evidence — Power of High Court to enforce recording of evidence.

S. 362, Cr. P. Code, is perfectly plain, and in cases which are not appealable a Presidency Magistrate need not record the evidence. The High Court cannot force a magistrate to record evidence unless he himself considers it necessary to do so, even in cases under the Hoarding and Profiteering Prevention Ordinance. (1947) 230 Ind Cas 34: 48 Cr LJ 479 (DB).

——Ss. 362, 439 — Summary trial — Revision — Interference.

Where the Presidency Magistrate has considered the matter and given full reasons for trying it summarily without recording evidence in full, his discretion to try it summarily must be taken to have been exercised judicially even though the case may have taken several hearings extending

over a long period and the High Court will not interfere in revision. AIR (Vol 31) 1944 Bom 129: 46 Bom LR 204: 45 Cr LJ 631: ILR (1944) Bom 382: 212 Ind Cas 409 (FB).

——S. 362 — **Recording evidence in appealable case, mode of.**

What the Appellate Court requires is not merely the opinion of the Magistrate regarding the evidence given by the witnesses but a correct record of the evidence given by the witnesses. It is for the High Court to decide whether the evidence corroborates or contradicts the other evidence and it can only decide this properly if it has the evidence before it.

Where, in recording the evidence-in-chief of two witnesses, the Magistrate while passing an appealable sentence merely records the words "corroborates P. W. No. 1" it does not amount to recording evidence in accordance with the provisions of S. 362, and the conviction cannot, therefore, be upheld. AIR (Vol 26) 1939 Cal 623: 41 Cr LJ 40: 184 Ind Cas 581 (DB).

——S. 362 — **Previous convictions of accused — Duty of prosecution to intimate to Magistrate to record evidence in such cases.**

Although the prosecution will be right in not informing the Magistrate about the previous convictions of an accused person, yet they may without impropriety, indicate to the Magistrate that they think that the case is one in which it is desirable that the evidence should be recorded. An intimation of that sort cannot prejudice the trained mind of a Magistrate and the difficulty of finding after he has tried the case, that he ought to have recorded the evidence can be saved. But, where the Magistrate does find that he has tried the case without recording the evidence and that a longer sentence than six months ought to be passed, his only course is to record the evidence afresh. AIR (V 22) 1935 Bom 37 : 36 Bom LR 1126 : 36 Cr LJ 527 : 154 Ind Cas 577.

——S. 362 — **Recording of evidence — Non-appealable case — Interference.**

Under S. 362, Criminal P. C., it is not necessary for a Presidency Magistrate to record evidence in cases which are not appealable and as long as the case falls within the cases excepted under S. 362 (4), the Magistrate is not bound to record the evidence, and the High Court has no jurisdiction to require him to do what the statute says it is not necessary for him to do. AIR (Vol 19) 1932 Bom 180: 56 Bom 200: 34 Bom LR 286: 33 Cr LJ 404: 137 Ind Cas 188 (DB).

——Ss. 362 (4), 488 (6) — **Proceedings under S. 488 — Recording evidence.**

The effect of S. 488, Sub-S. (6) and S. 362, Sub-S. (4) read together is that in a summons case tried by a Presidency Magistrate, it is not necessary to record the evidence. AIR (Vol 19) 1932 Bom 179: 33 Cr LJ 461: 34 Bom LR 276: 137 Ind Cas 27 (DB).

——S. 362 — A Presidency Magistrate is bound to frame a formal charge in an appealable warrant case. AIR (Vol 19) 1932 Cal 865: 36 CWN 791: 55 CLJ 448: 33 Cr LJ 828: 139 Ind Cas 755 (DB).

——S. 362 — Per Madgavkar, J.—In applications under S. 488, Criminal P. C., Presidency Magistrates are bound to record evidence in writing in the manner they record evidence in summons cases. AIR (Vol 18) 1931 Bom 142: 32 Bom LR 1499: 32 Cr LJ 276: 129 Ind Cas 339 (DB).

——S. 362 — **Applicability — Application under S. 488 — Presidency Magistrate — Recording of evidence.**

S. 362 is not confined to criminal offences; it applies to an application under S. 488 and so notwithstanding the words in S. 355, under Ss. 362 (4) and 488 read together. it is incumbent on Presidency Magistrates to record evidence in the manner laid down in S. 355. The Presidency Magistrate has no doubt a judicial discretion and where the case is disposed of in a single hearing, it may not be necessary to record the evidence in detail as the judgment will contain an abstract of the relevant evidence and his appreciation thereof. But where it appears he cannot dispose it of in a single day, the Magistrate should make notes for his own information and write a judgment with reasons for that decision. AIR (Vol 18) 1931 Bom 142: 32 Bom LR 1499 (DB).

——S. 362 — **Compliance.**

Magistrate must comply with the provisions of S. 362 (1) and (2) where, he deals with a case under S. 457 read with S. 511, I. P. C. and passes a sentence of one year's rigorous imprisonment though the sentence is to be served in the Dharwar Juvenile Jail. AIR (Vol 12) 1925 Bom 147: 85 Ind Cas 134: 26 Bom LR 1232: 26 Cr LJ 454 (DB).

——S. 362 — **Duty of Magistrate.**

It is the duty of the Magistrate in a case which comes within S. 362 to take a note of all the material facts whether they appear in the course of the examination in chief or in the course of cross examination. AIR (Vol 6) 1919 Cal 696: 22 CWN 834 : 28 CLJ 105 : 20 Cr LJ 24 : 46 C 411 : 48 Ind Cas 504 (DB).

——Ss. 362 and 537 — **Recording evidence as indirect narrative — Irregularity.**

If a Presidency Magistrate in contravention of the provision of S. 362 takes down the evidence in the form of indirect narration, the procedure is irregular. But the irregularity is such as will not vitiate the trial. AIR (Vol 5) 1918 Mad 1197: 18 Cr LJ 336: 38 Ind Cas 448.

——S. 362 — **Application to proceedings under S. 110.**

S. 362 does not apply to cases under S. 110 where it has become necessary to make a reference to the High Court. (1909) 9 CLJ 439: 13 CWN 318: 10 Cr LJ 122: 2 Ind Cas 651 (DB).

——S. 362 — **Evidence, recording of, in petty cases — Magistrate to use discretion — Retrial — Transfer.**

S. 362 of the Cr. P. C., does not mean that a Presidency Magistrate can act arbitrarily and record nothing by way of evidence in cases in which he is not bound to take down evidence in the manner prescribed in the section. In such cases the section merely gives him a discretion to take down the evidence or not, and the discretion should be exercised judicially in a reasonable spirit and not arbitrarily. There may be no necessity to record any evidence in 'morning cases.' But when a respectable person is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to be some record of evidence to enable him in case of conviction to go to the High Court. Even in a summary case a Magistrate is, bound to record a summary of the accused's examination and any statement in the course of that examination. (1907) 10 Bom LR 201 (202) (DB).

——Ss. 362, 411 — **Recording of evidence — Presidency Magistrate's duty — Warrant and Summons cases.**

A Presidency Magistrate is not bound to record evidence in any summons cases or warrant cases or cases in which enquiries have to be made as in summons cases or warrant cases, except where he may impose a fine exceeding two hundred rupees or imprisonment for a term exceeding six months. At the same time it is desirable that Presidency Magistrate should keep some record of

the statements made by witnesses or that their judgment should indicate what their statements are, so that the High Court as a court of revision may judge of the propriety or legality of the orders passed by them. The sentence mentioned in S. 362 is substantive sentence and sentence in default of payment of fine. (1906) 4 CLJ 408: 33 C 1036 (1039) (DB).

**——S. 362 — Appealable and non-appealable cases — Presidency Magistrate.**

It is only in appealable cases that Presidency Magistrates are required to duly record the evidence of witness. In other cases it is left to the discretion of the Magistrate to do so. The High Court cannot interfere with such discretion. (1904) 8 CWN 839 : 31 C 983 (988) (DB).

**——S. 363.**

**——Ss. 363 and 561-A — Public servant as witness — Court is free to make relevant comments on evidence — Remarks should not be based on conjectures.**

There is no "administrative law" in India which renders public servants immune from the ordinary judicial tribunals: no special privileges attach to their position when they come as witness or accused before a Court of law and the Court is free to comment on their evidence so far as such comments are relevant to the matter before it. But the Court must be very careful before it makes remarks which gravely affect honesty, reputation and good name of a witness before it, nonetheless so when that witness is served in the case in his capacity as a public servant and in course of the discharge of official duties. It is not fair to make such remarks mainly upon conjectures or surmises or when the Court is itself so uncertain of its "ground as to preface its remarks with the words "It may be . . . ." or "perhaps....." AIR (Vol 31) 1944 Sind 133 : ILR (1944) Kar 252 : 46 Cr LJ 88 : 215 Ind Cas 283 (DB).

——S. 363 — In commencing adversely upon a witness the Court must establish the particular fact warranting such criticism by proper evidence and not on conjectures only. (1939) 41 PLR 265.

**——S. 363 — Scope — Deposition.**

It is one thing to record remark about demeanour of witness and quite another to make or record remark or opinion about substance of deposition of witness — S. 363 makes incumbent on Magistrate the former but it does not entitle him to do the latter. AIR (Vol 15) 1928 Lah 975: 10 Lah 778 : 12 AI Cr R 96 : 30 Cr LJ 129 : 113 Ind Cas 321.

**——S. 363 — Refusal to refresh memory.**

When a Sub-Inspector does not remember what witnesses stated at the investigation and refuses to refresh his memory from the diaries, the Court should compel him to look into the diaries for the purpose of answering the question. AIR (Vol 11) 1924 Pat 829 : 2 Pat LR Cr 202.

**——S. 363 — Credibility of oral evidence — Demeanour of witnesses — Opinion of trial Judge conclusive.**

The opinion of a trial Judge as to the credibility of oral evidence adduced before him and as to the demeanour of witnesses, is almost conclusive and an appellate court ought not to transgress the same except in very exceptional cases. AIR (Vol 1) 1914 Lah 427 : 15 Cr LJ 203 : 125 PLR 1914 : 27 PWR 1914 Cr : 22 Ind Cas 987 (DB).

**——S. 364.**

See also, Criminal P. C., Ss. 164, 342 and 533.

1. **Scope and applicability.**
2. **Record of examination.**
2A. **Record of confession.**

See N. 1 and 2.

3. **Language of record.**
4. **To explain or add to his answer.**
5. **Shall be shown, read and interpreted to accused.**
6. **The record shall be signed.**
7. **"Shall certify under his own hand."**
8. **Examination under S. 263.**
9. **Non-compliance.**

1. Scope and applicability.

**——S. 364 — Confession — Deposition of Magistrate — Desirability of.**

In the matter of construction, Ss. 364 and 164 must be looked at and construed together. The practice of allowing Magistrates as witnesses to depose to confessions is improper and that where matters could be put on record and would be admissible when so put, there are the strongest reasons of policy for supposing that the Legislature designed that such matters should be available in that form and in no other. AIR (Vol 24) 1937 Nag 220 : 38 Cr LJ 462 : ILR (1937) Nag 268 : 168 Ind Cas 962 (DB).

——S. 364 — Section 26, Evi. Act is very wide in its terms and there is nothing in that section that limits its operations to Magistrates specially empowered under S. 164, Criminal P. C. The Evi. Act recognises that the confession other than one formally recorded under Ss. 164 and 364, Criminal P. C., can be admitted in evidence.

Where the accused was in the custody of the Police but he made the confessional statement in the immediate presence of the Magistrate, and the confession has been taken down without the precautions that such a confession made under Ss. 164 and 364 requires, there is nothing which prevents this statement being proved against him, but it cannot be proved in the same manner as if it were a confession recorded with all the required formalities under Ss. 164 and 364, Criminal P. C. AIR (Vol 24) 1937 Sind 212 : 38 Cr LJ 968 : 31 SLR 460 : 170 Ind Cas 827 (DB).

**——S. 364 — Accused in examination under S. 342, admitting guilt — Statement inculpating himself and other — Value of.**

Examination of accused under S. 342, in presence of other accused — Examination recorded according to S. 364 — Admission during course of examination inculpating himself as well as other accused — Admission is a confession proved within the meaning of S. 30, Evi. Act. AIR (Vol 18) 1931 Nag 169 : 27 NLR 163 : 32 Cr LJ 1222 : 134 Ind Cas 686.

**——S. 364 — Confession taken during enquiry.**

If an incomplete chalan is sent up and the evidence available is recorded by Magistrate the statement made by the accused is not a statement made under S. 164 of the Code but a statement recorded under S. 364 of the Code and the confession contained in the statement can be acted upon especially when it is corroborated by the conduct of the accused in pointing out the dead body. AIR (Vol 9) 1922 Lah 189 : 4 Lah LJ 225 : 23 Cr LJ 617 : 68 Ind Cas 841.

**——S. 364 — Section 164, Cr. P. C.**

Section 364, Criminal P. C., makes it obligatory upon the Magistrate who examines a person as an accused, to record the whole of the questions put to him and answers given by him. But statements whether in the nature of information given by witnesses about a crime or admissions by persons who have taken part in a crime, if made during the course of an investigation but before the commencement of trial or inquiry are governed by S. 164 which permits but does not compel

Quaere. — Where a Magistrate does not act under S. 164 or 364, Criminal P. C., and gives evidence to the effect that the accused pointed out a certain shop alleging that he had purchased crackers from that shop, whether only the statement or even the gesture of pointing out the shop is excluded from evidence. AIR (Vol 24) 1937 Lah 746 : 39 PLR 453 : 39 Cr LJ 262 : 173 Ind Cas 105.

——S. 364 — **Proof — Deposition by Magistrate.**

Positions of accused and Magistrates in recording their evidence and the desirability of the Magistrates coming and being examined as witnesses under S. 533, pointed out. (AIR (Vol 23) 1936 PC 253 (2) : 17 Lah 629 : 38 Bom LR 987 : 1936 OWN 505 : (1936) MWN 745 : (1936) ALJ 895 : 1936 AWR 620 : 37 Cr LJ 897 : 40 CWN 1221 : 17 PLT 594 : 71 MLJ 476 : 39 PLR 43 : 19 NLJ 214 : 64 CLJ 445 : 63 IA 372 : 44 MLW 583 : 163 Ind Cas 881.

**(Impliedly overrules AIR (Vol 20) 1933 Lah 716 (FB) ; AIR (Vol 23) 1936 Lah 247 ; 1881 Pun Re No. 2 (Cr) p. 36 ; AIR (Vol 21) 1934 All 81 (FB) ; AIR (Vol 9) 1922 Mad 401).**

——S. 364 — Recording of confession — Magistrate not strictly complying with the requirements of S. 364 :

Held, that the defect can be cured by examination of the Magistrate who recorded the confession. AIR (Vol 21) 1934 Lah 18 : 35 Cr LJ 1382 : 151 Ind Cas 745 (DB).

——S. 364 — **Deliberate non-compliance.**

When there has been a clear and deliberate non-compliance with Ss. 342 and 364, no question of prejudice arises. AIR (Vol 21) 1934 Nag 213 : 35 Cr LJ 1457 : 31 Nag LR 49 : 151 Ind Cas 778.

——S. 364 — **Questionnaire prepared by prosecution.**

A Magistrate made no attempt to examine the accused at all on the day on which he put in his original written statement. He accepted the Prosecuting Inspector's statement on that day that the statement was incomplete and allowed the Prosecuting Inspector two days in which to frame a questionnaire without attempting to do anything in the matter of elucidating any circumstances arising out of the original written statement either before or afterwards :

Held, that not only was the conduct of the Magistrate in contravention of the intention of S. 342, Criminal P. C., but in failing to put the questions on record and thereby preventing the Appellate and Revisional Court from determining the nature of the questions, there had been a contravention of S. 364, Criminal P. C., which enjoins that the whole of such examination (i.e., the examination conducted by a Magistrate) including every question put to the accused and every answer given by him shall be recorded in full. AIR (Vol 21) 1934 Nag 213 : 35 Cr LJ 1457 : 31 Nag LR 49 : 151 Ind Cas 778.

——S. 364 — **Non-compliance — Effect.**

In recording confessions, non-compliance with the provision of S. 364, Criminal P. C., is fatal to the prosecution case. AIR (Vol 21) 1934 Pat 651 : 1 BR 237 : 15 PLT 586 : 36 Cr LJ 447 : 153 Ind Cas 922.

——S. 364 — **How cured.**

Where a Magistrate while recording a confession of the accused fails to reduce into writing the questions and answers as required by S. 364. the defect is curable under S. 533 by examining the Magistrate as a witness provided no injury is caused to the accused as to his defence on the merits. Further the confession recorded by the Magistrate is itself admissible because the expression "such statement" in S. 533 refers to statement regarding which the Magistrate is called to give evidence. AIR (Vol 16) 1929 Bom 327: 31 Bom LR 565 : 31 Cr LJ 97 : 120 Ind Cas 350 (DB).

——S. 364—Where the Magistrate instead of asking separate questions to the accused puts him a long composite question, the examination of the accused is irregular and not in accordance with law. AIR (V 14) 1927 Lah 650 : 103 Ind Cas 847 : 28 Cr. LJ 767.

——S. 364 — The provisions of S. 364, Cr. P. Code are mandatory. Omission to comply with the provisions of S. 364 vitiates the trial. AIR ( V13) 1926 Cal 430 : 29 CWN 939 : 26 Cr. LJ 1032 : 87 Ind Cas 920 (DB).

——S. 364 — A record of the examination of the accused made under the provisions of S. 364 is obligatory and the absence of it will vitiate the trial. AIR (V 12) 1925 Cal 821 : 88 Ind Cas 860 : 52 Cal 446 : 26 Cr. LJ 1244 (DB).

——S. 364 — **Trial vitiated.**

Of an examination of the accused under S. 342 there was no record made and the only indication of it was to be found in the order sheet which contained the following remark:—"The accused declined to make any statement in this Court and on being asked whether they would adduce any evidence they replied in the negative."

Held, that the provisions of S. 364 were violated and that the trial being therefore vitiated should be held afresh. AIR (V 12) 1925 Cal 575 : 86 Ind Cas 345 : 41 CLJ 50 : 52 Cal 403 : 26 Cr LJ 761 (DB).

——S. 364 — **Record of statement by a Magistrate —Defect — Examination.**

A statement by an accused before a Magistrate who subsequently commits him to the sessions must be recorded in the form prescribed by section but any defect in it may be cured by proving it by the evidence of the Magistrate who recorded it. AIR (V 2) 1915 Lah 487: 44 PWR Cr 1914: 16 Cr. LJ 257 : 222 PLR 1915 : 28 Ind Cas 145 (FB).

——Ss. 364 and 533 — **Defect in recording confession — Curing of.**

In recording a confession the important thing is not the formal writing down by the Magistrate that the confession was voluntarily made but it should be made clear to a court in evidence that the recording Magistrate applied his mind to the question whether it was being voluntarily made. The procedure of the section of recording questions and answers in full is of no great importance and a confession is not vitiated by this want of formality. AIR (V 2) 1915 Lah 16 : 11 PWR 1915, Cr : 17 PR 1915 Cr : 16 Cr LJ 354 : 246 PLR 1915 : 28 Ind Cas 738 (DB).

——S. 366.

See also Cr. Pro. C., Ss. 265, 367, and 424.

1. **Scope and applicability.**
2. **Judgment, meaning of.**
3. **Judgment must be pronounced.**
4. **Delivery of judgment by successor or another magistrate.**
5. **Presence of accused.**
6. **Sentence or release to be after judgment.**
7. **Loss of records.**

**1. Scope and applicability.**

——Ss. 366 and 367 — Applicability to order under S. 145 (6). See (1948) 1 MLJ 396 : AIR (V 35) 1948 Mad 510.

——Ss. 366, 367, 537 — **Passing of sentence without recording judgment — Sentence announced orally**

**and judgment dictated subsequently — Defect in procedure held cured by S. 537.**

The requirements of Ss. 366 and 367, Criminal P. C. are not mere matters of form. The provisions of those sections are based upon good and substantial grounds of public policy, and whether they are or not, Judges must obey them and not be a law to themselves. The Court must record a proper judgment and date and sign it at the time of pronouncing it and passing the sentence. It is consequently illegal for a Court to pass a sentence without recording a judgment.

The sentence was announced orally on June 27, 1941 but the judgment was not dictated till July 6, 1941. Before the judgment was, however, signed by the Magistrate, he was murdered and, therefore, the shorthand notes of the judgment along with a typed judgment were placed on the record by the order of his successor. An appeal was presented to the Sessions Judge and an objection was raised first that the conviction of the petitioners was vitiated by the fact that the sentence was pronounced at a time when the judgment had not been actually recorded. The objection was, however, subsequently, waived and the conviction of the accused was upheld:

Held, that the fact that the accused themselves deliberately waived their objection to the procedure of the Magistrate may be taken to be tantamount to an admission that there had been no prejudice to them. Consequently, the defect in the Magistrate procedure was cured by S. 567, Criminal P. C. AIR (V 29) 1942 Lah 100 : 44 PLR 38 : 43 Cr LJ 619: 200 Ind Cas 106.

**——Ss. 366, 426 — Duty of Appellate Courts in writing judgments — Failure to comply with provisions of Code — Effect.**

Appellate Court should take care to write judgments which are in consonance with the provisions of the Criminal P. C., because by failing to do so, they encourage persons convicted to waste their money and the time of the High Court by making applications in revision. AIR (Vol 27) 1940 All 80: (1939) ALJ 1146: 1939 AWR 836: 41 Cr LJ 249: 186 Ind Cas 97.

**2. Judgment, meaning of.**

——S. 366 — A refusal by the Magistrate under S. 476, to file a complaint against an accused person, does not attract the applicability of the doctrine of autrefois acquit enunciated by S. 403, nor does it amount to judgment within the meaning of Ss. 366 & 369 which may not therefore be subsequently reviewed. AIR (Vol 17) 1930 Sind 315: 1930 Cr C 1147 (DB).

**——S. 366 — Contents — Discussion of evidence.**

The Court of first instance ought to help an appellate Court by making some definite statements, as for instance pointing out the exact evidence showing the complicity of each accused in the crime. AIR (V 11) 1924 Oudh 335 : 27 OC 32 : 25 Cr LJ 913 : 81 Ind Cas 529.

**——S. 366 — Judgment not pronounced — Charge of.**

A judgment written and signed but not pronounced is only an expression of opinion of the judge and can be changed before delivery. (1913) 11 ALJ 745 : 14 Cr LJ 562 : 21 Ind Cas 162.

**3. Judgment must be pronounced.**

**——S. 366 — Pronouncement of judgment not in accord with signed judgment — Validity.**

It is necessary for the Magistrate to write a judgment and to pronounce that judgment. A pronouncement that is not in accord with the signed judgment is not a pronouncement of the judgment and has no validity. AIR (V 29) 1942 Mad 668 : 55 MLW 517 : (1942) 2 MLJ 278 : 1942 MWN 581 : 44 Cr LJ 5 : 203 Ind Cas 461.

**4. Delivery of judgment by successor or another Magistrate.**

**——Ss. 366 and 537 — Judgment of Magistrate who heard the case and wrote the judgment pronounced in Court by a colleague of his — Curable irregularity.**

A Magistrate who had heard a case and written his judgment sent it to a colleague of his for pronouncing it in Court as he was under orders of transfer and was busy otherwise. On a question as to the legality of such a step held, strictly speaking, the Magistrate who heard the case and wrote the judgment himself should have delivered it in open Court. But what was done was only an irregularity cured by S. 537, Cr. P. C. AIR (V 35) 1948 All 339 : 49 Cr LJ 457 : (1948) AWR (HC) 43 : ILR (1948) All 222 : 1948 OA (HC) 43 : 1948 ALJ 96 : 1948 ALW 149.

**——S. 366 — Transfer of Magistrate.**

Judgment written by a Magistrate who has heard the evidence, after his transfer and handing over of his charge is invalid. (1942) 1942 NLJ 302.

**——Ss. 366 (5), 350 — Judgment signed — Successor can deliver it.**

Once a Magistrate signs the judgment written by him, he has delivered it within the meaning of S. 366 (3), Criminal P. C. and the trial is then over.

An accused remained absent on the date fixed for arguments, and the Magistrate then wrote out the judgment in the case convicting the accused and added a sentence at the end of it: "As the accused is not present to-day, and I am under orders of transfer, I keep this judgment on the file and leave this for any successor to pronounce it when the accused appears in Court". He then signed it and dated it:

Held, that the trial of the accused had been completed and all that remained was the execution of the judgment against him. Section 350, Criminal P. C. did not apply and the accused could not claim de novo trial. AIR (V 26) 1939 Lah 21 : 40 PLR 996 : ILR (1938) Lah 567 : 40 Cr LJ 288 : 179 Ind Cas 990.

**——S. 366 — Transfer of Magistrate after signing judgment — Pronouncement of judgment by successor.**

The trial of a criminal case terminates as soon as the Magistrate has determined the issue of guilt or innocence of the accused, the mere pronouncing of the judgment is not a part of the trial.

Where a judgment was signed and dated by a Magistrate but was not pronounced by him before his transfer and his successor, to whom the judgment was handed over, pronounced it:

Held, that there was no irregularity or illegality in the pronouncement of the judgment and the accused were not entitled to a de novo trial. AIR (V 20) 1933 Mad 251 (1) : 36 MLW 881 : 34 Cr LJ 117 : (1933) MWN 95 : 141 Ind Cas 174.

**——S. 366 — Sessions Judge delivering judgment after making over charge to successor.**

Where the judgment in a criminal case was delivered by the Sessions Judge a few hours after making over charge of his office to his successor:

Held, that he had no jurisdiction to deliver the judgment and consequently the convictions and sentences were bad and the case should be re-tried. AIR (V 19) 1932 All 582 : (1932) ALJ 753 : 34 Cr LJ 112 (1) : 141 Ind Cas 31 (DB).

**——S. 366 — Pronouncement of judgment written out by predecessor.**

The presiding officer delivering the judgment in a criminal case should be the officer who is respon-

sible for the reasons therefor and the Magistrate who makes himself responsible for the judgment must always be the Magistrate who, before delivery of the judgment, had considered the evidence on record and had also listened to the arguments, if any, on behalf of the accused.

Where, therefore, a Magistrate delivers a judgment written out by his predecessor the judgment is passed without jurisdiction and is liable to be set aside in revision. AIR (V 18) 1931 Cal 637 : 35 CWN 838 : 33 Cr LJ 60 : 134 Ind Cas 1265 (DB).

——**Ss. 366, 537 — Judgment prepared after transfer and pronounced by successor — Validity — Effect of consent.**

Where a Magistrate who was transferred from his Sub-Division to another Sub-Division after he had heard the evidence and arguments in a case, prepared the judgment after his transfer and sent it to his successor to pronounce in open Court with the consent of the parties:

Held, that the judgment was entirely without jurisdiction and the defect could not be cured by invoking the provisions of S. 537, Criminal P. C. AIR (V 18) 1931 Pat 386 : 12 PLT 647 : 32 Cr LJ 1224 : 134 Ind Cas 625.

——**S. 366 — Bench Court — Judgment — Writing and delivering of.**

Section 366 requires that the judgment of a criminal Court should be pronounced by the Court. When the members composing the Bench leave the Bench, there is no Court at all. The mere fact that the presiding officer sits in the Court-room and writes his judgment, will not make that a Court. The mere delivery of a judgment may be let to the presiding officer by the other members of the Bench, but they must be aware of what the judgment contains. Judgment prepared by the presiding officer after other members left the Bench, is not a proper judgment at all. AIR (V 15) 1928 Mad 1172 : 55 MLJ 576 : 28 MLW 498 : 1928 MWN 785 : 11 AI Cr R 265 : 1 M Cr C 298 : 29 Cr LJ 973 : 52 Mad 237 : 112 Ind Cas 61.

——**Ss. 366 and 367 — Judgment delivered.**

A judgment is held to be delivered under Ss. 366 and 367 when (1) it is written (2) signed (3) dated (4) pronounced in open Court. The last three steps must take place on the same occasion. AIR (V 4) 1917 Mad 340 : 40 M 108 : 3 LW 46 : (1916) 1 MWN 372 : 17 Cr LJ 166 : 32 MLJ 81 : 33 Ind Cas 646 (DB).

**5. Presence of accused.**

——**Ss. 366 and 537 — Delivery of judgment in the absence of accused who had already appeared — Curability.**

A Magistrate acts illegally in pronouncing judgment in the absence of the accused who had already appeared and were appearing from day to day. The law requires that the accused persons must be notified or the date of judgment and that the judgment must be delivered in their presence unless their presence has been dispensed with. But in view of S. 366 (4) and S. 537, a judgment shall not be invalid by reason of the above irregularity. AIR (V 37) 1950 Kutch 41 : 51 Cr LJ 1062.

**6. Sentence or release to be after judgment.**

——**S. 366 — Pronouncing before writing — Failure of justice.**

Though it is desirable that Magistrate should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily vitiate the trial, unless such omission has in fact occasioned a failure of justice. 14 All 242 & 27 Mad 237, Not Foll. AIR (V 17) 1930 Rang 77 : 7 Rang 370 : 1930 Cr C 203 : 30 Cr LJ 1166 : 120 Ind Cas 225.

——**S. 366 — Irregularity.**

Where after a long trial, the assessors unanimously gave their verdict of not guilty and the Judge also agreeing with them told the accused that they were acquitted and in fact gave his full reason for the acquittal at another time and it ended there,

Held, assuming that the method adopted by the Judge in this case is not a full compliance with Ss. 366 and 367 it is a mere irregularity and it is not open to the High Court to set aside the acquittal on that ground alone. AIR (V 9) 1922 Mad 502 : 43 MLJ 369 : 45 Mad 913 : 16 MLW 413 : 1922 MWN 579 : 31 MLT 342 : 23 Cr LJ 583 : 68 Ind Cas 615 (DB).

——**Ss. 366, 368 — Delivered after conviction and sentence — Illegality.**

Where in a criminal trial the judgment was delivered after conviction and sentence.

Held, that this is a violation of the provisions of Ss. 366 and 367, Cr. P. C., and vitiates the conviction and sentence. (1903) 27 M 237 (238) : 2 Weir 240 (DB).

**7. Loss of records.**

——**S. 366 — Loss of material records before pronouncing judgment, effect of — Inherent power of Court to restore lost records.**

Section 366, Criminal P. C. does not validate a judgment only, if the records of the case are in the Court house when the judgment is pronounced and a Court has always the inherent power to restore any judicial document when it may be lost. (1913) 14 MLT 317 : 25 MLT 445 : (1913) MWN 862 : 14 Cr LJ 595 : 38 M 498 : 21 Ind Cas 467.

——**S. 367**

See also Criminal P. C., Ss. 265, 366, 424, 537 and 561-A.

(1) **Scope and applicability.**
(2) **Contents of Judgment.**
(3) **Appreciation of Evidence.**
(4) **Basis of Decision.**
(5) **Suspicion.**
(6) **Untrustworthy Evidence.**
(7) **Benefit of Doubt.**
(8) **Remarks and Strictures.**
See also Cr. P. C., Ss. 439 and 561A.
(9) **Dictation of Judgment.**
(10) **Presiding Officer.**
(11) **Signature of presiding officer.**
(12) **Death Sentence.**
(13) **Trial by Jury.**
(14) **Defects in procedure.**
(15) **Judgment — Language of.**
(16) **Non-compliance with the provision — Effect.**

**1. Scope and applicability.**

——**S. 367 — Trial by Judge with assessors — Passages under heading "General Remarks". — If part of judgment.**

S. 367, Cr. P. Code, is not exhaustive. It merely states what must be found in a judgment. In a trial by a Sessions Judge with assessors, the passages under the heading "General Remarks" form a part of the judgment. AIR (Vol 33) 1946 Sind 121: ILR (1946) Kar 268: 223 Ind Cas 190: 47 Cr LJ 374 (DB).

——S. 367 — Provision is made in S. 367 (3), for judgment to be passed in the alternative on separate or alternative charges framed under S. 236, or which might have been framed under that section. AIR (Vol 32) 1945 Cal 421: 49 CWN 392: 47 Cr LJ 193: 221 Ind Cas 499 (DB).

**——S. 367 — Applicability of, to appeals disposed of summarily.**

Section 367, Criminal P. C., has no application to appeals and specifically to an appeal disposed of summarily whether by a District Magistrate or a Sessions Judge or a High Court. AIR (Vol 27) 1940 Oudh 369: 41 Cr LJ 711: 1940 OWN 594: 1940 AWR 255: 15 Luck 662: 189 Ind Cas 83 (DB).

**——S. 367 — Section does not lay down particular form for judgment — Irregularity, if curable.**

Section 367 does not lay down any particular form which a judgment must take. It is enough if the points, the decision and the reasons therefor can be gathered from the body of the judgment itself. AIR (Vol 24) 1937 Nag 122: ILR (1936) Nag 217: 39 Cr LJ 370: 173 Ind Cas 844.

**——Ss. 367 and 421 — Appeal — Summary dismissal — Judgment.**

A court when dismissing an appeal summarily under S. 421, Cr. P. Code, need not write a judgment as under S. 367. Only the reasons for rejection should be recorded. AIR (Vol 1) 1914 All 311: 36 All 496: 12 ALJ 850: 15 Cr LJ 512: 24 Ind Cas 600.

**2. Contents of judgment.**

**(a) General.**
**(a—1) Points for determination.**
**(b) Decision.**
**(c) Reasons.**
**(d) Appellate judgments.**
**(e) Irregularities in judgments.**
**(f) Matters to be avoided.**
**(g) Offence and section.**
**(h) Several accused.**

**(a) General.**

**——S. 367 — Judgment — Contents — Reasons — Necessity.**

The judgment must contain the points for determination, the findings on them and the reasons for the findings; otherwise it is no judgment in law. The giving of reasons for the decision arrived at is necessary to demonstrate that justice is done. The parties have to be satisfied that the judge had applied his mind to the facts and arguments in the case before coming to the decision. 1950 ALJ 669.

**——S. 367 — Judgment — Contents — Reference to politics — Propriety.**

Although there should be no interference by Judges or Magistrates in politics, nevertheless where the case of the prosecution is that the motive for the crime was a political one and that the man who was murdered and the accused charged with participating in the conspiracy to murder him were both prominent politicians it would not be irrelevant or improper for the Court to refer to consider and to remark on this fact. AIR (V 33) 1946 Sind 121: ILR (1946) Kar 268: 233 Ind Cas 190 : 47 Cr LJ 374 (DB).

**——S. 367 — Appellate judgment — Essentials for legality.**

No judgment of a Court other than a High Court which purports to dispose of an appeal under S. 423, Criminal P. C., is a legal judgment unless it contains the 3 requirements of S. 367 read with S. 424, namely: (1) a statement of the point or points for decision; (2) the decision thereon; and (3) the reasons for the decision. AIR (Vol 32) 1945 Nag 116: 1945 NLJ 87: 46 Cr LJ 595: ILR (1945) Nag 441: 219 Ind Cas 320.

**——S. 367 — Recording orders.**

The Magistrates and Judges are required to record their orders in writing. It would be against public policy to call them as witnesses to determine what they meant by their judgments and orders. AIR (Vol 31) 1944 Nag 274: ILR (1944) Nag 511: 1944 NLJ 247.

**——S. 367 — Judgment should commence with statement of facts.**

The judgment should commence with a statement of the facts and not with circumstances which might be held to provide a motive for the offence. AIR (Vol 22) 1935 Nag 81: 17 NLJ 274.

——S. 367 — Magistrate should ordinarily write regular judgments except in very simple cases. (Judgment in a trial under S. 408, I. P. C. criticised.) AIR (Vol 22) 1935 Pat 495 : 1 BR 878 : 36 Cr LJ 1375: 158 Ind Cas 332.

——S. 367 — The practice of writing long judgments with a number of repetitions is to be deprecated, the judgment should set out the effect of the evidence fully, the accused's case, the attacks which are made upon the evidence by either side, the Judge's own criticisms of it and the reason for his conclusions. AIR (Vol 20) 1933 Mad 233: 64 MLJ 88: (1932) MWN 801: 37 MLW 220: 34 Cr LJ 481: 56 Mad 231: 143 Ind Cas 46.

**——S. 367 — What it should contain.**

The judgment of any appellate Court other than a High Court shall, among other things, contain the point or points for determination, the decision thereon, and the reasons for the decision. AIR (Vol 13) 1926 Sind 275: 20 SLR 82: 27 Cr LJ 343: 92 Ind Cas 855 (DB).

——S. 367 — In view of the provisions of S. 424 an appellate Court's judgment must comply with the provisions of Section 367, Criminal Procedure Code. AIR (Vol 12) 1925 Cal 266: 81 Ind Cas 437: 25 Cr LJ 901 (DB).

**——S. 367 — Dismissal under S. 423.**

Where an appeal is dismissed under S. 423, the appellate Court is bound to write a judgment stating the points for determination and the reasons for its decision. AIR (Vol 12) 1925 Lah 644: 89 Ind Cas 516: 26 Cr LJ 1380.

——S. 367 — Appellate Court is bound to record a proper judgment setting forth the points of determination, the objections of the appellant, his decision thereon, and the reasons for his decision. AIR (Vol 9) 1922 Pat 157: 66 Ind Cas 325: 3 Pat LT 203: 23 Cr LJ 261.

**——S. 367 — Criminal trial — Judgment — Independent opinion of Magistrate.**

An accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and contain the particulars required by S. 367 of the Cr. P. Code. A judgment following the opinion of a subordinate Magistrate is bad in law. AIR (Vol 6) 1919 Pat 290: 20 Cr LJ 444: 51 Ind Cas 268.

**(a-1) Points for determination.**

**——S. 367.**

The intention of S. 367, Criminal P. C., is that the Magistrate should direct his own attention to every material question of fact or law to which he would be required to apply his mind. A question so framed, that it would apply equally well to any criminal charge which could ever be preferred, does not serve any useful purpose. AIR (Vol 19) 1932 Sind 180: 34 Cr LJ 163: 141 Ind Cas 537 (DB).

**(b) Decision.**

**——S. 367 — Credibility — Judicial determination of a case must proceed on evidence on record — Statements made at Bar, not a satisfactory way of dealing with case — Government not excepted.**

The more satisfactory way of dealing with a case is to present all the relevant facts in properly drawn up affidavits sworn to by the officers concerned, or such other officers who can give first-hand information. To deal with a case judicially on statements made at the Bar is not a very satisfactory method of dealing with a case; judicial

determination of a case must proceed on evidence on record. The Govt. stands on the same footing as any other litigant in a Court of Justice and should, therefore, present its case in the ordinary way known to the Courts on evidence properly brought on record, at the proper time, so that the party adversely affected by that evidence should have a full opportunity of adducing evidence to counter the evidence given on behalf of the Crown. AIR (Vol 32) 1945 Pat 44: 23 Pat 968 (FB).

——**S. 367 — Motive for prosecution, if immaterial.**

The Court is not concerned with the motive for the prosecution. AIR (Vol 32) 1945 Sind 106: ILR (1945) Kar 31: 46 Cr LJ 674: 220 Ind Cas 178.

——**S. 367 — Judgment should set out what evidence is.**

Judgments ought to set out what the evidence is and not merely the conclusion of the Judge. AIR (Vol 30) 1943 Cal 612: 45 Cr LJ 170: 210 Ind Cas 17 (DB).

——S. 367 — It is imperative that if, in any case in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal. The provisions of S. 258 (1), Criminal P. C., are mandatory. Mere mention of fact of acquittal in an order sheet is not enough. The order sheet is no substitute for the judgment. AIR (Vol 28) 1941 Oudh 575: 1941 AWR 245: 1941 OWN 889: 42 Cr LJ 633: 194 Ind Cas 872.

——**S. 367 — Word 'proof' should be avoided in interlocutory orders.**

Although there is a technical use of the word 'proof' which is practically synonymous with 'evidence', yet in an interlocutory order, the expression should be avoided as the fact cannot be held, to be 'proved' until it comes to the final adjudication. AIR (Vol 25) 1938 Lah 706: 40 Cr LJ 79: 178 Ind Cas 507.

——**S. 367 — Citations.**

Commentaries, of course, are very useful things, but they must be used with discretion and with discrimination and the mere citation of a long list of authorities does not of itself make a bad judgment a good judgment or correctly conclude the matter. AIR (Vol 23) 1936 Sind 237: 38 Cr LJ 133 (2): 30 SLR 327: 166 Ind Cas 83 (2) (DB).

——**S. 367 — Findings must be precise and definite.**

Trial Courts are expected to record findings with definiteness and precision and not to indulge in airy generalities. AIR (V 21) 1934 All 714 : 35 Cr LJ 1289 : 3 AWR 564 : 151 Ind Cas 350.

——**S. 367 — Evidence on both sides interested.**

Where the evidence on both sides is of an interested nature, the truth of either version and the guilt of the accused must be judged in the light of surrounding circumstances. AIR (V 20) 1933 Lah 1055 : 35 Cr LJ 470 : 147 Ind Cas 722 (DB).

——S. 367 — In proceedings under S. 110, Criminal P. C., the Magistrate should consider evidence regarding the general repute of the persons accused. He must also consider whether this evidence is to be regarded as in any way rebutted by the evidence of repute adduced on behalf of the accused, and must discuss in the judgment how this evidence affects each individual among the accused. AIR (V 20) 1933 Pat 112 : 34 Cr LJ 476 : 146 Ind Cas 934.

——S. 367 — If in a case of rioting with common intention of taking possession of complainant's land, the Magistrate does not decide as to possession on the ground that another case under S. 145 is pending and acquits the accused, his decision ought to be set aside. AIR (V 13) 1926 Cal 945 : 96 Ind Cas 527 : 53 Cal 471 : 27 Cr LJ 975 : 7 AI Cr R 55 (DB).

——S. 367 — For a conviction in a criminal case it is not enough if the prosecution story is stronger than the defence version. There must be a definite finding as to the guilt of the accused. AIR (V 4) 1917 Cal 792 : 21 CWN 550 : 18 Cr LJ 698 : 40 Ind Cas 698 (DB).

——**S. 367 — Offence under special Acts, proof of — Strict proof required.**

In the case of an offence under a Special Act, the guilt of the accused ought to be strictly proved. (1905) 2 ALJ 411 (412).

——**S. 367 — Suspicion — Absence of evidence — Conviction on suspicion — Legality of.**

Where there is no evidence on record a conviction based on suspicion is illegal. (1902) 4 Bom LR 425 (426) (DB).

——**S. 367 — Criminal trials — Prosecution story taken as a whole false — Accused entitled to an acquittal, even if parts of the story be true.**

Where the prosecution story, taken as a whole, is false, the accused is entitled to an acquittal even if portions of the prosecution story be true. (1902) 6 CWN 380 (382) (DB).

**(c) Reasons.**

——S. 367 — Trial with aid of assessors — Judge merely stating in judgment that he agrees with assessors without giving his reasons for decision is no compliance with S. 367, Criminal P. C. AIR (V 25) 1938 Cal 551 : 42 CWN 896 : 39 Cr LJ 835: 177 Ind Cas 29 (DB).

——**S. 367 — Judgment not complying with requirements — Effect.**

Section 367, Criminal P. C., requires that a judgment of a Criminal Court must contain; (1) the points for decision, (2) the decisions thereon, and the reasons for the decision.

Where a judgment stated, "I have gone through the record. The conviction under S. 419, I. P. C., is sound. The fine inflicted of Rs. 30 only is very light. I see no reason to interfere and dismiss the appeal:"

Held, that this was not a proper judgment and the case should either be remanded for re-trial or disposed of by the High Court. AIR (V 20) 1933 Nag 328 : 35 Cr LJ 136 : 146 Ind Cas 447.

——**S. 367 — Complicated cases.**

Judgment of an appellate Court ought to contain particulars so as to satisfy the revisional Court that the case has been examined from every aspect. In simple cases where the facts are clear no further reason than that the evidence is accepted by the Judge may be strictly required. In complicated cases, however, specially when there are more than one question, both of law and fact, arising, a mere statement of this kind will have to be accepted with difficulty as amounting to a reason for the dismissal of the appeal. AIR (V 13) 1926 All 318 : 24 ALJ 318 : 7 LRA Cr 55 : 27 Cr LJ 449 : 93 Ind Cas 241.

——**S. 367 — As assessors and as jury — Judge not giving reasons in the former.**

Where in a joint trial of several accused persons for various offences, some triable by jury and others triable with the aid of assessors, the Judge summed up the case at some length to the jury with regard to all the charges, but when he came to write his judgment with regard to the charges triable by himself with the assessors, he merely referred to the charge to the jury without giving any reasons for agreeing with the jury,

Held, there was no sufficient compliance with the requirements of S. 367 in respect of the offences triable with the aid of assessors and the judgment was therefore defective. AIR (V 14) 1927 Mad 56 : 97 Ind Cas 748 : 27 Cr LJ 1164.

**——S. 367 — Appeal — Judgment in, when in accordance with law.**

Where the Dt. Magistrate on appeal made no attempt to discuss and merely said that a detailed judgment had been recorded by the trial court and nothing that had been urged in appeal affected the reasons given for the conviction, his judgment is not in accordance with law. AIR (V 4) 1917 Pat 592 : 1 Pat LW 673 : 18 Cr LJ 994 : 42 Ind Cas 722.

**——S. 367 — Appellate Court's judgment.**

The judgment of an Appellate Criminal Court must show that evidence on both sides has been weighed and judicial mind exercised. Reasons must support its findings. Vague judgment is not judgment and must be reversed. AIR (V 4) 1917 Oudh 113 : 4 OLJ 141 : 18 Cr LJ 649 : 40 Ind Cas 297.

**——S. 367 — Reasons for judgment.**

Sentence cannot be passed before giving reasons as it is an irregularity. The High Court will revise it if failure of justice is caused. (1911) 5 SLR 131 : 12 Cr LJ 610 : 12 Ind Cas 986 (DB).

**——S. 367—Duty of Magistrate to decide points of law raised at the trial—Postponement of case to enable accused to get a ruling from the High Court — Impropriety of.**

Where the trying Magistrate finding it difficult to decide whether certain coins, which the accused was charged with making were King's coins or not, postponed the case to enable the accused to obtain a ruling of the High Court on the point:

Held, that the Magistrate was wrong in doing so; it was his duty to decide whether the coins were King's coins or not and whether any offence was committed under S. 230, I. P. C. It was not the business of the High Court to decide the point at that stage. (1907) 12 CWN 604 (DB).

**(d) Appellate judgments.**

**——Ss. 367 and 424 — Appellate judgment — Mode of dealing with the case before the appellate Court.**

A District Magistrate hearing and deciding an appeal ought, in terms of S. 367, Cr. P. Code, adequately deal with the points arising for and against the appellant. Where from the judgment it does not even appear that he had read the evidence produced in the case and the provisions of S. 367 are not followed, the appellate order is liable to be set aside. 1948 OA (CC) 45 : 1948 OWN 90 : 1948 AWR (CC) 45.

**——S. 367 — Non-compliance by Appellate Court with S. 367 — Effect stated.**

Per O' Sullivan, J. — Where, the reasons for decision in the judgment of the Appellate Court are not such as to enable a Revisional Court acting under the provisions of Ss. 435 and 439, Criminal, P. C., to form any conclusion as to the correctness, legality or propriety of the findings, the judgment is clearly defective and the appeal must be re-heard. AIR (V 27) 1940 Sind 113 : 41 Cr LJ 724 : 189 Ind Cas 226 (DB).

——S. 367 — The Appellate Court's judgment cannot be read in connection with and as supplementary to the judgment of the Court of first instance, but must be quite independent and stand by itself. AIR (V 24) 1937 Sind 26 : 38 Cr LJ 363 : 30 SLR 382 : 167 Ind Cas 227 (DB).

**——S. 367 — Essentials of.**

Section 367, Criminal P. C., must be interpreted reasonably and so long as the Appellate Court below writes a judgment from which the High Court can gather what the decision of the Appellate Court really was, that in the majority of instances ought to be sufficient. It would be manifestly most unreasonable to expect an Appellate Court to dot every 'i' and cross every 't'. If, therefore, it is possible for the High Court reasonably to arrive at an understanding of what has been found in the Court below, it is not necessary that the High Court should cautiously or capriciously set aside the judgment of the Court below or even comment on it with any severe strictures. Still less is it obligatory upon the High Court to hold that the proceedings in appeal ought to be quashed and the matter re-heard in appeal from the beginning. AIR (V 22) 1935 Cal 316 : 36 Cr LJ 982 : 62 Cal 749 : 156 Ind Cas 678 (DB).

——S. 367 — The judgment of the Appellate Court must show that the Court has also brought its mind to bear on the points for decision and has arrived at its own decision. (1935) 1935 MWN 653 (1).

——S. 367 — The judgment of the Court of Appeal in a criminal case must comply with the provisions of S. 367, and if the provisions of that section be not substantially complied with, the aggrieved person can justly take exception to the judgment and ask for its reversal.

Whether a judgment of a Court of Appeal substantially complies with the provisions of S. 367 or not, is a question which cannot be answered without reference to the facts of each particular case. If the case be a simple case in which no intricate questions of fact are involved or where the evidence is clear, strict compliance of the rule contained in S. 367 as regards the absence of detailed reasons for coming to a decision will not be taken to be a non-compliance with the provisions of the law; but where the facts are intricate and the evidence is contradictory, it is incumbent on the Court of Appeal to set out the points for decision, the decision, and the reasons for the decision with sufficient clearness in order to enable the High Court, in case of an application in revision being filed, to satisfy itself that the matter has been properly considered by the Court of Appeal. Where, however, the Court of Appeal merely refers to the decision of the trial Court and says that nothing has been urged in appeal which affects the reasons given by the trial Court for the conviction, such a decision is clearly not in accordance with law inasmuch as it offends against S. 367 of the Code. But, if on a perusal of the judgment of the Court of Appeal, the High Court is satisfied that the Appellate Court did consider the evidence and came to an independent finding of its own, it will not interfere with the decision in appeal merely because the reasons are not set out in detail.

It is always desirable for a Judge of a Court of Appeal to write a judgment which may indicate that he applied his own mind to the evidence and was not content with the fact that the witnesses had been believed by the trial Court. AIR (V 18) 1931 Pat 379 : 12 PLT 601 : 32 Cr LJ 1197 : 11 Pat 143 : 134 Ind Cas 619 (DB).

**——S. 367 — Non-compliance — Illegal.**

The language of S. 367 is peremptory on the point that the judgment shall contain point or points for determination, the decision thereon and reasons for the decision and consequently if an appellate Court fails to comply with these requisitions, the irregularity amounts to an illegality and vitiates the order. AIR (V 17) 1930 Bom 163 : 125 Ind Cas 710 : 31 Cr LJ 925 : 32 Bom LR 353 : 1930 Cr C 487 (DB).

**——S. 367 — Discussion of evidence.**

Where there is no discussion or setting out of the evidence, on which conclusions are based in an appellate judgment such a judgment is not a proper judgment and it should be set aside. (1928)

112 Ind Cas 359 : 10 LLJ 347 : 11 AI Cr R 354: 29 Cr LJ 1031.

——S. 367 — Court deciding without issuing notice.

Where the appellant's pleader fails to make out a case for the issue of notice to the Public Prosecutor and the appellate Court thinks fit to decide the case without such notice, a formal order or judgment giving reasons is necessary to dispose of the appeal. There must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried. The judgment or order must bear marks of such intelligent appreciation on the part of the appellate Court of the necessary facts and materials as would warrant the High Court to infer that the conclusions were properly arrived at by the lower appellate Court. AIR (V 14) 1927 Nag 88 : 98 Ind Cas 716 : 27 Cr LJ 1404 : 7 AI Cr R 471.

——S. 367 — Discussion of evidence.

If the judgment of an appellate Court does not discuss evidence and does not give facts indicating the occurrence dealt with in it the judgment is not a judgment under S. 367, Cr. P. Code. Such a judgment must be set aside. AIR (V 12) 1925 Cal 266 : 81 Ind Cas 437 : 25 Cr LJ 901.

——S. 367 — Merely saying "I substantially agree with the trial Court" is no judgment where the appeal is not summarily dismissed and such judgment is liable to be set aside. AIR (V 11) 1924 Cal 537 : 72 Ind Cas 71 : 24 Cr LJ 311 (DB).

——S. 367 — Should be complete by itself.

Under S. 424 of the Cr. P. Code the rules contained in S. 367 as to the judgment of a Criminal Court of original jurisdiction apply to the judgment of any appellate Court other than a High Court. The High Court will not in revision make up for the deficiency of the appellate judgment by having recourse to that of the Court of first instance. AIR (V 10) 1923 Lah 344 : 76 Ind Cas 710 : 25 Cr LJ 246.

——S. 367 — Should be self-contained.

Appellate judgment must contain materials indicating that appeal has been properly tried — High Court must be able to follow the appellate judgment without reference to trial Court judgment. AIR (V 8) 1921 Lah 102 : 64 Ind Cas 377 : 2 Lah 303 : 23 Cr LJ 9 : 24 PLR 1922.

——S. 367 — Where the judgment was too succinct to comply with the requirements of S. 367 and was of a stereotyped nature so as to suit any judgment of an appellate Court.

Held, that the judgment should be set aside and that the appeal should be reheard. AIR (V 8) 1921 Pat 487.

——S. 367 — Where neither the facts nor the points for determination nor discussion of those points find a place in a judgment of appellate Court, that in itself is sufficient to set the judgment aside. (1921) 63 Ind Cas 336 : 2 PLT 228 : 22 Cr LJ 640 (DB).

——S. 367 — Judgment not setting out the facts and evidence.

The appellate judgment should show that the Court has considered the facts and the evidence in the case in reasonable detail, for want of which the judgment is liable to be set aside. AIR (V 5) 1918 Mad 814 : 18 Cr LJ 752 : 40 Ind Cas 752 : 8 Cr LR 314.

——Ss. 367 and 424 — Appellate judgment — Contents.

There ought to be sufficient materials in the appellate judgment itself to enable the High Court to form a conclusion as to the propriety of the conviction against the accused and correctness of the sentence. AIR (V 4) 1917 Cal 285 : 20 CWN 1296 : 18 Cr LJ 294 : 38 Ind Cas 326 (DB).

——Ss. 367, 423 and 537 — Disposal of appeal after notice — Judgment.

If an appeal is dismissed not summarily, but under S. 423, the Court must deliver a judgment that would fulfil the conditions laid down in S. 367. Omission to write a judgment is an irregularity not curable under S. 537. AIR (V 2) 1915 Bom 139 : 17 Bom LR 1085 : 16 Cr LJ 832 : 31 Ind Cas 1008 (DB).

——S. 367 — Judgment — Contents of — What it should contain — Imperfect judgment — Acquittal set aside.

The High Court should not interfere with an order of acquittal unless there has been a miscarriage of justice. Where, however, the judgment of a district Magistrate acquitting on appeal an accused person, was so meagre that it was impossible to form an opinion as to the merits of the case or to say whether there has been a miscarriage of justice or not, the High Court, on the application of the complainant, set aside the order of acquittal and directed the appeal to be reheard. (1907) 5 CLJ 452 (454) (DB).

(e) Irregularities in judgments.

—— Ss. 367 and 537 — Two cases under Gaming Act tried together and common judgment written — Conviction based mainly on presumption under S. 6 — Writing one judgment is merely irregularity.

Where two cases under the Madras Gaming Act were tried together and the conviction was based mainly on presumption under S. 6 of the Act:

Held, though it would have been better if the Magistrate had written separate judgments referring only to the evidence in each case, the writing of common judgment under the circumstances for both cases was merely an irregularity. AIR (V 33) 1946 Mad 465.

——S. 367 —— Wrong number or letter through mistake, if affects complaint or judgment.

Neither a complaint nor a judgment is affected by a wrong letter or wrong number written or by a label attached by mistake by a clerk or typist or even by mistake of the Judge himself, is to be looked at are the allegations of fact and the findings of fact. AIR (V 31) 1944 Sind 222 : ILR (1944) Kar 246 : 46 Cr LJ 369 : 218 Ind Cas 15 (DB).

——Ss. 367, 537 — Points for determination and reasons for decision not given — Only defence arguments and defence case dealt with — Judgment is not proper — S. 537 does not apply to such case.

Where in the judgment of the Appellate Court, neither the points for determination, nor the reasons for the decision, have been set out and the judgment says nothing about the nature of the occurrence and nothing about the prosecution case, and deals with the case for the defence only by seeking to answer, in a somewhat desultory and disjointed manner, the arguments of the defence Pleaders, it is not a case of an error in a judgment, but a case of there being no proper judgment at all and S. 537, Criminal P. C., has no application to such a case. AIR (V 30) 1943 Cal 465 : 45 Cr LJ 71 : 47 CWN 332 : ILR (1943) 1 Cal 423 : 209 Ind Cas 105 (DB).

——S. 367 — Decision given without recording evidence — Procedure, held irregular.

The Appellate Magistrate having once passed an order for the evidence of certain witnesses being recorded by the trial Court, his decision of the appeal without that evidence being recorded, held irregular :

Held, also that the judgment of the Appellate Court could not be called a judgment under S. 367, Criminal P. C. AIR (V 27) 1940 Oudh 396 : 41 Cr LJ

725 : 1940 OWN 607 & 927 : 1940 AWR 253 : 189 Ind Cas 258

**——Ss. 367, 366 — Magistrate acquitting accused without delivering any judgment — Whether irregular.**

Where a Magistrate, by an informal order on the order-sheet, acquitted the accused without delivering a judgment at all :

Held, that the procedure in directing the accused to be acquitted without writing a judgment was irregular but inasmuch as the irregularity consisted of what appeared to have been an informal order of acquittal before the judgment was written and pronounced, and as the Magistrate when he did come to write and pronounce judgment was of the same opinion as he had been when he directed the accused to be acquitted; and as he had given his reasons for that opinion based on the evidence in the case, there was no miscarriage of justice. AIR (V 20) 1933 All 660 : 34 Cr LJ 1036 : (1933) ALJ 1244 : 55 All 886 : 145 Ind Cas 664

——S. 367 — If there is any error in recording judgment according to S. 367, Criminal P. C., but the points for decision, the decision and the reasons therefor can be gathered from the judgment, it is mere irregularity which is curable. AIR (V 24) 1937 Nag 122 : ILR (1936) Nag 217 : 39 Cr LJ 370 : 173 Ind Cas 844

**——S. 367 — Curable irregularity.**

Where the only case in appeal was one of considering whether the evidence did justify the conclusion that the accused persons were responsible for a particular act, and the appellate Court did not state in its judgment the points for determination, and the reasons for a finding on each point specifically in the manner contemplated by Ss. 367 and 424, but in fact it had gone into the case and said, "The Magistrate's findings of fact are fully justified by the evidence",

Held, there was not an "absence" of a judgment and the irregularity in drawing up the judgment was curable under S. 537. AIR (V 13) 1926 Bom 512 : 28 Bom LR 1029 : 27 Cr LJ 1153 : 97 Ind Cas 737 (DB).

**——S. 367 — Karachi Sessions Court.**

The Judges of Judicial Commissioner's Court, sitting as Sessions Judges for the District of Karachi, should follow as closely as possible the provisions of S. 367 and S. 424. But the omission to do so cannot vitiate and nullify the whole proceeding before the Sessions Court. The Clause "so far as may be practicable" that occurs in S. 424 would certainly bring the error within the scope of S. 537. AIR (V 13) 1926 Sind 244 : 95 Ind Cas 753 : 20 SLR 261 : 27 Cr LJ 833 (DB).

**——Ss. 367 and 423 — Omission of trial court to write a proper judgment — Reversal.**

If an appellate court finds that the Magistrate has not written a judgment in conformity with S. 367, Cr P. Code, the correct procedure is to accept the appeal and to remand the case for hearing de novo. The Appellate Court cannot retain the appeal on its file and ask for a judgment which the Magistrate has failed to record. AIR (V 7) 1920 Mad 171 : (1920) MWN 120 : 11 LW 308 : 21 Cr LJ 52 : 54 Ind Cas 404 (DB).

**——S. 367 — Non-compliance with — Retrial.**

Where a judgment in a case does not comply with the provisions of S. 367 in that it omits to mention the points for determination, the decisions thereon, and the reasons for the decision, the case should be returned for retrial (1912) 13 Cr LJ 48 : 13 Ind Cas 288 (Ajm-Mer)

**(f) Matters to be avoided.**

**——S. 367 — Court must proceed on evidence in case and not on ex cathedra assumption.**

The whole basis of the administration of justice is to try to arrive at the truth by a scientific investigation of the evidence given and not by a series of ex cathedra assumption. AIR (V 29) 1942 All 47 : 1941 AWR 358 : 43 Cr LJ 380 : ILR (1941) All 912 : 198 Ind Cas 452.

**——S. 367 — What it should contain, stated.**

It is not necessary for a judgment to contain everything recorded in the evidence ; when an appeal is heard, the evidence is read. The judgment should contain sufficient of the evidence as is necessary to ascertain the facts deposed to, and the importance of and the value to be attached to the evidence of the witnesses, and the reasoning based on this evidence on which the Judge founds his decision and his sentence ; to put more than this into a judgment is merely to confuse. AIR (V 26) 1939 Rang 263 : 40 Cr LJ 871 : 184 Ind Cas 78 (DB).

**——S. 367 — Recording of finding, if must conform to words of section.**

Ipsissima verba is not required to express a finding. A Magistrate, therefore, need not use the terms of a section in recording a finding. AIR (V 25) 1938 Cal 623 : 66 CLJ 567 : 39 Cr LJ 969 : 177 Ind Cas 939

**——S. 367 — All evidence, if to be reproduced.**

A judgment is not required to be a resume or reproduction of all the evidence on record ; a Court is entitled to and should select such important evidence as it considers necessary to support a decision on material points arising for consideration. AIR (V 24) 1937 Cal 99 : 38 Cr LJ 818 : 169 Ind Cas 977 (SB).

——S. 367 — The personal views of Judge upon certain organisations and their activities should not be allowed to obtrude in a judicial pronouncement. It is duty of a Judge sitting in a Court of Justice to avoid all language which may suggest a bias in favour or against a particular class or section of the people. AIR (V 21) 1934 All 776 : 35 Cr LJ 919 : 4 AWR 191 : 149 Ind Cas 210 (DB).

——S. 367 — A judgment has not to be a resume of the entire evidence or a discussion of the relevancy of all the evidence. A Court is entitled to select such evidence as it considers important and sufficient to prove the point for consideration. AIR (V 20) 1933 All 690 : (1933) ALJ 799 : 34 Cr LJ 967 : 55 All 1040 : 145 Ind Cas 481 (DB).

**——S. 367 — Judge disbelieving prosecution evidence — Conviction on an assumption of what their evidence ought to have been.**

In a criminal trial, it is beyond the scope and power of the Sessions Judge, while disbelieving the evidence of the prosecution witnesses in its main details, to build up a theory of his own as to what the transaction really was, and upon an assumption of what their testimony ought to have been, to come to a conclusion adverse to the accused. AIR (V 20) 1933 Oudh 566 : 10 OWN 1203 : 35 Cr LJ 278 : 147 Ind Cas 77.

**——S. 367 — Judgment — Embodying prosecution statement.**

It is generally undesirable to make documents prepared by the parties to a case part of the judgment, but where a satement of the prosecution evidence was checked by the trial court before being embodied in the judgment, he could not be prejudiced. AIR (V 7) 1920 Cal 87 : 47 Cal 154: 31 CLJ 192 : 21 Cr LJ 386 : 55 Ind Cas 994 (DB).

**—— S. 367 — Judgment — Contents — Sessions Judge embodying summing up to the Assessors in his judgment.**

It is not convenient nor commendable for a Sessions Judge to embody in his judgment his summing up to the Assessors. But his judgment

is not illegal though he does so, or vitiate it so as to render it invalid. (1909) 9 CLJ 55 (65, 66): 10 CrLJ 325: 3 Ind Cas 625 (DB).

**——S. 367 — Court setting up a defence not set up by accused.**

A court ought not to set up on behalf of persons accused before it a defence that they were acting in the exercise of the right of private defence of property which defence the accused himself did not set up. (1904) AWN 113 (113).

**—— S. 367 — Trial Magistrate importing his own knowledge of the accused in the case.**

A Magistrate trying an accused person ought not to import his own knowledge of, or, as regards, the accused into the case. (1904) 6 Bom LR 480 (481) (DB).

**(g) Offence and Section**

**——S. 367 — Judgment — Contents — Offences found guilty of and section of Penal Code — Necessity to give.**

Trial Judges must record in their findings the offences of which they find a person guilty and also the section of the Penal Code. AIR (V 36) 1949 Mad 663 : (1949) 1 MLJ 152 : 1949 MWN 17 : 50 Cr. LJ 950. (DB).

**——Ss. 367 (2) and 537 — Trial of several accused for different offences — Conviction without specifying the sections of the I. P. Code, and passing of a combined sentence on all — Legality — If curable under S. 537.**

Where in a trial of a number of accused for different offences under the I. P. Code, the Magistrate passes an order convicting all of them without specifying the sections of the I. P. Code, under which he was convicting them and passes a combined sentence upon all of them, the error cannot be cured under S. 537, Cr. P. Code, because it has occasioned a failure of justice inasmuch as the Court was unable to apply its mind to the case of each accused separately and judge the extent of each accused's guilt and determine what sentence has to be passed upon them for each offence. AIR (V 35) 1948 All 136 : 1948 AWR (HC) 78 : 1947 ALJ 593 : 49 Cr. LJ 103.

**(h) Several accused.**

——S. 367 — A judgment must conform to the provisions of S. 367, Criminal P. C., which require, inter alia, that it shall contain the points for determination, the decision thereon and the reasons for the decision. These requirements must be fulfilled in respect of each individual accused or suspect in cases where there are more than one. AIR (V 27) 1940 Sind 113 : 41 Cr. LJ 724 : 189 Ind Cas 226 (DB).

**——S. 367 — Judicial finding with reference to each accused be given — Not only justice should appear to be done but should in fact be done.**

In criminal trials, it is the duty of the Court to give a judicial finding with reference to the case of each individual accused, and the evidence adduced on behalf of the accused in support of their case must also be carefully and fully considered. It is not expected that the Court would come to a conclusion in favour of the defence in every case, but justice must appear to be done to the accused as well as in fact it must be done to the accused. AIR (V 25) 1938 Pat 34 : 18 PLT 869 : 39 Cr. LJ 221 : 4 BR 202 : 172 Ind Cas 933.

——S. 367 — Where in a case, six prisoners are accused of no less than seven separate offences, yet the Judge has framed one point for decision only, such a compliance with the provisions of S. 367 is perfunctory and perilous. AIR (V 21) 1934 Sind 89 : 28 SLR 12 : 36 Cr. LJ 53 : 151 Ind Cas 976 (DB).

——S. 367 — The judgment of an appellate Court should show on the face of it that the case of each accused in joint trial has been separately taken into consideration. The appellate Court should so far as necessary state reasons showing that it has devoted judicial attention to the case of each accused. The judgment must be such that the High Court as a Court of revision might be in a position to see what the case was and how the Court of appeal has considered the evidence as to the guilt or innocence of each of the accused. Therefore the appellate Court should give an explicit opinion as to the question of facts involved in the case and must form its opinion about the evidence after perusing the record. AIR (V 11) 1924 Cal 618: 81 Ind Cas 820 : 39 CLJ 117 : 25 Cr. LJ 1044 (DB).

**——S. 367 — Should be complete by itself.**

Where the appellate court's judgment disposed of appeals in two cases, one dealing with five accused and the other with three, but it did not mention the name of any of the accused or the name of any of the witnesses produced by the prosecution or the defence, and thus it was impossible to follow the appellate judgment without reading the judgment of the court of first instance, held that the judgment was not in accordance with S. 367. An appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial court. AIR (V 11) 1924 Lah 660 : 76 Ind Cas 177 : 25 Cr. LJ 113.

**——S. 367 — Judgment — Several accused — Cases of each to be separately discussed.**

Where several persons are charged with an offence the judgment of the court should contain a discussion of the evidence as against each accused. AIR (V 6) 1919 Mal 885 : 19 Cr. LJ 248 : 44 Ind Cas 40.

**——Ss. 367 and 424 — Several accused — Duty of Court in pronouncing judgment.**

Where there are several accused who have appealed it must appear from the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given as far as may be necessary to show that Appellate Court has devoted judicial attention to the case of each of the accused. AIR (V 3) 1916 Mad 1125 : 16 Cr. LJ 496 : 29 Ind Cas 336.

**3. Appreciation of Evidence.**
**(a) General.**
**(a-1) Plurality of accused.**
**(b) Duty of Prosecution.**
**(c) Duty of Court.**

**(a) General**

**——S. 367 —By presiding Magistrate.**

The question of the appreciation of evidence in a criminal trial is entirely within the province of the presiding Magistrate. It is his right to appreciate the evidence rightly or wrongly. In case he appreciates it wrongly, the High Court would correct the error in appropriate proceedings. AIR (V 32) 1945 Sind 51 : ILR (1944) Kar 411 : 47 Cr. LJ 84 : 221 Ind Cas 136 (DB).

**——S. 367 —Evidence of witness not true in one or two particulars — Whole of his statement cannot be ignored.**

If a witness is not found to have told the truth in one or two particulars, the whole of his statement cannot be ignored. The Courts are required to shift the evidence, accept what they find to be true and rejected the rest. They have to separate the grain from the chaff. In doing so, they are justified in looking upon a witness with suspicion if he is not found to be true in some material

respect. But this does not justify them to throw away the whole of the statement although it is natural that they must examine the rest with greater care. AIR (V 31) 1944 Lah 97 : 45 PLR 393 : 45 Cr. LJ 634 : 212 Ind Cas 440 (DB).

**——S. 367 — Rules as to, explained.**

Per Rowland, J.—Evidence needs to be not merely enumerated but weighed and the tests available are well-known and settled. Where the parties to a suit are at issue on a vital question, the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The real tests for either accepting or rejecting evidence are, how consistent the story is with itself how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. If witnesses are prima facie interested or disinterested, if they have changed or developed their story from time to time, these are also matters that ought to be regarded. AIR (V 30) 1943 Pat 131 : 21 Pat 854 : 9 BR 212 : 44 Cr. LJ 356 : 24 PLT 105 : 205 Ind Cas 241 (DB).

**——S. 367 —Appreciation of evidence — Prosecution evidence should be considered on merits and not rejected on consideration of defence evidence.**

While dealing with the evidence of each prosecution witness, the Judge should not unnecessarily introduce the defence evidence and reject the prosecution evidence largely because in his opinion the defence evidence established the innocence of the accused. The Judge should examine the prosecution evidence witness by witness on its own merits and reject it, if upon a careful analysis and scrutiny of the evidence, he finds that it was not true or reliable to support the prosecution case. He should not test trustworthiness of the prosecution witnesses in the light of the defence evidence AIR (V 28) 1941 Oudh 487 : 1941 AWR 211 : 42 Cr LJ 595 : 1941 OWN 852 : 194 Ind Cas 557 (DB).

**——S. 367 — Evidence of convicts.**

Where an offence is committed by jail officials in jail premises against a convict a criticism that all the eye-witnesses are convicts and that, therefore, their evidence is unreliable, has no force. In the first place, in an offence of this kind committed in a jail, it is obvious that the only evidence likely to be produced would be that of convicts. If a rule was laid down that evidence was unreliable because it was that of a convict, jail officials would have complete immunity for the commission of any offence against a convict. In addition, there is no reason to believe that those convicted of crimes of violence should be more untruthful than other persons. The vice of untruthfulness would be more associated with those convicted of deceit, fraud or perjury. A murder may have some good qualities such as courage and initiative. AIR (V 27) 1940 Lah 210 : 41 Cr. LJ 639 : ILR (1940) Lah 521 : 188 Ind Cas 440.

**——S. 367 — Prosecution witnesses inter-related.**

The mere fact that the principal prosecution witnesses are inter-related is not sufficient to disbelieve their statements in toto especially when they were present on the spot and their version is amply corroborated by other facts and circumstances. AIR (V 27) 1940 Lah 53 : 41 PLR 802 : 41 Cr. LJ 348 : 186 Ind Cas 603 (DB).

**——S. 367 — Scientific theories.**

Persons cannot be convicted merely on scientific theories which may or may not be infallible. AIR (V 26) 1939 Lah 523 : 41 PLR 763 : ILR (1939) Lah 307 : 41 Cr LJ 146 : 185 Ind Cas 266.

**——S. 367 — Motive — Should be judged by reasonable standard.**

Motive for crime is a matter of guess work on the part of those who do not take part in the offence and what may appear insufficient to one may be a compelling spring of action for another but it has to be judged by reasonable standards. AIR (V 25) 1938 Lah 594: 39 Cr LJ 907 (2): 40 PLR 890 : 177 Ind Cas 617 (DB).

**——S. 367 — Portion of evidence found untrue — Whether ground for rejecting whole of his evidence.**

Even if a portion of a witness's evidence is found to be untrue, it is generally not a ground for rejecting the whole of his evidence altogether. It is the Magistrate's duty to sift the truh from falsehood and to find out what the real truth of the matter was and not to throw out the entire case merely on the ground that the matter seemed to have been exaggerated by the complainant and that truth had been mixed with falsehood. AIR (V 24) 1937 Oudh 283 : 38 Cr. LJ 329 : 1937 OWN 281: 166 Ind Cas 987 (1).

**——S. 367 — Falsus in uno falsus in omnibus — Practice in N. W. F. P.**

The maxim falsus in uno falsus in omnibus is one which has never been accepted by Court of the Judicial Commissioner of N.W.F.P., in respect of witness of N.W.F. Province where there is a notorious tendency to accuse the innocent along with the guilty. Hence in view of the fact that in many cases witnesses will knowingly make a false charge against an innocent person, at the same time that they make true charges against guilty persons, the fact that witness makes a false charge against an innocent person does not necessarily falsify the whole of his evidence. It makes no difference whatever whether the factum of the falseness of the one charge is actually proved or is merely suspected. AIR (V 22) 1935 Pesh 50: 36 Cr. LJ 942 : 156 Ind Cas 436 (DB).

**——S. 367 — Analysis and appraisement of evidence.**

It is the duty of the Judge presiding at a trial to do more than merely collect in his judgment the statements of witnesses who give evidence before him. A careful analysis and appraisement of the evidence are absolutely essential in the interests of justice. AIR (V 21) 1934 All 776 : 35 Cr. LJ 919 : 4 AWR 191 : 149 Ind Cas 210 (DB).

**——S. 367 —Discrepancies.**

It is not proper to lay too much stress on discrepancies in evidence without any attempt to appraise their real value and effect. It is common experience that discrepancies do occur even in the statements of perfectly honest witnesses, which are really due to differences in individual faculties with regard to observation, recollection and recital of details and unless there is any good ground to think that they are due to a deliberate attempt to suppress or depart from the truth, it is unfair to discard the direct testimony of witnesses merely on account of such discrepancies, when there is general agreement as to the material circumstances. AIR (V 21) 1934 Lah 710: 36 Cr LJ 419: 35 PLR 641 : 153 Ind Cas 889 (DB).

**——S. 367 — Sifting evidence.**

It is the function of a Magistrate to sift evidence for prosecution as well as for defence before he comes to conclusion whether a case has been made out or not. (1934) 1934 MWN 891.

**——S. 367 — Doctrine of falsus in uno falsus in omnibus — Applicability of.**

It is generally unsafe to apply the doctrine falsus in uno falsus in omnibus to evidence of witnesses in India. No doubt there are cases in which the amalgam of truth and falsehood is such that it is hardly possible to extricate the truth from the

falsehood. There are also cases in which witnesses commit themselves to such patent and palpable falsehoods that they must be branded as gross liars, no part of whose testimony can be entitled to any credit. But where the lower Court finds that although the prosecution witnesses have introduced some embellishments in their story, the prosecution version is on the whole correct, the evidence in the case cannot be said to fall within the classes referred to. AIR (V 20) 1933 Oudh 269 : 10 OWN 482 : 35 Cr. LJ 58 : 146 Ind Cas 452.

——S. 367 — **Oral evidence — Omission to refer.**

All that S. 367 requires is that the point for determination should be stated, the decision thereon, and the reasons for the decision. It cannot be assumed that because the Magistrate has not referred to the oral evidence but has drawn inferences from documents and from probabilities, therefore he has not considered the evidence. Where he has given strong and legal reasons for his conclusion there is no reason to say that his judgment is defective. AIR (V 11) 1924 Pat 181 : 71 Ind Cas 597 : 24 Cr. LJ 181 : 2 Pat LR Cr. 154.

——**Ss. 367 and 439 — Wholesale acceptance of prosecution evidence.**

Where the judgment of a Magistrate makes no attempt to scrutinise the oral evidence of the prosecution, but summarily accepts that evidence, the judgment cannot be upheld in revision. AIR (V 7) 1920 Nag 71 : 54 Ind Cas 620.

——S. 367 — **Judgment —Contents of.**

A court should in its judgment duly weigh the evidence and discuss the points for and against the party. AIR (V 3) 1916 All 180 : 14 ALJ 279 : 17 Cr. LJ 167 : 33 Ind Cas 647.

(a-1) **Plurality of accused.**

——S. 367 — **Judgment— Trial of several accused — Duty of Court to give separate findings against each accused.**

Where in a single trial a number of accused are tried together it is the duty of the Court to consider the evidence against each of the accused separately and as to what part was played by each of them and deal with them accordingly. (1950) 1950 ALJ 659.

——S. 367 — **Judgment — Case of riot — Case of each accused to be dealt with separately.**

In cases of riot where the incidents have to be gathered from a large number of witnesses and where various persons are alleged to have seen the accused at different times it is necessary to take up the case of each accused separately and examine the evidence against him and state how far the Judge accepts or rejects it. AIR (V 37) 1950 Kut 94.

——S. 367 — **Some accused implicated being relatives of principal accused — Some old accused also implicated — Large number of accused said to be identified — Very strict standard in weighing evidence must be adopted.**

Some of the accused who were old men of over 60 were implicated by the prosecution as members of a mob and a large number, i.e., no less than 40 in all, were said to have been identified. There was strong reason to believe that some at least of the accused were implicated not because they were seen to take part in the assault but because they were relatives of the principal accused:

Held, that it was difficult to believe that witnesses could have identified so many accused and a very strict standard must, therefore, be adopted in weighing the evidence against each accused. AIR (V 33) 1946 Pat 235: 24 Pat 708 (DB).

——S. 367 — **Omission to deal with accused separately — Serious irregularity.**

Omission of the Judge to deal separately with the evidence against each of the accused is a serious irregularity. (1937) 1937 MWN 737(2).

(b) **Duty of prosecution.**

——S. 367 — **Prosecution must prove guilt of accused — There is no burden on accused to prove his innocence — Lacuna in defence not strictly consistent with innocence of accused — Prosecution still must prove accused's guilt beyond reasonable doubt.**

It is not correct to say that in criminal cases when the Crown has adduced such evidence as the circumstances and nature of the case demanded it is for the accused to establish his innocence. In criminal cases the onus of proving the general issue never shifts. The prosecution must prove the guilt of the prisoner. There is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. Therefore the prosecution must, even though there may be some lacuna in the defence, not strictly consistent with the innocence of the accused, still prove his guilt beyond all reasonable doubt. AIR (V 33) 1946 All 191: 1945 OWN 334 (DB).

——S. 367 — **Burden is on prosecution — Prosecution evidence insufficient — Judge must acquit accused — Offence serious — Still re-trial cannot be directed.**

The burden is on the prosecution to prove that the accused is guilty and if the evidence is not sufficient to bring the guilt home to the accused, the Judge has no other course but to acquit him, even if the offence is a serious one affecting the public interest, he is not justified in directing a re-trial. AIR (V 33) 1946 Mad 389.

——S. 367 — **Onus is always on prosecution.**

The onus in a criminal case is always on the prosecution, and it is for the prosecution to prove that the accused has committed the offence with which he is charged. It is not for the accused to prove his innonce. AIR (V 33) 1946 Pat 140: 11 Cut LJ 60.

——S. 367 — **Right of prosecution to rely on evidence not led by them but coming on the record otherwise.**

The prosecution are entitled to ask the Court to come to a finding of fact not only on evidence which they lead but on evidence which is otherwise brought on the record

The accused were convicted for contravening an order of the Sub-Divisional Magistrate made under R. 81(2)(b), Defence of India, Rules, prohibiting the sale of certain commodities above a certain rate. The prosecution, offered no direct evidence of the method of publication, or of the method prescribed by the Sub-Divisional Magistrate for publication of his order as required by R. 119, Defence of India Rules:

Held, that from the finding in the case that the accused issued a cash memo wrongly showing that the prices they had charged were the prices actually prescribed by the Sub-Divisional Magistrate it was clearly inferable that they not only knew that the Sub-Divisional Magistrate had made an order fixing the prices of various commodities at certain rates, but that knowledge of that order had been brought to the notice of the accused in the manner contemplated by the Sub-Divisional Magistrate. AIR (V 33) 1946 Pat 122 (DB).

——S. 367 — **Criminal Procedure — Prosecution evidence defective — Supplementing prosecution evidence.**

Per Rahim J. : It is the duty of the prosecution to prove their allegations by means of sufficient and reliable evidence; and if the evidence of the prosecution is neither satisfactory nor conclusive, that defect cannot be cured by the fact that the accused is unable to make out positively that such evidence is false and has been manufactured by any particular person or person interested in the prosecution. In a criminal trial even if the evidence in support of a charge is false it would more often than not be impossible for an accused person to show how it came to be fabricated. (1910) 20 MLJ 657 (677): 7 MLT 314: 6 Ind Cas 51: 1910 MWN 77.

——**S. 367 — Direct evidence implicating accused — But prosecution witnesses not able to explain injuries — Prosecution story, if should be rejected.**

Where the prosecution has led direct evidence implicating the accused in the case, the prosecution story cannot be disbelieved merely because the witnesses do not explain exactly how the contused injuries and bruises were caused, especially when the majority of the injuries found are consistent with the prosecution story. AIR (V 30) 1943 Lah 118: 45 PLR 151: 44 Cr LJ 627: 207 Ind Cas 243 (DB).

——**S. 367 — Standard of proof in criminal cases.**

The law is the same whether the offence is heinous or not; the standard of proof is exactly the same, namely that the evidence should be such as to lead a reasonable mind to a satisfactory conclusion that the offence has been brought home to the accused. AIR (V 30) 1943 Pat 163: 21 Pat 865: 44 Cr LJ 507: 9 BR 305: 206 Ind Cas 365 (DB).

——**S. 367 — Mass of false evidence — Attempt to search for truth, advisability.**

It is dangerous to attempt search for a small modicum of truth which might be buried in a mass of false evidence. The task is really an impossible one to perform and even otherwise, and it is a dangerous task, dangerous to the persons involved whose position might be seriously prejudiced by such an attempt. The duty of the prosecution is to establish the guilt of the accused by evidence which satisfies the Court and it cannot be said that evidence which is for the most part untrustworthy can be relied upon or can be said to satisfy the Court as regards the few of the accused when the evidence of the same witness does not satisfy the Court in respect of a large number of accused. The attempt to draw a distinction between the credibility of some person's evidence so far as it concerns some of the accused and so far as it concerns others is an attempt to do something which is really impossible and it certainly does not promote the advancement of justice. (1940) 190 Ind Cas 366 (368, 369): (1939) MWN 1256: 41 Cr LJ 903.

——**S. 367 — Weak points in prosecution.**

The Magistrate discharging the functions of a Judge cannot afford to ignore the weak points of the prosecution in reaching a conclusion. If the Magistrates are to be condemned for this, there will be hardly any case in which any accused person could entertain even the faintest hope of acquittal, (1936) 159 Ind Cas 238: 18 NLJ 90: 37 Cr LJ 89.

——**S. 367 — Duty of Court to consider all evidence and decide if it establishes case.**

The onus is on the prosecution to establish that an offence has been committed, but that does not mean that if there is evidence which supports the prosecution case, the Court may disregard it if the evidence adduced by the prosecution does not establish the charge. The Court is bound to consider all the evidence before it and to decide whether such evidence establishes the case beyond any reasonable doubt. AIR (V 22) 1935 Pat 474: 16 PLT 629: 2 BR 164: 37 Cr LJ 227: 160 Ind Cas 116.

——**S. 367 — Proof in criminal charges — Standard of.**

There is only one standard of proof for all charges and that is that the Crown must prove the charge beyond all reasonable doubt. The nature of the sentence cannot affect the question of proof. AIR (V 20) 1933 All 334: (1933) ALJ 1597: 55 All 639: 35 Cr LJ 353: 146 Ind Cas 957 (DB).

——**S. 367 — Prosecution and defence cases not free from criticism.**

Where in a criminal case, the evidence adduced on behalf of the prosecution and the defence was not free from criticism and there was delay on the part of the prosecution in launching the prosecution:

Held, that it would not be safe to hold that the guilt of the accused was proved beyond doubt. AIR (V 20) 1933 Rang 117: 34 Cr LJ 794: 144 Ind Cas 430.

——**S. 367 — Circumstantial evidence.**

Where in a criminal trial, the prosecution case is strongly supported by the probabilities and circumstances of the case, the absence of evidence of independent witnesses is immaterial. AIR (V 20) 1933 Oudh 123 : 10 OWN 389 : 34 Cr LJ 609 : 143 Ind Cas 656.

**(c) Duty of Court.**

——**S. 367 — Absence of Crown witnesses — Duty of Court.**

It is a matter for the discretion of the prosecution whether to call all Crown witnesses or not and though a Court ought and no doubt will take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly, taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses. AIR (V 33) 1946 PC 16: 1945 MWN 778: 12 BR 280: 59 MLW 9: (1945) 2 MLJ 486: 47 Cr LJ 489: (1946) ALJ 29(2): 50 CWN 145: 72 IA 205 222 Ind Cas 273 (PC).

——S. 367 — Reference to previous decisions.

The findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. It is the duty of a Criminal Court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by referenece to any previous decision which is not binding upon it. AIR (V 32) 1945 PC 18: 11 BR 130: (1945) ALJ 47: 26 PLT 56: 47 Bom LR 245: 46 Cr LJ 413: 80 CLJ 19: 1945 OWN 258: ILR (1945) Lah 1: 1945 AWR 21: ILR (1945) Kar 39 Sup: 49 CWN 191: 1945 Pesh LJ 18: 1945 MWN 49: 71 IA 203: 58 MLW 57: 217 Ind Cas 1.

——S. 367 — Merely saying that all the points arising in the case have been considered by the Court below and have been rightly decided, does not show that the Appellate Court has applied its mind to the points arising in the case and has arrived at its own independent judgment in respect of them as it is required by the law to do. AIR (Vol 27) 1940 All 18 : (1939) ALJ 671 : 41 Cr LJ 220 : 1939 AWR 567 : ILR (1939) All 865 : 185 Ind Cas 682.

——S. 367 — Magistrate should not hold conferences with the superior executive officers or prosecuting officers in respect of a criminal case. (1934) 36 PLR 527.

——S. 367 — **Judges and Magistrates should be fair and impartial.**

It is a fundamental principle of the due administration of justice that Judges and Magistrates should not only be fair and impartial but also should appear to reasonable persons to be fair and impartial, and neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned, is biased either in their favour or against them. AIR (Vol 21) 1934 Rang 105 : 35 Cr LJ 1362 : 151 Ind Cas 615.

——S. 367 — **Prosecution false and concocted in material particulars.**

Per Young, J. — The plain duty of the Court when it finds the prosecution case false and manufactured in material and vital particulars, and supported by perjured evidence, is to throw the whole case out without delay. The practice of laboriously and anxiously searching with a microscope for some truth which might be buried in the evidence is wrong, a waste of valuable time and a danger to the public as it must frequently result in innocent persons being convicted.

Per King, J. — Any general observations purporting to fetter the discretion of trial Courts in the matter of believing or disbelieving witnesses, should be viewed with profound distrust. If a witness has told a lie on one point, but the Court nevertheless conscientiously believes the witness to be speaking the truth on another point, it is useless to tell the Court that the witness should be disbelieved on every point. Belief of this sort does not or at least should not, yield to the dictates of authority. The trial Judge must decide each case on its merits and it is impossible to lay down any general rules for his guidance in believing or disbelieving testimony. The ascertainment of the truth is the primary duty imposed upon Criminal Courts. A Court is not absolved from attempting to perform that duty merely because (as usually happens in riot cases) neither side puts forward the plain unvarnished truth, but only a distorted or exaggerated version. AIR (Vol 20) 1933 All 896 : (1933) ALJ 1119 : 35 Cr LJ 236 : 56 All 188 : 146 Ind Cas 914 (DB).

——S. 367 — It is the duty of the committing Magistrate and the trial Judge to be solicitors in the interest of the accused. This is especially so in riot cases where the accused are generally humble and ignorant people unable to defend themselves and often inadequately represented in the Courts. It is emphatically the duty of the Magistrate who commits or the Judge who convicts to see each of the accused before he commits or convicts and passes sentence. AIR (Vol 20) 1933 All 314 : 34 Cr LJ 689 : (1933) ALJ 590 : 55 All 379 : 144 Ind Cas 207 (DB).

——S. 367 — **Abdication of functions in favour of Police Officers.**

It is not desirable that in all cases the opinion of a Police Offier should be accepted as the last word on questions of fact. The decision of such questions has been entrusted by law to the Magistracy and the Magistrates should not abdicate their functions in this respect entirely in favour of the Police. When a Magistrate does so, the Sessions Judge should consider the question as to the desirability of the procedure adopted by the Magistrate. AIR (Vol 20) 1933 Pat 499 : 34 Cr LJ 1140 : 145 Ind Cas 1031.

——S. 367 — **Interlocutory orders.**

There is no provision in the Criminal P. C. for writing orders in the course of a case and Magistrates will be well-advised to defer all writing till after the conclusion of the trial. AIR (Vol 18) 1931 Mad 419 : (1930) MWN 1271 : 33 MLW 475 : 60 MLJ 495 : 32 Cr LJ 895 : 54 Mad 595 : 132 Ind Cas 319.

——S. 367 — **Functions of Judge.**

Per Harington, J. — A Judge in this country exercising into functions of a jury would be bound to direct his mind to those consideration to which had he been summing up to a jury, he would have been bound to direct their minds to. (1907) 12 CWN 490 (507) : 35 Cal 495 (FB).

### 4. Basis of decision.

——S. 367 — **Judgment must be based on legal evidence.**

The judgment of a Court must be based on legal evidence and not on conjectures and surmises. AIR (Vol 33) 1946 Nag 321 : ILR (1946) Nag 946 : 1946 NLJ 656 : 47 Cr LJ 918 : 226 Ind Cas 377 (DB).

——S. 367 — **New point — Judge should not rely on point which comes to his notice only at time of judgment.**

A Judge should not rely for the first time upon a point which comes to his notice only at the time of judgment, and which has not been made the subject of question or argument in the hearing of the case before him. AIR (Vol 31) 1944 Sind 33 : ILR (1944) Kar 123 : 45 Cr LJ 650 : 212 Ind Cas 467 (DB).

——S. 367 — **Quasi criminal matters — Points, not argued.**

In quasi criminal matters, just as in criminal cases, Judges have to apply the law to the best of their ability and cannot ignore points which strike their attention merely because Counsel have omitted to argue them. AIR (Vol 30) 1943 Nag 26 : 1943 NLJ 1 : ILR (1943) Nag 154 : 44 Cr LJ 345 : 205 Ind Cas 5 (DB).

——S. 367 — **Dropping of proceedings on one of parties agreeing to give donation to some fund, is illegal.**

Disputes have to be decided on the merits in accordance with the law and procedure which has been prescribed by the Legislature. It is highly improper for any Magistrate or any presiding officer of a Court to invite subscriptions to public or charitable funds from anybody appearing in his Court either in the capacity of a party or a witness or professionally, or to entertain suggestions made by anybody else that donations should not be accepted from such. The "dropping" of a proceeding by a Magistrate on one of the parties agreeing to make a donation to the War Fund is illegal. AIR (Vol 29) 1942 Pat 337 (1) : 23 PLT 40 : 8 BR 659 : 43 Cr LJ 633 : 200 Ind Cas 301.

——S. 367 — **Magistrate cannot base his judgment on extra-judicial information.**

While sitting as a Judge, a Magistrate is not at all expected to base his decision on matters which come to his knowledge extra judicially. A Magistrate may have more sources of information than one, but in his judgment in judicial cases, he can employ only those that are covered by the Evi. Act. The rest is hearsay and cannot be utilised for or against a party in any manner. AIR (Vol 29) 1942 Lah 232 : 43 Cr LJ 808 : 44 PLR 409 : 202 Ind Cas 292.

——S. 367 — What a witness does not say is not substantive evidence on which an accused person can be convicted. AIR (Vol 26) 1939 Sind 130 : 40 Cr LJ 661 : 182 Ind Cas 464 (DB).

——S. 367 — **Circumstantial evidence.**

In all criminal cases, the evidence must be such as to exclude to a moral certainty every reason-

able doubt of the guilt of the accused. In cases in which the proof afforded is of a presumptive nature or rests on circumstantial evidence to justify an inference of guilt, the inculpating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Where these tests are not fulfilled and the Court is not satisfied that the guilt of the accused has been established, it is proper that the accused should be acquitted. AIR (Vol 20) 1933 Lah 308 : 34 Cr LJ 714 : 34 PLR 694 : 144 Ind Cas 301.

**——S. 367 — Untruthful nature of a large portion of prosecution evidence — Conviction on residue without corroboration.**

When the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it would be dangerous to convict the accused on the residue without corroboration. Enmity is a double-edged weapon, and what would be a reason for the murder might also be a reason for fabrication of a false case. AIR (Vol 20) 1933 Oudh 457 : 10 OWN 976 : 35 Cr LJ 299 : 147 Ind Cas 111 (DB).

**——S. 367 — Maxim 'falsus in uno falsus in omnibus' — Too rigid adherence to maxim.**

Although the too rigid adherence to the maxim 'falsus in uno falsus in omnibus', would render the conviction of the accused in a large majority of criminal trials in India, almost next to impossible; yet, where the story of the prosecution and the evidence in support of it are so garbled and distorted, and where the true facts of the case are so overlain with a mass of lies that it is practically impossible to disentangle them from the falsehoods in which they lie embedded, no conviction can be legally based upon such tainted evidence. AIR (Vol 20) 1933 Oudh 226 : 10 OWN 506 : 8 Luck 397 : 34 Cr LJ 935 : 145 Ind Cas 359 (DB).

**——S. 367 — Quantum of evidence.**

In a criminal case, the quantity of evidence required does not vary with the enormity of the crime. Every person accused of any offence is entitled to claim that the charge against him shall be clearly established by admissible evidence. If the Judge is not convinced, then it is his duty not to convict. But if he is fully satisfied, and if he has reached that satisfaction by the use of admissible methods of proof, then it is immaterial whether those methods be a confession, a circumstance, or the testimony of a witness. AIR (Vol 20) 1933 Sind 166 : 34 Cr LJ 808 : 144 Ind Cas 664 (DB).

### 5. Suspicion.

——S. 367 — In the trial of an accused for a crime, or for that matter even in the trial of a civil cause, suspicion cannot be made the ground of a finding by the Court or jury as the case may be. AIR (Vol 28) 1941 Mad 1 : 1940 MWN 1105 : 52 MLW 710 : 42 Cr LJ 677 : 195 Ind Cas 129.

——S. 367 — Mere suspicion is no ground for conviction. AIR (Vol 27) 1940 Pat 365 : 6 BR 110 : 41 Cr LJ 114 : 185 Ind Cas 162 (DB).

——S. 367 — Great suspicion but nothing inconsistent with accused's story being true — It would not be right or just to convict the accused. AIR (Vol 22) 1935 Cal 304 : 62 Cal 666 : 37 Cr LJ 698 : 162 Ind Cas 910 (DB).

——S. 367 — Suspicion, though a ground for scrutiny cannot be made the foundation of a decision. The Court's decision must rest upon legal grounds established by legal testimony. AIR (Vol 22) 1935 Oudh 477 : 1935 OWN 781 : 36 Cr LJ 1007 : 11 Luck 327 : 156 Ind Cas 819.

**——S. 367 — Grave suspicion against accused — Whether sufficient for conviction.**

In a criminal trial, the Court's decision should not rest upon suspicion. The gravest suspicion against the accused will not suffice to convict him of a crime unless evidence establishes it beyond doubt. AIR (Vol 20) 1933 Oudh 372 : 10 OWN 742 : 35 Cr LJ 66 : 146 Ind Cas 431 (DB).

——S. 367 — Suspicion, however, strong, is not sufficient to justify a conviction when the case for the prosecution is not substantial. In such cases, the accused is entitled to the benefit of doubt. AIR (Vol 20) 1933 Pesh 28 : 34 Cr LJ 386 : 142 Ind Cas 392 (DB).

——S. 367 — In a criminal trial, suspicion cannot take the place of judicial proof. AIR (Vol 18) 1931 Lah 406 : 32 Cr LJ 1049 : 133 Ind Cas 639.

### 6. Untrustworthy evidence.

**——S. 367 — Witness resiling from his previous statement—Court, if can act upon his statement.**

In a criminal trial, the mere fact that a witness resiles from his previous statement and completely exonerates the accused in the statement made by him at the trial makes it incumbent upon the Court not to act upon his evidence unless it is corroborated by any other independent evidence. AIR (V 33) 1946 Lah 48 : 47 Cr. LJ 232 : 221 Ind Cas 638 (DB).

**——S. 367 — Conviction of accused identified by at least six witnesses and acquittal of those identified by less — This is not proper way to estimate evidence.**

Convicting those accused who were identified by at least six witnesses and acquitting those identified by five or less is rather a mechanical standard for judging the evidence and is not the proper way to estimate evidence. There is no virtue in a multiplicity of witnesses if once it is found that most of them are interested. AIR (V 33) 1946 Pat 235 : 24 Pat 708 (DB).

**——S. 367 — Prosecution witness favouring defence —Effect.**

The evidence of a prosecution witness favouring the defence may be ignored when the witness happens to be a close relation of the accused especially where the evidence of such witness is inconsistent with the accused's own confessional statement. AIR (V 32) 1945 Lah 43 : 46 PLR 379 : 46 Cr. LJ 736 : 220 Ind Cas 325.

**——S. 367 — Evidence of witness with regard to some of essential parts unworthy of acceptance — Whether rest of evidence can be accepted.**

The question as to whether prosecution witnesses can be believed in part if their testimony is unworthy of acceptance with regard to some of the essential parts of the prosecution story is not really a question of law; it is really a matter based on human experience and must be decided with reference to the facts of each particular case. No hard and fast rule like a rule of law can be laid down in the matter. AIR (V 32) 1945 Pat 376 (DB).

**——S. 367 — Unbelievable evidence, admissibility of.**

There is no doubt, a fundamental difference between the admissibility and the credibility of evidence but for all practical purposes, if it is said that evidence cannot be believed, it may just as well be said that it is not admissible. AIR (V 25) 1938 All 91 : (1937) ALJ 1253 : 39 Cr. LJ 364 : 1937 AWR 1099 : 173 Ind Cas 838.

**——S. 367 — Evidence entirely oral and of interested persons — Absence of circumstantial evidence.**

Where the evidence is entirely oral and of interested witnesses and there is no circumstantial evidence against the accused, he cannot be con-

victed. AIR (V 22) 1935 Lah 922 : 37 Cr LJ 233 : 33 PLR 136 : 160 Ind Cas 158.

——S. 367 — **Perjured witnesses.**

In cases where the Court has difficulty in not holding that the witnesses have committed perjury the Court will unhesitatingly refuse to convict on no evidence but that of men who have been charged with the crime of murder, on evidence so tained and so suspicious, no Court is justified in recording a conviction. To proceed to convict on such testimony as if it were thoroughly reliable evidence would be to perpetrate a gross miscarriage of justice. AIR (V 21) 1934 All 908 : 57 All 267 : 4 AWR 5 : 36 Cr LJ 152 : 152 Ind Cas 741 (DB).

——S. 367 —**Use of evidence of witness for accused against co-accused.**

Statements of witnesses produced by one accused are admissible against a co-accused but at the same time, they should be received with great caution and suspicion, since they cannot be contradicted under S. 162 by the accused against whom the statements are made admissible. The accused may also be deprived of the benefit of S. 342, for though the Court may give him an opportunity of making a statement about the evidence, that is not obligatory under the terms of the section. AIR (V 23) 1936 Bom 154 : 38 Bom LR 106 : 60 Bom 148: 37 Cr LJ 688 : 162 Ind Cas 399 (DB).

——S. 367 — **False evidence given by witness—Corroboration.**

If it is proved that a witness for the prosecution has given false evidence it is unsafe to rely upon him at all and there is no reason why this rule of English Law — based on centuries of experience— should not be strictly applied in India.

False evidence must inevitably damage the whole fabric of the prosecution case. Honest or circumstantial evidence cannot be used to support or corroborate a perjured witness. Such evidence must be itself sufficient to justify a finding of guilty. AIR (V 20) 1933 All 401 : (1933) ALJ 581 : 34 Cr LJ 765 : 144 Ind Cas 383.

——S. 367 — Where there is reason to believe that certain accused, on the ground of enmity or otherwise, may have been falsely charged, the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. AIR (V 20) 1933 All 314 : 34 Cr LJ 689 : 55 All 379 : (1933) ALJ 590 : 144 Ind Cas 207 (DB).

### 7. Benefit of doubt.

——S. 367 — Accused taking away boy for a magic worship — Causing wound on back of neck — Subsequently apologizing and bondaging the wound — Intention to kill — Benefit of doubt may be given. AIR (V 22) 1935 All 614 : 1935 AWR 812 : 37 Cr LJ 305 : 160 Ind Cas 525.

——S. 367 — The suggestion that if there is little doubt that accused challaned by Police are guilty, the prosecuting authorities are entitled to do their best to obtain a conviction, should be rejected. That "the end justifies the means" is a doubtful proposition in any sphere and it can find no countenance in a Court of Justice. It is the right of every man, be he guilty or innocent to insist that he be tried according to the principles to be observed in investigating criminal charges. AIR (V 21) 1934 All 908 : 36 Cr LJ 152 : 4 AWR 5 : 57 All 267 : 152 Ind Cas 741 (DB).

——S. 367 — Where the prosecution witnesses did not implicate one of the accused in their examination by the Magistrate previous to the trial, but did implicate him in examination before the same Magistrate during the trial:

Held, that, that accused was entitled to the benefit of doubt, and must be acquitted. AIR (V 21) 1934 Lah 211 (1) : 36 Cr LJ 32 : 152 Ind Cas 153.

——S. 367 — It is not permissible for the trial Judge to make any surmise in favour of the prosecution. The benefit of any doubt that may arise in the mind of the trial Judge is to be given to the accused and it is not permissible for a trial Court to gloss over the deficiencies in the evidence of the prosecution witnesses by and special pleading. AIR (V 21) 1934 Oudh 485 : 11 OWN 1224 : 35 Cr LJ 1489 : 152 Ind Cas 85 (DB).

——S. 367 — Where there is a reasonable doubt the benefit of it must be given to the prisoner. It is much better that a guilty man should be acquitted than that an innocent man should be wrongly convicted. AIR (V 18) 1931 Cal 752 : 54 CLJ 244 : 33 Cr LJ 85 : 134 Ind Cas 1191 (DB).

——S. 367 — In a criminal case, where different constructions can be placed on an incident consistent with the evidence in the case, it is right to put the construction that is most favourable to the accused. AIR (V 18) 1931 Oudh 385 : 8 OWN 685 : 32 Cr LJ 851 : 132 Ind Cas 270.

——S. 367 — **Evidence, weighing of — Presumption of innocence.**

Where the facts proved in a case are perfectly consistent either with the innocence or guilt of the accused, the presumption of innocence should prevail. (1904) 6 Bom LR 551 (552).

### 8. Remarks and strictures.

See also Criminal P. C., Ss. 439 and 561A.

**(a) General.**

**(b) Expunging of.**

#### (a) General.

——S. 367 — **Allegations against Counsel in judgment — Permissibility.**

Where the Counsel acts in the discharge of his duties to the best of his judgment and ability the mere fact that the Judge is not satisfied by his conduct of the case is no reason for the Judge to make serious allegations against the Counsel in the judgment (e.g., that the Counsel acted irresponsibly) in the absence of an enquiry or explanation from the Counsel. AIR (Vol 33) 1946 Nag 321: 47 Cr LJ 918: 1946 NLJ 656: ILR (1946) Nag 946: 226 Ind Cas 377 (DB).

——S. 367 — **Sessions Judge trying case with aid of assessors — Passages under heading 'General Remarks' can be said to form integral part of judgment.**

When the Sessions Judge is trying a case with assessors it cannot be said that the passages under the heading 'General Remarks' do not form a part and an integral part of the judgment. Whether a Judge should indulge in moralizing in the concluding part of his judgment or not is more a matter of fashion or taste than a matter of law. Nor, if in the course of a case before him Judge considers that certain provisions of the law should be amended, is there any reason why he should not express so or why the passages in which he says so should not be considered an integral part of his judgment. AIR (Vol 33) 1946 Sind 121 (DB).

——S. 367 — **Criticising judgment of lower Court in unrestrained language is undesirable.**

It is undesirable and improper for one Judge or Magistrate to criticise another in unrestrained language. It is unfair to the Magistrate concerned

as a public indictment tends to make his position as a Magistrate difficult and must affect adversely his ability to perform his magisterial duties. It also lowers the administration of justice. If there is any serious cause for complaint, the matter should be taken up privately with the District Magistrate, judgment is not the proper place for such strictures. AIR (Vol 31) 1944 Nag 136: 1944 NLJ 93: ILR (1944) Nag 176: 45 Cr LJ 766: 215 Ind Cas 57.

**——S. 367 — Criticism of conduct of persons who are not witnesses**

A Magistrate is fully justified in making criticisms in his judgment (provided he does so in restrained and decorous terms), of matters relevant to the conduct and merits of the case and of persons who are witnesses but he should confine his criticisms to matters that are strictly relevant to the issue involved. He should be careful to avoid criticisms of the conduct of persons who are not witnesses specially when they are in responsible official position. AIR (Vol 30) 1943 Lah 298: 45 Cr LJ 149: 46 PLR 334: 209 Ind Cas 468 (DB).

**——S. 367 — European Magistrate preaching in judgment on such delicate subject as Indian womenfolk and making sweeping generalizations about Indians — Remarks, held objectionable and insulting.**

It is highly improper for a European Magistrate to assume the role of a mentor and to preach to all Indians without any exception on such a delicate subject as their womenfolk and to ask them to give up their time honoured notions or to make sweeping generalizations about Indians.

He should know that the ideas imbibed by him in his own country are altogether foreign to this soil and that his advice that the Indians should "learn more esprit de corps" so as not to resent the conduct of those people who stare at their womenfolk with an immoral object would be treated as a sheer insult.

Similarly the remarks that Indians have not yet developed a sense of general and civic responsibility, that they are devoid of integrity, and that they cannot, in fairness, claim to be called a civilised people to say the least, are most ill-advised and most indiscreet. Even if he seriously entertains this view, expediency alone should teach him not to give expression to it in a judicial pronouncement as it is likely to wound the feelings of millions of people who constitute one-fifth of the human race, more especially at a time when Provincial Govts. are being efficiently run by Indian Ministers. AIR (Vol 29) 1942 Lah 232: 43 Cr LJ 808: 44 PLR 409: 202 Ind Cas 292.

**——Ss. 367, 561-A — Remarks by Magistrate in cases which are sub judice causing reflection on impartiality of Court should be expunged.**

Nobody—not even the Sub-Divisional Magistrate—is permitted to pass any remarks in cases which are sub judice especially such remarks as tend to cast a serious reflection on the integrity and impartiality of the Court trying them.

Honorary Magistrates are not elected by the people but are appointed by Govt. and for a responsible officer to say that they will "dance to the tune played by the Municipal Commissioners" is indirectly to criticise those who appoint such dishonest Magistrates. If the Magistrate making such remarks really believes that the Honorary Magistrates were open to extraneous influences, he should move the authorities concerned for their removal and not condemn them publicly in such an objectionable manner. If such remarks emanate from any other quarter, they would clearly amount to a contempt of Court. Such remarks should be expunged from the judgment. AIR (Vol 29) 1942 Lah 232: 43 Cr LJ 808: 44 PLR 409: 202 Ind Cas 292.

**——S. 367 — Wholesale condemnation of leading townsmen and Police.**

Wholesale condemnation of all Municipal Commissioners and leading townsmen, without sparing even the Police based on mere gossip or the Magistrate's own imagination are highly objectionable and should be expunged. AIR (Vol 29) 1942 Lah 232: 43 Cr LJ 808: 44 PLR 409: 202 Ind Cas 292.

**——S. 367 — Remarks on conduct of party or witness.**

A Magistrate is not bound to confine himself merely to a finding that the accused is not proved guilty. Such a verdict often leaves the accused with a stain on his character in the public estimation though not in law and it is the duty of a Magistrate if he considers that the prosecution case is not only not proved but was deliberately false and concocted to give such a finding in favour of the accused so that the accused should leave the Court without a stain on his character.

In arriving at the conclusion that a prosecution case is false and fabricated, the Judge is at liberty to make remarks on the character or conduct of certain witnesses who have appeared to support that case for, otherwise he cannot arrive at a finding that the documents on which the prosecution rely are false and fabricated. When he had done so, the remark that the conduct of person doing such a thing is criminal or contemptible, follows and is justified on the findings arrived at. AIR (Vol 27) 1940 Lah 42: 41 Cr LJ 380: 186 Ind Cas 799.

——S. 367 — While sentencing the accused, the Magistrate remarked "the accused persons are young boys of tender ages. They have committed the offence in the heat of their youth and dashing courage unmindful of consequences. This weighs much before me. A light fine will meet the ends of justice." One of the accused was a young man of 25. The other two were youths of 16 and 19:

Held, that to call a man of 25 years a boy of tender age is inaccurate. The remarks of the Magistrate were injudicious as they would put a premium on hooliganism. AIR (Vol 27) 1940 Nag 276: 1940 NLJ 389: 41 Cr LJ 793: ILR (1942) Nag 277: 189 Ind Cas 731.

**——Ss. 367, 561-A — Commenting on conduct of persons — Guiding principles — Courts should not act as propagandists.**

While on the one hand Courts are at liberty to discuss the conduct of the persons before them, either as parties or as witnesses, untrammelled by any considerations, on the other, they are not permitted to travel beyond the record and are bound to exercise due restraint on the language employed by them. In other words, they should neither make any such sweeping assertions as are not borne out by the evidence produced before them nor should they use language which is unduly harsh. The most offensive feature of the whole case would be where, while commenting on the conduct of the Police Officer, the Court makes an appeal to the Press to take up the particular defect pointed out by it in the working of the Police and to start a public agitation against them. Courts are not expected to play to the gallery nor to invoke the Press in a manner which is liable to be misunderstood and may land the administration in general in an awkward situation. They should play the part of judges alone and not that of propagandists and confine their whole attention to the evidence led before them and to the matters

requiring determination at their hands. AIR (Vol 26) 1939 Lah 174: 41 PLR 74: 40 Cr LJ 655: ILR (1939) Lah 327: 182 Ind Cas 281.

——S. 367 — The Judges in appeal are rightly inclined to attach great weight to the views of trial Judges on the manner in which evidence has been given before them. It is, therefore, essential that a trial Judge should endeavour in making such comments to be strictly accurate. AIR (Vol 25) 1938 Lah 288: 39 Cr LJ 534: 175 Ind Cas 96 (DB).

**——S. 367 — Strictures on defence Counsel.**

Making of strictures against the conduct of the defence Counsel by the Sessions Judge, deprecated. AIR (Vol 21) 1934 Oudh 362: 11 OWN 581: 35 Cr LJ 1042: 9 Luck 636: 150 Ind Cas 205.

**——S. 367 — Care to be taken by judicial officers.**

Even though it may often be the duty of a Sessions Judge to comment adversely on the conduct of an investigation, great care should be taken by him, when it is necessary to do anything of this kind, that no disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared in the witness-box. AIR (Vol 20) 1933 Sind 91: 34 Cr LJ 367: 27 SLR 13: 142 Ind Cas 587 (DB).

**——S. 367 — Pleader — Magistrate's remarks against — Judgment, copy of.**

An advocate against whom remarks have been made by a court imputing to him misconduct should have furnished to him a copy of the written judgment containing those remarks in order that he may place his own conduct before the particular court in the light most favourable to himself and with such explanations as he may be able to afford and as may perhaps induce the court to alter, modify or perhaps even withdraw the opinion expressed adversely to the advocate's conduct in the particular case. (1904) 6 Bom LR 540 (541) (DB).

**(b) Expunging of.**

——S. 367 — High Court has no jurisdiction to expunge passages from the judgment of lower Court which has not been brought before it in regular appeal or revision. AIR (Vol 27) 1940 Bom 266: ILR (1940) Bom 415: 42 Bom LR 478: 42 Cr LJ 855: 190 Ind Cas 205.

——S. 367 — Disparaging remarks made against a person not before the Court and unwarranted by evidence or made against a witness without affording him any opportunity to offer explanation, should be expunged from the judgment. AIR (V 27) 1940 Mad 134: (1939) MWN 1131: 50 MLW 782: 41 Cr LJ 317: 186 Ind Cas 472.

**——S. 367 — Power of High Court to expunge remarks — Remarks seriously prejudicing accused — Person neither accused nor witness — Magistrate, if justified in condemning him.**

It is a serious matter for the High Court to expunge remarks from a Magistrate's judgment or order. It will interfere to expunge remarks which are libellous and irrelevant. But if they form an integral part of the judgment or its argument, and if they are inseparable, the Court will not interfere and mutilate a judgment so that it reads disjointedly or incoherently, nor will it interfere merely because the Court may have passed remarks adverse to a witness provided that judgment shows there is some basis for them, however inadequate may appear this basis to the higher Court. It may well be the bounden duty of a Judge or Magistrate in giving his judgment and reasons to comment adversely upon the conduct of witnesses, so also it may be his duty to comment adversely upon the conduct of accused persons even though he may not consider the evidence sufficient to commit them for trial to the Court of Session. Nor will the High Court in revision inquire into question of fact, but in dealing with applications of this nature, it will take the Magistrate's judgment as it stands.

Where the Magistrate's own order exculpates rather than inculpates the accused, he is not justified in making remarks seriously to his prejudice which will be justified only if this order tended to inculpate rather than exculpate.

A Magistrate, when he is called upon to investigate a case in which a large number of persons may be involved and may appear to be implicated in some offences, may in his order, consider the case against a person who is neither a witness nor an accused. He may have to consider facts in relation to a particular individual who is not an accused or witness in order to weigh fairly the evidence against the acused or the evidence given by witnesses, but a Magistrate is not justified in condemning any person without his being given an opportunity of being heard. AIR (V 25) 1938 Sind 103: 39 Cr LJ 524: 175 Ind Cas 57 (DB).

**——S. 367 — Observations prejudicial to character of a person not connected with case.**

A Magistrate should not in his judgment in a criminal case make observations prejudicial to the character of any person who is neither a witness nor a party to the proceedings and who has had no opportunity of being heard and upon material which is not legal evidence in the case. The High Court in revision can expunge the remarks. (1935) 153 Ind Cas 262 : 35 PLR 373 : 36 Cr LJ 383 (1).

**——S. 367 — When it can be done.**

Remarks upon the evidence tendered before the court of trial are the proper subject of comment by that court and such comments will not be varied or expunged by the High Court except in an appeal preferred against the decision based on the evidence. Thus the High Court will not revise the judgment of the lower Court to the extent of expunging the objectionable matter. 1930 MWN 791.

**——S. 367 — Judgment — Contents and language of — High Court — Powers of.**

A Judge should not admit irrelevant matter on the record and should confine himself to a consideration of the issues before the court together with fair and legitimate comment on any errors or irregularities likely to be disclosed in the trial. The language of a judgment should be temperate and sober and not satirical. The High Court can order that irrelevant matter in the judgment of a Lower Court should be struck out. (1912) 5 Bur LT 20: 13 Cr LJ 259: 14 Ind Cas 643.

**9. Dictation of Judgment.**

**——S. 367 — Dictation of judgment.**

Where the Magistrate did not write the judgment himself but dictated and signed it.

Held, that the dictation of the judgment contravened the provisions under S. 376, Cr. P. C. (1906) 4 CLJ 411 (412) (DB).

**10. Presiding officer.**

**——S. 367 — Judgment — "Shall be dated and signed by the presiding officer" — Judgment dated and signed by successor — No irregularity.**

Under S. 367, Cr. P. C., it is not necessary that the presiding officer of the court who wrote the judgment should be the same person as the presiding officer who is required to date, sign and pronounce it. (1907) 18 MLJ 197 (197) (DB).

**——S. 367 — Magistrate signing judgment not hearing all evidence — Conviction is illegal.**

**A conviction is illegal if the Magistrates who signed the judgment did not hear all evidence. (1938) 175 Ind Cas 874(874): (1938) MWN 591: 39 Cr LJ 680: 48 MLW 149.**

**——Ss. 367 and 537 — Succeeding Sessions Judge — If can pronounce judgment of his predecessor in case heard by the latter — Conviction — Legality — Defect — If cured by S. 537 of the Code.**

S. 367, Cr. P. Code, does not authorise succeeding Sessions Judge to pronounce a judgment of his predecessor who has heard the Sessions case. The moment the predecessor hands over charge to his successor he becomes functus officio and has no jurisdiction to write a Judgment and the successor had no jurisdiction to pronounce a judgment on evidence recorded by his predecessor. The "presiding officer" referred to in S. 367(1), Cr. P. Code, means the presiding officer at the trial, who is assumed in the section to have written and pronounced his judgment while still holding the same office. A conviction by the succeeding Sessions Judge is therefore illegal and must be set aside. The defect if it may be so called cannot be cured by S. 537 of the Cr. P. Code. AIR (V 34) 1947 Mad 248: 59 LW 472: 1946 MWN 585: (1946) 2 MLJ 195: ILR (1947) Mad 365: 228 Ind Cas 164: 48 Cr LJ 81 (DB).

**——S. 367 — Predecessor in office — Preparation by.**

The succeeding magistrate cannot be said to act without jurisdiction in pronouncing judgment signed and written by his predecessor. AIR (V 12) 1925 Oudh 62: 81 Ind Cas 899: 11 OLJ 725: 25 Cr LJ 1075: 28 OC 109.

**——S. 367 — Judgment pronounced by another Magistrate.**

It was not suggested that the failure of the Magistrate to pronounce judgment in any way prejudiced the accused in the conduct of the case. The only omission, namely, that the Magistrate did not himself pronounce the judgment in the case was due to the fact that he was physically incapacitated.

Held, at the most his procedure in getting another Magistrate to pronounce the judgment was a mere irregularity completely covered by S. 537. AIR (V 10) 1923 All 276: 71 Ind Cas 525: 24 Cr LJ 173: 21 ALJ 137: 4 LRA Cr 76.

**——S. 367 — Cannot be deputed.**

The judgment was signed and dated before delivery and sent to the chief clerk to deliver.

Held, it was not legally pronounced, there was no court for no presiding judge was present. The delivery of judgment and the passing of sentence is an integral part of a criminal trial. It is not a mere formality and the deliberate breach of express provisions of the law cannot be treated as a mere irregularity to be cured by S. 537. AIR (V 10) 1923 Rang 44: 73 Ind Cas 328: 1 Bur 122: 24 Cr LJ 584 (DB).

**——S. 367 — Sessions trial — Change of judge — Evidence recorded by one judge orders passed by another — Validity.**

A Sessions Judge cannot act on evidence recorded by his predecessor in office: On a change of the judge, a sessions trial must commence de novo. The judgment passed by a Sessions Judge on evidence partly recorded by his predecessor in office is illegal and must be set aside. (1908) 8 CLJ 59 (61) (FB).

**11. Signature of presiding officer.**

**——S. 367 — Where though only three Magistrates of the Bench heard the evidence and tried the case, the judgment was signed by seven:**

Held, that there was an illegality which vitiated the proceedings. AIR (V 18) 1931 Mad 494: (1930) MWN 770: 32 Cr LJ 971: 133 Ind Cas 4.

——S. 367 — Where a Magistrate prepares a judgment but does not sign it, such omission to sign the judgment amounts to a mere irregularity curable by S. 537. AIR (V 17) 1930 Rang 77: 120 Ind Cas 225: 1930 Cr C 203: 7 Rang 370: 30 Cr LJ 1166.

——S. 367 — Where the judgment was entirely in the hand-writing of the Magistrate.

Held, in the circumstances of the case, irregularity of the judgment not being signed, was covered by S. 537. AIR (V 12) 1925 All 299: 86 Ind Cas 64: 47 All 284: 26 Cr LJ 688: 6 LRA Cr 41: 23 ALJ 8.

**——S. 367 — Bench Magistrates — Signing in Register of convictions.**

The intention of S. 265 is that by whomsoever the judgment and record may have been written, they shall be signed by all the members present. The words "presiding officer of the Court" do not afford any assistance in the construction of S. 265 and do not show that the judgment may be signed by the Chairman of the Benches; they are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments. But the failure to comply with a mandatory provision of the Code is not necessarily an illegality and thus where all the members of the Bench sign the register, in which the sentences are embodied, and thus agree in the judgment, their omission to comply with the technical requirements of the law in the fact that the judgment is signed only by the Chairman is a mere irregularity which occasions no failure of justice. AIR 1928 Mad 1172, Doubted. AIR (V 17) 1930 Mad 187: 57 MLJ 763: 124 Ind Cas 501 : 31 Cr LJ 715 : 53 Mad 165 : 1930 Cr C 187 : 1930 MWN 78 : 30 MLW 883 : 2 M Cr C 222 (DB).

**——S. 367 — Bench Magistrates.**

If the record is prepared by a member of the Bench and not by the presiding officer, it shall have to be signed by each member of the Bench taking part in the proceedings, as required by S. 265(2). But where a judgment of a Bench is prepared by the presiding officer it is sufficient, if he alone signs it. AIR (V 15) 1928 Mad 1172: 55 MLJ 576: 112 Ind Cas 61: 28 MLW 498: 1928 M WN 785: 1 M Cr C 298: 29 Cr LJ 973: 11 AICrR 265: 52 Mad 237.

**12. Death sentence.**

**(a) General.**

**(b) Extenuating circumstances.**

**(a) General.**

**——S. 367(5) — Awarding of lesser penalty — Proper reasons must be given.**

In the case of an offence punishable with death, if some lesser penalty is to be awarded, the Court should give its reasons for doing so. Where no special reasons have been given barring the remark that there had been a dispassionate consideration of all the circumstances, that remark is not sufficient reason in the eye of law to justify the lesser penalty. AIR (V 27) 1940 Pesh 49: 42 Cr LJ 254: 1940 Pesh LJ 53: 192 Ind Cas 179 (DB).

**——S. 367 — Court passing lower sentence for murder must give reasons.**

While passing the lower sentence of transportation on a charge of murder, the Court must give, under S. 367(5), Criminal P. C., reasons why the normal sentence of death is not passed. AIR (V 22) 1935 Lah 337: 36 Cr LJ 1001: 16 Lah 1131: 38 PLR 109: 156 Ind Cas 786 (DB).

——S. 367 — Reasons for not passing it should be recorded by trial Judge.

In a case of murder, if the trial Judge does not think it proper to pass a sentence of death, he is bound to record reasons why sentence of death was not passed upon the accused, that is to say, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstances. It is not enough if he says that under the circumstances of the case, the accused is sentenced to transportation for life. He is bound to state what these circumstances are, and whether they served to justify him in abstaining from passing capital punishment. AIR (V 22) 1935 Oudh 265: 1935 OWN 321: 36 Cr LJ 529: 154 Ind Cas 691 (DB).

——S. 367 — Judge, if should record specifically judgment of acquittal.

It is specifically provided by S. 367(4), Criminal P. C., that if a judgment be a judgment of acquittal, it shall state the offence for which the accused is acquitted. In a charge of murder, the Judge should raise as one of his points for decision, the question whether the accused is guilty of murder. If he decides to acquit, he should specifically record a judgment of acquittal under S. 302, I. P. C. AIR (V 21) 1934 Sind 139: 36 Cr LJ 83: 28 SLR 337: 152 Ind Cas 376 (DB).

——S. 367(5) — Conviction for murder — Death sentence, when to be passed — Duty of Sessions Judge — Opinion of assessors that accused is not guilty — Whether ground for passing lesser sentence.

The duty of Sessions Judge under S. 367(5) of the Criminal P. C., is to pass sentence of death in cases of conviction of murder under S. 302, I. P. C., unless there are reasons for not passing such sentence. The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence. Assessors are meant to assist the Judge in arriving at a conclusion whether the accused before the Court is guilty or not, but the responsibility for the sentence rests with the Judge and the Judge alone, and, having once made up his mind to differ from the assessors as regards conviction, he should not let their opinion weigh with him with regard to sentence. AIR (V 20) 1933 Nag 307: 34 Cr LJ 1168: 30 NLR 9: 146 Ind Cas 118 (DB).

——S. 367 — Where the Sessions Judge passed a sentence of transportation for life on a youthful offender on the ground that he was young, that he may reform and that the murder was committed without premeditation but otherwise it appeared that the murder was brutal and cold blooded,

Held, in appeal that the sentence of death should have been passed. AIR (V 18) 1931 Oudh 89(1): 7 OWN 767: 1930 Cr C 965: 32 Cr LJ 83: 128 Ind Cas 80 (DB).

——S. 367 — When need not be passed.

Apparently the provision in S. 367(5) contemplates that death sentence is to be passed as a matter of course unless there is sufficient reason to the contrary. But the Court must consider the question of sentence with reference to the circumstances and if these circumstances justify the passing of a sentence other than the sentence of death, the Court must pass that sentence. Therefore, in fixing the measure of punishment one is to be guided not by S. 367, but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it.

D, a mere lad of twenty, went to retire with his wife and shut himself in the upper room. In the morning the door was found open and the girl was found murdered. D was found absconding and remained hiding for some six weeks.

Held, that on consideration of his age, good character, the provocation at the unsympathetic treatment he had been getting ever since his marriage from his wife's relations, a sentence of transportation for life instead of death, would meet the ends of justice. AIR (V 17) 1930 Cal 193: 125 Ind Cas 305: 33 CWN 1226: 1930 Cr C 225: 31 Cr LJ 817 (DB).

——S. 367 — When need not be passed.

Where a large number of persons has participated in a murder, in deciding as to whether some or all of them are to be sentenced to death after a conviction for murder it has long been settled that prima facie all the persons convicted should be sentenced to the extreme penalty and it is only where special circumstances are shown in favour of any individual that the Court would sentence such individual to the alternative punishment of transportation for life. AIR (V 16) 1929 Pat 161: 117 Ind Cas 176: 8 Pat 181: 30 Cr LJ 737 (DB).

——S. 367 — Quarrel.

Where the murder was not a deliberate one but occurred suddenly after mutual abuse, and the accused who did not belong to a turbulent class took up on the spur of the moment the weapon and killed the deceased with it, a sentence of transportation for life was substituted for the death sentence. AIR (V 15) 1928 Lah 913: 116 Ind Cas 187: 11 LLJ 1: 12 AI Cr R 453: 30 Cr LJ 571 (DB).

——S. 367 — Youth — Tool in the hands of others.

Youth alone does not constitute such an extenuating circumstance as would justify the imposition on the lesser penalty prescribed by the law.

But where a youth charged under S. 302 had no personal enmity with the victim, and he was found to be only a tool in the hands of the enemies of the victims,

Held, the extreme penalty of the law should not be exacted in the case. AIR (V 15) 1928 Lah 855: 110 Ind Cas 234: 10 AI Cr R 501: 29 Cr LJ 682 (DB).

——S. 367 — Reasons for not awarding.

It is necessary for the Judge to state the reason, when convicting an accused of an offence punishable with death, why he is not passing a sentence of death. AIR (V 14) 1927 Oudh 588: 105 Ind Cas 804: 4 OWN 977: 28 Cr LJ 980 (DB).

——S. 367(5) — Sentence of death not awarded — Reasons.

The Sessions Judge should state his reasons for not awarding a sentence of death in a case punishable with death. (1910) 8 MLT 81: 11 Cr LJ 481: 7 Ind Cas 397 (DB).

(b) Extenuating circumstances.

——S. 367 — Age of accused in a murder case — Duty of Sessions Judge.

Where the person concerned has been sentenced to death, it is important to ascertain his age correctly so far as that may be possible, and the Sessions Judge should clearly indicate his own opinion if there is any doubt on the point. The question of age is of particular importance where it has been contended that a young man of only 19 is not likely to have organised and directed the offences of which he and the others have been found guilty. AIR (V 28) 1941 Oudh 517: 1941 OWN 981: 42 Cr LJ 758: 1941 AWR 365: 195 Ind Cas 630 (DB).

——S. 367 — Youth.

Youth alone in every case is not such an extenuating circumstance as would justify an impo-

sition of the lesser penalty. (1928) 109 Ind Cas 364: 10 AI Cr R 212: 29 Cr LJ 540 (DB).

**——S. 367 — Doubt as to the cause of death.**

If a person is convicted of an offence punishable with death, the fact that the accused murdered his victim merely to escape from custody, is not a sufficient reason for imposing the lesser sentence.

But where the case rested entirely on circumstantial evidence and it was open to question whether the injuries to the head would have caused death had not the deceased been drowned,

Held, there can be other reasons for inflicting the lesser punishment. AIR (V 14) 1927 Oudh 352: 104 Ind Cas 636: 4 OWN 754: 9 AI Cr R 46: 28 Cr LJ 860 (DB).

**——S. 367 — Voluntary drunkenness**

The reasons justifying the infliction of the lesser penalty under S. 367(5) must be such as are in accord with established legal principles; unless drunkenness either amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation and is not a reason for inflicting a sentence of transportation for life instead of the death sentence. AIR (V 13) 1926 Lah 428: 95 Ind Cas 284: 7 Lah 141: 27 PLR 332: 27 Cr LJ 764 (DB).

**——S. 367 — Accused a woman.**

Mere absence of premeditation or deliberate intent to kill is not an adequate reason for not passing sentence of death, so also the fact that the accused is a woman is not a conclusive reason for not passing a sentence of death. AIR (V 11) 1924 Rang 179 : 1 Rang 751 : 2 Bur LJ 277 : 25 Cr LJ 1121 : 81 Ind Cas 945 (DB).

**13. Trial by jury.**

**——S. 367 (5), Proviso — Re-charge to jury — Need for record.**

A Judge is entitled to explain matters afresh to a jury, but what he told the jury on the second occasion is of vital importance to the High Court sitting in appeal. What he said in re-charging the jury is quite as important if not more important than his original charge, and a record of that should be kept as required by the proviso to S. 367 (5), Cr. P. C., to enable the High Court to come to a conclusion about the validity or otherwise of the verdict of the jury. AIR (V 36) 1949 Cal 579 : 53 CWN 716 : 50 Cr LJ 1001 (DB).

**——S. 367 — Erroneous verdict — Proof of.**

Although it is desirable that the record of heads of charges should indicate far more fully than mere enumeration of the numbers of the sections, in order to entitle the High Court to interfere with the verdict of the jury and set it aside, it must be affirmatively proved that there has been misdirection and misunderstanding and the verdict is erroneous owing to misdirection by Judge and misunderstanding on the part of the jury of the law as laid down by him. AIR (V 17) 1930 Cal 712 : 1930 Cr C 1112 (DB).

**——S. 367 — What the charge should be.**

Under S. 367 the Judge is not to write a judgment but to record the heads of the charges to the jury, but as an appeal lies to the High Court in jury trials, it is necessary that the charge recorded should be such as to convey sufficient information to the High Court as to the explanation of the law by the Judge and about important questions of fact. AIR (V 13) 1926 Cal 895 : 30 CWN 693 : 43 CLJ 537 : 27 Cr LJ 926 : 96 Ind Cas 270 (DB).

**——S. 367 — What the charge to jury should be.**

According to the proviso to S. 367 (5) the recording of "heads of charge to the jury" need not be a verbatim reproduction of the Judge's summing up; nor is it necessary that the charges should be written out before it is delivered. But whether, the heads of charge are written out before delivery or not, they should be placed on record by the Judge as soon as it is possible for him to do so and whilst what he said is fresh in his re-collection.

The heads of charge need not be meticulous or lengthy but must give accurately the substance of what the Judge said to the jury so that the High Court may, if occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the jurors.

Where the records of the heads of charge merely stated that certain sections of the Penal Code had been "read over and explained".

Held, that this was not a sufficient compliance with the law. AIR (V 12) 1925 Pat 797 : 4 Pat 626 : 7 PLT 239 : 27 Cr LJ 49 : 91 Ind Cas 225 (DB).

**——S. 367 — Functions of Judge and Jury considered.**

Under S. 367 a Judge is called upon to show by the heads of his charge to the jury in what way the law on the subject was explained to the jury and the heads of the charge ought to show that the evidence was properly laid before the jury. It is only for the jury to decide whether evidence relied on by each accused is worthy of consideration. AIR (V 4) 1917 All 173 : 15 ALJ 205 : 39 A 348 : 18 Cr. LJ 491 : 39 Ind Cas 331.

**——S. 367 — Writing down heads of charge.**

Though there is no time limit in S. 367 for a Judge to write down the heads of charge to the Jury before delivery, still it should be done as soon as possible after the charge has been delivered and the case is fresh in his mind. (1909) 36 C 278: 1 Ind Cas 970: 12 CWN 817 (DB).

**——S. 367 — "Heads of charge".**

The expression "heads of charge" in S. 367, Cr. P. C., must be construed reasonably, and must be held to include such statement on the part of the Sessions Judge as will enable the appellate court to decide whether the evidence has been properly laid before the Jury or whether there has been any misdirection in the charge. (1908) 10 Bom LR 565 (566) (DB).

**——S. 367 — Judgment —Heads of charge to jury, when to be recorded — S. 162 — Evidence before Police, if admissible as corroboration — Evidence Act (I of 1872), S. 157 — Misdirection — Depositions, if must be read out to Jury.**

The heads of charge to the jury should be written out by the judge as soon as possible after its delivery and while the facts are still fresh in his mind. S. 367 of the Criminal Procedure Code does not make it obligatory for the charge to be written out before delivery. It is not incumbent on the Judge to read out the whole of the depositions of the witness to the jury. (1908) 13 CWN 197: 36 C 281 (283): 9 CLJ 199: 5 MLT 97: 1 Ind Cas 970 (DB).

**——S. 367 — Charge to jury, heads of — Recording of.**

It is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fulness to enable the appellate Court to satisfy itself that all points of law were clearly and correctly explained to the Jury in reference to the facts and the evidence in the case. (1907) 34 C 698 (704): 11 CWN 666 (DB).

——S. 367 — Charge to jury — Record of heads of charge.

In a trial by a jury before a Sessions Judge the record made by the Judge of the heads of his charge to the Jury under the provisions of S. 367 of the Cr. P. C., should include such a statement as will enable an appellate court to decide whether the evidence was properly laid before the Jury or whether there has been any misdirection in the charge. (1903) AWN 232 (232).

14. Defects in procedure.

——S. 367 — Proper way of dealing with criminal case.

The proper way for a Magistrate to deal with a criminal case is to discuss first the prosecution evidence and come to an independent finding on the truth or falsity of the story related by them and then to examine the statement of the accused and criticize it in the light of the circumstances brought on the record. After having weighed the prosecution evidence, and the statement of the accused, he should then be justified in formulating his conclusion as to the guilt or innocence of the accused.

Where the Sessions Judge dealt with the statement of the accused first and having found it untrustworthy, except to the extent of his admission that he had killed his wife, then animadverted upon the prosecution evidence and finding it to be entirely unreliable, believed the evidence only to the extent to which it agreed with the admission of the accused:

Held, that the manner in which the case was approached was entirely illegal. AIR (Vol 25) 1938 Lah 850: 40 PLR 265: 40 Cr LJ 185: 179 Ind Cas 237 (DB).

——S. 367 — Cross cases — One judgment — Propriety — Interference.

Cross-cases — Evidence taken separately one after the other—One argument and one judgment — Procedure strictly speaking is irregular.

(There being no prejudice caused to the accused in their defence, the High Court did not interfere.) AIR (Vol 22) 1935 Cal 548: 36 Cr LJ 1339: 157 Ind Cas 1042 (DB).

——S. 367 — Where the president of a village panchayat wrote the judgment and further evidence was taken the next day, then it was obviously a nullity having been pronounced before the case was closed. (1932) 1932 MWN 648.

——S. 367 — Sentence before completing judgment.

Pronouncing sentence before completing the judgment, that is to say before preparing the essential parts of it, such as the statement of points for determination and the reasons for decision makes the sentence illegal and vitiates conviction. AIR (Vol 17) 1930 Pat 148: 122 Ind Cas 531: 1930 Cr C 90: 11 PLT 195: 8 Pat 904: 31 Cr LJ 416 (DB).

——S. 367 — Pronouncing sentence before writing judgment is an irregularity covered by S. 537 and is curable except in case of failure of justice. 14 All 242, Diss. AIR (Vol 12) 1925 Lah 137: 81 Ind Cas 193: 25 Cr LJ 705.

15. Judgment—Language of.

(a) General.

(b) Loss of.

(a) General.

——Ss. 367, 537 — Judgment, language and script — Irregularity of, cured.

Under S. 367, Cri P. C., the judgment of a criminal court should be written in the language of the court or in English. Where an Honorary Magistra[illegible] Hazipur had written his judgment in Urdu t[illegible] script used being Persian.—Held: this was irregular and the judgment should have been written in Hindi, which was the language of the court or in English, and the script should have been in the former case as directed by the Local Government in Kaiti and Roman in the latter. Held also, that such an irregularity was cured by S. 537. (1906) 4 CLJ 232 (233) (DB).

(b) Loss of.

——S. 367 — Judgment, lost — Procedure.

It is open to a judge, when a judgment has been lost, to re-write from memory the substance of it. (1907) 8 CLJ 521 (522) (DB).

16. Non-compliance with the section — Effect.

——Ss. 367, 439 — Appellate judgment not in accordance with S. 367 — High Court whether bound to remand — S. 439 — Interference in revision is discretionary — Fact that in revision accused is invariably heard and discretion is used in judicial manner gives no right to accused to demand these things.

If an Appellate Court does not write a judgment in accordance with S. 367, Criminal P. C., the High Court is not bound to send the case back to the Appellate Court for a re-hearing; it can itself hear the appeal and dispose of it upon an application for revision under S. 439. In such a case the accused would be deprived of what he calls his right of revision but he cannot complain, for, as a matter of fact, there is no such right. Interference in revision is purely discretionary; it is not even necessary to hear the accused. The fact that he is invariably heard, and the fact that the discretion conferred by S. 439 is exercised in a judicial manner, does not make any difference to the fact that the accused has no right to demand any of these things. All that he is entitled to is that a second Court of competent jurisdiction should hear his entire case as an appeal. If he gets that, he has obtained all that the law allows him, and when the High Court hears his appeals in place of a lower Court, he has obtained a good deal more than he has any right to claim. AIR (Val 23) 1936 Nag 160: ILR (1937) Nag 38: 39 Cr LJ 349: 173 Ind Cas 639.

——S. 367 — Interference in revision.

Where although an order of a Magistrate did not strictly comply with the provisions of S. 367, Criminal P. C., it was clear that the Magistrate had perused the evidence and heard arguments, and having heard the case argued, had come to an independent opinion as to the guilt of the accused, the High Court refused to interfere with the order. AIR (Vol 19) 1932 Bom 473: 33 Cr LJ 801: 34 Bom LR 1110: 139 Ind Cas 608 (DB).

——S. 367 — Proceeding under S. 476 — Contents of judgment in appeal.

In a case under S. 476, Criminal P. C., the judgment of the Court of Appeal was as follows: "Heard the appellant. I do not think it is necessary to direct prosecution of the respondent in this case. Appeal dismissed".

Held, that the provisions of S. 367, Criminal P. C., had not been complied with and the judgment was bad.

Held, further, that even if the provisions of the Civil P. C. applied the result would be the same as in that case O. XLI, R. 31 would apply. AIR (V 18) 1931 Cal 454: 35 CWN 660: 32 Cr LJ 1045: 133 Ind Cas 672 (DB).

——S. 367 — Contents of judgment.

A judgment which does not comply with the provisions of S. 367, but consists of a few notes on the arguments of Counsel and a somewhat vague conclusion, is no judgment. AIR (Vol 17) 1930 Lah 1054: 1930 Cr C 1230.

——S. 367 — Where a Court does not discuss the facts nor the grounds of appeal its judgment is not in accordance with law and must be set aside in revision. (1925) 91 Ind Cas 690: 27 Cr LJ 114 : 1 LC 399 (Lah).

——S. 367 — A judgment which is deficient in the points mentioned in S. 367 is illegal and cannot be allowed to stand. AIR (Vol 8) 1921 Pat 504: 63 Ind Cas 416: 2 PLT 616: 22 Cr LJ 656.

**——S. 367 — Judgment — Contents of.**

A recital of facts preceding the alleged offence without a discussion of the evidence or consideration of such essential points as the ownership of the thing alleged to be stolen and the possibility of the accused having acted in good faith does not satisfy the requirements of S. 367, Cr. P. Code. (1912) 12 MLT 335: (1912) MWN 881: 13 Cr LJ 712: 16 Ind Cas 520.

**——S. 368.**

**——S. 368 — Sentence of death — Omission to direct that accused be hanged by neck till he is dead — Sentence, if executable.**

The effect of S. 368, Cr. P. Code is the same as though the Code provided that where a person is sentenced to death, he shall be hanged by the neck till he is dead. There is, therefore, no difficulty in the way of executing a sentence of death by hanging the person sentenced even if the Judge does not, as required by S. 368, incorporate in his judgment that statutory direction. The form of the warrant that issues when the sentence is confirmed by the High Court, directs the convict to be hanged by the neck till he is dead and where the sentence is imposed by the High Court either in appeal under S. 417, Cr. P. Code, or in exercise of the powers of revision the formal order that issues from the High Court contains a similar direction. AIR (Vol 37) 1950 Lah 250.

**——Ss. 368 and 369 — Sentence of death passed by Sessions Judge — Absence of direction that accused "be hanged by neck till he is dead" — Sentence confirmed by High Court — Correction of "clerical error" — Power of High Court.**

Under S. 368, Cr. P. Code, it is the duty of the Sessions Judge passing a sentence of death to direct that the accused "be hanged by the neck till he is dead". On appeal under S. 423, Cr. P. Code, the duty of the Appellate Court is, after hearing the accused and the Public Prosecutor, to decline to interfere if there is no sufficient ground and to dismiss the appeal. The appellate Court is under no obligation to define mode in which the sentence is to be executed. That is the function of the trial Court. Under S. 376, Cr. P. Code, the High Court may confirm the sentence, and the confirmation by the High Court would mean only this: that the death sentence awarded by the trial Court is, in the view of the High Court, an appropriate sentence and should be allowed to stand. In confirming the sentence of death, it is nowhere prescribed that the High Court should clearly state that the sentence is to be executed by hanging as prescribed in the Code. If, therefore, the Sessions Judge fails to direct that the sentence is to be carried out by hanging by the neck, the "clerical error" if, any, is that of the Sesssions Judge and cannot be corrected by the High Court under S. 369, Cr. P. Code. The High Court can correct only its own error and not that of any other Subordinate Judge. Pak LR (1950) Lah 52: AIR (Vol 37) 1950 Lah 82: 51 Cr LJ 842 (DB).

——S. 368 — The sentence should not be "to receive the supreme penalty". It must direct that the accused be hanged by the neck until he be dead. AIR (Vol 23) 1936 Rang 46: 37 Cr LJ 290: 160 Ind Cas 459 (DB).

**——S. 369.**

1. Scope.
2. "Judgment" — Illustrative cases.
3. Matters that can be reviewed.
4. Need of review — Procedure.
5. Powers of High Court

**1. Scope.**

——S. 369 — It may happen that in an application under S. 491 read with S. 3 of U. P. Maintenance of Public Order Act IV of 1947, that a detention is valid on a particular day and would justify the dismissal of an application under S. 491, but by something that might transpire later; the further detention might become illegal. In such case, applicant would be entitled to prefer a second application under S. 491 and section 369 will not bar second application. ILR (1949) A 455: 1949 AWN 11: 1949 ALW 11: 1948 ALJ 483: AIR (V 36) 1949 A 147: 50 Cr LJ 212 (FB).

**——Ss. 369, 424 — Appellate Court — Review, power of.**

The effect of S. 424 read with S. 369 is that the Appellate Court becomes functus officio after pronouncing its judgment and it has no power to revise or review its previous order. If it does so, the subsequent order is clearly ultra vires and therefore illegal. AIR (Vol 32) 1945 Oudh 52: 1944 OWN 393: 1944 AWR 256: 46 Cr LJ 68: 220 Ind Cas 430.

——S. 369 — Section 369 is no bar to the exercise of the power of enhancement by the High Court as that section must be read subject to the provisions of S. 430, the exception to which covers the power of enhancement. AIR (Vol 29) 1942 All 339: 1942 AWR 293: 43 Cr LJ 867: (1942) ALJ 376: ILR (1942) All 892: 202 Ind Cas 586 (DB).

**——S. 369 — Review.**

A Court of competent jurisdiction may decide a case rightly or wrongly, and it is not open to the same Judges much less to other Judges of co-ordinate jurisdiction to review that decision. AIR (Vol 22) 1935 Sind 84: 36 Cr LJ 831: 29 SLR 203: 155 Ind Cas 736 (FB).

——S. 369 — Alteration and recording of sentence in the absence of accused is illegal. AIR (Vol 20) 1933 PC 218: 34 Cr LJ 886: (1933) ALJ 1025: 38 MLW 635: 38 CWN 562: 66 MLJ 216: 145 Ind Cas 209.

**——S. 369 — Mutilation of judgment by referring officers, condemned.**

Once the judgment has been sealed, signed and delivered, it should remain (except for the correction of any accidental clerical error) in the shape in which it was originally published. Practice of mutilating of judgments of other Courts by referring Courts condemned. AIR (Vol 20) 1933 Sind 91: 27 SLR 13: 34 Cr LJ 367: 142 Ind Cas 587 (DB).

——S. 369 — The Court has no jurisdiction to review or revise its own orders in criminal matters. 85 Ind Cas 383: 26 Cr LJ 543: AIR (Vol 12) 1925 Oudh 476.

**——S. 369 — Review.**

A Sessions Court cannot review its own order, under the section. 25 PR 1916 (Cr): 18 Cr LJ 332: 38 Ind Cas 444: AIR (Vol 4) 1917 Lah 163.

**——S. 369 — Criminal case — Jurisdiction of Magistrates to review.**

A Magistrate has no power to alter or review the order once passed by him. 16 Cr LJ 584: 30 Ind Cas 136: AIR (Vol 3) 1916 Mad 1220.

**——S. 369 — Review its own decisions.**

Generally, a Criminal Court, cannot review its own decisions. (1911) 4 Bur LT 211: 12 Cr LJ 473: 12 Ind Cas 81.

**——S. 369 — Review — Criminal case.**

A Criminal Court cannot review its own judgments. A Bench of Chief Court cannot review

its own order when it is within jurisdiction nor can it be reviewed by another Bench of the same Court. 8 PR 1909 Cr: 38 PLR 1910: 17 PWR 1909 Cr: 10 Cr LJ 314: 3 Ind Cas 580 (DB).

——Ss. 369, 434, 439 — **Decision of a single Judge.**

A Division Bench or Full Bench of the Chief Court of Punjab, cannot revise either in appeal or in revision the decision of a single Judge exercising original criminal jurisdiction. 1 PR Cr 1909: 6 PWR 1909, Cr: 9 Cr LJ 306: 1 Ind Cas 506 (DB).

——S. 369 — **Alteration of judgment — Interpolation by Magistrate — Contempt case.**

No Magistrate can add to or alter the proceedings or judgment in any case after they are signed and punished. It is especially irregular when made in the absence of the accused and without notice to him. (1906) 10 CWN 1062 (1063): 4 CLJ 415 (DB).

**2. "Judgment" — Illustrative cases.**

——S. 369 — Judgment — Order of discharge on account of absence of complaint — Power to review. See 51 Bom LR 578 : AIR (Vol 37) 1950 Bom 10.

——**S. 369 — "Judgment" Meaning of.**

A "judgment" within the meaning of S. 369, Cr. P. Code, is the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments. ILR (1949) Bom 372: AIR (Vol 37) 1950 Bom 10: 51 Cr LJ 213: 51 Bom LR 578 (DB).

——**S. 369 — Scope and effect of — Successive applications under S. 491, Cr. P. Code — Maintainability — Power of Court to entertain second application after dismissal of first — Scope of inquiry under S. 491.**

The dismissal of an application under S. 491, Cr. P. Code, will not operate as a bar to a second application under that section, when further detention of the applicant has become illegal after the first application was disposed of. What the Court has to determine in an application under S. 491 is whether the detention of the applicant under an order (under S. 3, U. P. Maintenance of Public Order Act IV of 1947), is legal or not, once the Court has pronounced on the legality of the detention, S. 369, Cr. P. Code, would bar the consideration of the same matter.

It would not be open to applicant to prefer a second application amounting to an application for reviewing the previous order of the Court, on grounds which were not brought to the notice of the Court when it made the prior order and which, if raised would have been held to make sufficient to render the prior detention invalid. ILR (1949) A 455: 1949 AWN 11: 1949 ALW 11: 1948 ALJ 483: AIR (Vol 36) 1949 A 147: 50 Cr LJ 212 (FB).

——**Ss. 369 and 561-A — Judgment — Order setting aside conviction by High Court — If can be altered or set aside — Powers under S. 561-A.**

Though 'judgment' has nowhere been defined in the Cr. P. Code, as ordinarily understood, an order which sets aside the conviction of a person in exercise of its appellate or revisional jurisdiction by a High Court cannot but be a 'judgment'. S. 369 prohibits the Court from altering or reviewing its judgment after the same has been signed. Resort cannot be had to the provisions of S. 561-A to obtain a relief prohibited by S. 369. S. 561-A gives no new powers. It only provides that the powers which the Court already inherently possesses shall be preserved and is inserted lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Cr. P. Code, and that no inherent powers had survived the passing of that Act. (1947) OA (CC) 130: 1947 OWN 355: 1947 AWR (CC) 130: AIR (Vol 34) 1947 Oudh 221.

——S. 369 — In absence of any rules framed under S. 491 (2) of Criminal P. C., successive applications under S. 491 for the issue of writs in the nature of habeas corpus cannot be entertained when previous applications on the facts has been considered and dismissed on merits. AIR 1928 PC 300, Held not applied. 4 DLR (Pat) 42: AIR (Vol 36) 1949 Pat 262.

——**Ss. 369 and 439 — Reference under S. 438 — Order without notice, viz., 'No order on this reference' is judgment within S. 369 — No application in revision lies on same matter.**

The term judgment is not defined either in the Criminal P. C. or in the Penal Code. It is described as the expression of the opinion of the Court arrived at after due consideration of the evidence and of the arguments, if any. This however applies to the judgment of a trial Court. As provided in S. 424, S. 367, which prescribes what the form and contents of the judgment of a trial Court ought to be, does not apply to the judgment of a High Court.

There are no definite rules as to what the judgment of a High Court acting in its appellate as well as revisional jurisdiction should contain, because the judgment of the High Court in its criminal jurisdiction is ordinarily final and does not, therefore, require the statement of any reasons, especially in a revisional application where the parties are not bound to be heard. There is, therefore, practically no distinction between an order and a judgment of a High Court disposing of a proceeding before it. Hence where on a reference made by the Sessions Judge under S. 438, a Division Bench of the High Court passes an order, without issuing notice, viz., 'No order on this reference', the applicant at whose instance the Sessions Judge made the reference is not entitled to make an application in revision to the High Court in the same matter, in view of the provisions of S. 369, Criminal P. C.

(In view of the hardship caused to a party by R. 26 of the Appellate Sides Rules of the High Court, the Full Bench suggested the addition of a new rule to the effect that a reference made by a Sessions Judge recommending the setting aside of an order of the trial Court should always be placed for hearing after issuing notices to all the parties concerned). AIR (Vol 33) 1946 Bom 276: 48 Bom LR 41 (DB).

——**S. 369 — Judgment by High Court delivered but not signed — Judgment pronounced as a result of inaccurate copy of notification — High Court has power to re-hear appeal.**

There is nothing in S. 369 or any of the sections of the Code, which Bars the Court from altering its unsigned judgment. A judgment is complete only when it is signed. Hence, the High Court is competent to re-hear the appeal and pass such judgment as it thinks proper, despite the pronouncement of the former judgment which was the result of an inaccurate copy of the District Magistrate's notification being referred to but was not signed by the Judge concerned. AIR (Vol 31) 1944 Pat 209: 23 Pat 28: 11 BR 59: 46 Cr LJ 30: 215 Ind Cas 121 (DB).

——S. 369 — Order to pay maintenance to wife though not applied for — Subsequent cancellation of such order without notice to wife and enhancement of maintenance to be paid to children — Order, held illegal — Magistrate, held, ought to have acted under S. 369, Criminal P. C. AIR (Vol 27) 1940 Rang 222: 41 Cr LJ 833: 190 Ind Cas 142.

——S. 369 — A complaint cannot be a judgment even when the complaint is made by a Court under S. 476, Criminal P. C. Therefore, S. 369 cannot apply to a complaint and does not, therefore, amount to a bar against a Court altering or reviewing a complaint under S. 476, Criminal P. C. AIR (Vol 24) 1937 All 76: (1936) ALJ 1199: 1936 AWR 1125: 38 Cr LJ 318: 166 Ind Cas 915.

**——S. 369 — Principle of S. 369, whether applies to orders — Order transferring case — S. 369, whether applies.**

Section 369 of the Criminal P. C., relates only to the alteration of judgment. Although this section refers in express terms to judgments under Chap. XXVI, of the Code still the principle laid down therein applies also to final orders which are in the nature of judgments. The section does not apply to orders which are not in the nature of judgments. Generally an order in the nature of a judgment is one which is passed on full enquiry and after hearing both parties. Such an order cannot be altered after it is once passed and signed. The order of transfer cannot be regarded as an order in the nature of a judgment. AIR (Vol 22) 1935 All 815: 36 Cr LJ 918: 1935 AWR 799: 1935 ALJ 1063: 156 Ind Cas 163.

——S. 639 — There is no dismissal of criminal appeal for default of appearance by a party as in a civil case and therefore, when an appeal is summarily dismissed deliberately and openly by a Court of competent jurisdiction in the apparent exercise of the powers vested in it under S. 421, Criminal P. C., it is, prima facie a judgment within meaning of S. 369, Criminal P. C. AIR (Vol 22) 1935 Sind 84: 36 Cr LJ 831: 29 SLR 203: 155 Ind Cas 736 (FB).

**——Ss. 369, 419, 439 — Presentation of appeal without copy of judgment — Time for filing copy — Order dismissing appeal for non-compliance with S. 419 — Whether judgment — Refusal to consider appeal on merits — Legality of.**

Where an appeal was presented before the Sessions Judge, who on finding that there was no copy of the judgment along with the appeal, memo., granted time to the accused to file a copy of the judgment and on the expiry of the period, passed an order dismissing the appeal as no steps had been taken to complete the appeal by filing a copy of the judgment:

Held, that the order was one of rejection of the appeal for non-compliance with the provisions of S. 419, Criminal P. C., and not one of dismissal, and the order rejecting the appeal could not be held to be an order amounting to a judgment within the meaning of S. 369, Criminal P. C., and did not prevent the Court from considering the appeal on the merits. AIR (Vol 21) 1934 All 206: 35 Cr LJ 441: (1934) ALJ 329: 4 AWR 516: 56 All 299: 147 Ind Cas 347 (2).

**——S. 369 — Discharge.**

Order of discharge under S. 209 or S. 203 is not judgment within the meaning of S. 369. 121 Ind Cas 401: 33 CWN 974: 1930 Cr C 13: 31 Cr LJ 260: AIR (Vol 17) 1930 Cal 61 (DB).

——S. 369 — "Judgment" contemplated by S. 369 is only a decision on the merits. A dismissal for default of appearance, therefore, is not a judgment and High Court has power to review a dismissal order for default of appearance passed in its appellate jurisdiction. 117 Ind Cas 243: 30 Cr LJ 749: AIR (Vol 15) 1928 Rang 288.

**——S. 369 — Finality of Judgment.**

A judgment even of a High Court, when it is signed becomes final, and it is not thereafter open to review. Where an appeal was disposed of by a Judge of the High Court but by mistake, the appeal filed through Counsel was not posted along with it and he was not consequently heard,

Held, that was no ground for re-hearing the appeal, as the appeal has been disposed of and the High Court has no power of review and the judgment had become final. There is no rule in the Madras High Court similar to Rule 83 of Allahabad High Court as to the sealing of orders. The judgment has become final when it was delivered and signed. 23 MLW 56: 1926 MWN 147: 27 Cr LJ 184: 91 Ind Cas 1000: AIR (Vol 13) 1926 Mad 420: 50 MLJ 51.

——S. 369 — It is not open to a Magistrate to review an order which is a final order, so far as one party is concerned under S. 145. 89 Ind Cas 153: 26 Cr LJ 1289: AIR (Vol 12) 1925 Nag 457.

**——S. 369 — Review.**

An entry in the order sheet "Entry false, mistake of law" is an order finally disposing of the case and has the effect of "destroying the proceedings"; and therefore under S. 369 the Magistrate has no jurisdiction to alter or review that order. 72 Ind Cas 945: 1 Pat LR Cr 97: 24 Cr LJ 481: AIR (Vol 10) 1923 Pat 532

**——S. 369 — Theft — Sentence passed on charge — Further trial — The same case on a charge under Ss. 75 and 379 — Sentence.**

The accused was charged under S. 379 of I. P. C., and under Ss. 75 and 379 of the Code. At the trial before a Sessions Court by a Jury the Judge tried the accused on the first charge alone and convicted and sentenced him. The further charge of previous convictions was next inquired into and the accused was again sentenced on that charge. Held, that the subsequent proceedings with reference to the charge under S. 75 of I. P. C. were not valid, because after the judgment including the sentence was pronounced in the trial on the first charge, there is no power to review or alter the same under S. 369 of the Cr. P. Code. 19 Cr LJ 279: 20 Bom LR 87: 42 Bom 202: 44 Ind Cas 183: AIR (Vol 5) 1918 Bom 250 (DB).

**——Ss. 369 and 488 — Final order in maintenance proceedings — If judgment — Power of Magistrate to review his order under S. 488.**

There is no provision in the Cr. P. Code authorizing a Magistrate to review a final order made by him in a proceeding under S. 488, Cr. P. Code. Under S. 369, Cr. P. C., no Court other than a High Court, when it has signed the judgment, shall alter or review the same except as provided in certain sections or to correct clerical errors. An order under S. 488 does not come within any of the exceptions contemplated in S. 369, the principle of which applies to an order under S. 488 and the final order is in effect a judgment. 21 CWN 344: 18 Cr LJ 556: 39 Ind Cas 700: AIR (Vol 4) 1917 Cal 799 (DB).

**——Ss. 369 and 146 — Review of order not competent.**

Orders under S. 146 of the Cr. P. Code cannot be reviewed by the same Court though clerical errors may be corrected under S. 369 of the Code. 19 Cr LJ 225: 43 Ind Cas 817: AIR (Vol 4) 1917 Pat 110.

**——Ss. 369 and 145 — Previous order under Ss. 145 and 146 — Cancellation of — Review.**

Where a Magistrate in a dispute as to land, cancelled his previous order under Ss. 145 and 146, Cr. P. Code, and passed a fresh order under S. 147, held, that the Magistrate had no jurisdiction to set aside the previous order since S. 369 did not permit a review. (1913) 16 OC 192: 14 Cr LJ 605: 21 Ind Cas 477.

——S. 369 — 'Judgment' — Order discharging an accused on the complaint being withdrawn, how far a complaint.

An order discharging an accused as the complainant withdraw his complaint is not a judgment within S. 369 of the Criminal Procedure Code. (1902) 6 CWN 633 (636) (FB).

3. Matters that can be reviewed.

——S. 369 — Court subor inate to High Court cannot review its own judgment except in few cases.

No Court subordinate to the High Court has any inherent jurisdiction to review its own judgment save in a few circumstances, such as, where there was abuse of process of Court, or fraud played upon the Court, or where petty clerical errors or mistakes have been made. AIR (Vol 30) 1943 Mad 392: 1943 MWN 163: 56 MLW 254: (1943) 1 MLJ 277: 44 Cr LJ 554 : 206 Ind Cas 591.

——Ss. 369, 489 (2) — Order obtained by fraud on Court is nul'ity — S. 369, held did not apply — Magistrate, held could cancel his order rescinding original one under S. 489 (2).

Any order obtained by fraud practised on the Court is one which is to be treated as a nu'lity. Even the Criminal Courts have power to ignore their orders passed either under a mistake or by fraud.

It is not the intention of the Procedure Codes that they should encourage the hindering of justice, and all procedure is intended to help justice.

Section 489 (2), Criminal P. C., really suggests that it is open to the Magistrate to vary the order of maintenance or to alter it if circumstances so require.

A Magistrate passed an order of maintenance in favour of wife. The husband then obtained a decree for restitution of conjugal rights and informed the Magistrate about it without disclosing that an appeal therefrom was then pending. The Magistrate thereupon cancelled his order of maintenance. The decree having been set aside in appeal the wife informed the Magistrate accordingly, who, upon such information cancelled his previous order rescinding the order of maintenance and restored the original one. It was contended that the Magistrate had no jurisdiction to cancel his order under S. 369 and also that the wife ought to have put in a fresh application:

Held, that S. 369 did not apply to the present case in view of the express provisions of Ss. 488 and 489. The Magistrate had jurisdiction to vary or cancel his previous order as this order, cancelling the previous order for maintenance was really obtained by fraud upon the Magistrate in his not being appri ed on that date that the decree for restitution of conjugal rights was liable to be set aside on appeal which was then pen'ing and an order obtained by fraud must be treated as having no legal effect.

Held, also that the wife's making a fresh app'ication was merely a matter of form and not of substance. AIR (Vol 24) 1937 Cal 334: 39 Cr LJ 381: 173 Ind Cas 915.

——S. 369 — General rule of S. 369, when operates — Practice in Bombay High Court Original Criminal Side — Review or alteration of judgment.

The effect of S. 369, Criminal P. C. may — speaking broadly and without attempting strict accuracy— be put under three heads: (1) it saves powers to correct clerical errors; (2) it provides that as a ge eral rule, no Court shall alter or review its judgment after it has signed it, except to correct clerical errors. and (3) in cases where the judgment has been signed and it is sought (in contravention of the general rule) to alter or review the judgment for the purpose of correcting errors other than clerical, power to correct such errors being reserved only if it can be derived from any provisions in (a) the Criminal P. C. or (b) in any other law for the time being in force, or (c) (in the case of a High Court established by Royal Charter), by the Letters Patent of such High Court.

In the case of the High Court exercising its Ordinary Original Criminal Jurisdiction like that of Bombay, no judgment nor any other pronouncement of its decision is signed until warrant is signed by the presiding Judge. The warrant is drawn up some little time after the sentence has been orally pronounced. The practice has been for the Judges in proper cases to review their sentences though already pronounced in Court so long as the warrant has not been drawn up and signed. That practice does not conflict with S. 369. Consequently, before signing a warrant, the Court can alter or review its sentence. AIR (Vol 23) 1936 Bom 193: 38 Bom LR 153: 37 Cr LJ 753: 60 Bom 485: 162 Ind Cas 950 (DB).

——Ss. 369, 561-A — Prisoners Act (III of 1900), S. 39 — Order in Chambers for producing prisoner as witness in Court — Power to make subsequent order for examination on commission — Inherent power to review ex parte orders — S. 561-A, scope of.

The rule that where an 'ex parte' order is passed without notice to the opposite party, it must be regarded as a tacit term of such an order that though unqualified in expression, it should be open to reconsideration at the instance of the party prejudicially affected is applicable to orders passed under the Criminal P. C. subject to the qualification that inherent power cannot be invoked on a point where the Code has made express provision. AIR (Vol 18) 1931 Pat 81: 11 PLT 892: 32 Cr LJ 551: 130 Ind Cas 538.

——S. 369 — Void judgment.

A reasonable opportunity for the accused to be heard is an essential condition precedent to the exercise of jurisdiction under S. 439, when the Court is considering the question of enhancing the punishment inflicted on him. Where the conditions laid down by law as precedent and requisite to the hearing of a case are not observed, the Court acts without jurisdiction, and its order is, therefore, void 'ab initio' and the case can be re-heard. AIR (Vol 11) 1924 Mad 640: 46 MLJ 456: 47 Mad 428: 20 MLW 18: 34 MLT 218: 26 Cr LJ 370: 84 Ind Cas 850 (DB).

——S. 369 — Omissions — Accidental slip — Orders under Ss. 517 and 520.

Where an appellate Magistrate disposing of a criminal appeal fails to pass an order under S. 520 it will be open to his successor to do so in spite of S. 369, if there is only an accidental slip or omission. Though an order under S. 517, Cr. P. Code should be made at the time of passing judgment in the criminal case itself, an order made subsequently is not illegal or made without jurisdiction. AIR (Vol 9) 1922 Mad 329: 43 MLJ 87: 15 MLW 664: 1922 MWN 494: 31 MLT 367: 24 Cr LJ 159: 71 Ind Cas 511.

——S. 369 — Criminal trial — Judgment — Expunging damaging remarks.

A Judge has power to expunge damaging remarks about a witness in his judgment in a criminal case.

This does not amount to a review of judgment. 2 PWR 1910 Cr: 11 Cr LJ 178: 5 Ind Cas 611.

**——Ss. 369 and 440 — Power to re-open a case.**

A Court has power to re-open a case where it has been dismissed for default though it cannot alter or review its own judgment. (1909) 10 CLJ 80: 10 Cr LJ 287: 3 Ind Cas 393 (DB).

**——S. 369 — Order of dismissal — Power to set aside.**

A Magistrate dismissing an appeal for non-appearance of appellant, can set aside order of dismissal, and hear and decide the appeal. Cr. P. Code does not warrant dismissal of an appeal, because the appellant does not appear to support it. (1909) 5 NLR 76: 9 Cr LJ 553: 2 Ind Cas 247.

**4. Need of review — Procedure.**

**—— S. 369 — Court of Bench Magistrates — Whether can retry accused to rectify illegality.**

The Court of Bench Magistrates has no power to correct errors in its judgment or to review its own illegal orders. Such power vests only in the High Court. Where the Bench Court retries the accused in order to rectify its previous illegal acquittal the second trial is illegal. The original order of acquittal, though illegal, having been passed by the Bench without constituting a quorum, must stand until set aside. AIR (Vol 29) 1942 Mad 240: 43 Cr LJ 401: (1941) 2 MLJ 1049 : 55 MLW 30 (2): 1942 MWN 428: 198 Ind Cas 515.

**—— Ss. 369, 403, 526 — Accused discharged — Application to review the dischrge order refused — Another complaint before same Magistrate on same facts — Transfer.**

On a previous complaint under Ss. 494 and 498, I. P. C. the Magistrate summoned the accused and after hearing evidence of the complainant, discharged him. After that, the complainant made an application to the Magistrate to review his order of discharge. The Magistrate refused to review his judgment. After that, the complainant filed another complaint on the same facts in the Court of the same Magistrate :

Held, that an application to review the order of discharge was clearly against the provision laid down in S. 369, Criminal P. C.

Held, also that although under S. 403, Criminal P. C., explanation, the discharge of the accused is not acquittal for the purpose of that section which would prevent the accused being again tried for the same offence, yet if the application for transfer of the case were granted and the case transferred to another Magistrate and that Magistrae convicts the accused, the situation would arise that the accused would have been discharged by one Magistrate and without that order of discharge being set aside, the accused would be convicted by another Magistrate on the same charge. The correct course for the complainant to adopt would have been to make an application under S. 436, Criminal P. C. to the Sessions Judge or the District Magistrate asking for the order of discharge to be set aside and further enquiry to be made. AIR (Vol 22) 1935 All 59: 36 Cr LJ 128 (2): 1935 AWR 623: 152 Ind Cas 619.

**—— S. 369 — Punishment in lieu of fine — Procedure.**

Where a Sessions Judge passes a sentence of fine but omits through oversight to pass a sentence in default of payment of fine, he cannot order such sentence in default subsequently, but the proper course for him is to submit his proceeding to High Court and ask in its revisional jurisdiction to enhance the punishment by inflicting imprisonment in default of payment of fine. AIR (Vol 8) 1921 Bom 368: 23 Bom LR 846: 62 Ind Cas 880: 22 Cr LJ 608 (DB).

——S. 369—Where a judgment has been lost, the proper course for the judge is to write it from memory and from materials before him and place it on record. (1913) 14 MLT 317 : 25 MLJ 445 : 1913 MWN 862 : 14 Cr LJ 596 : 21 Ind Cas 467.

**—— S. 369 — Criminal — Review — Reference to High Court.**

Where a sub-Divisional Magistrate erroneously dismisses an appeal as time barred it is not open to him to review his own order and admit the appeal again. The only course open to him is to submit the case to the High Court for revision. (1904) 6 Bom LR 360 (360).

**5. Powers of High Court.**

**—— Ss. 369, 430 — Construction of S. 369.**

Section 369, Criminal P. C. must be read with S. 430 of the Code. AIR (Vol 26) 1939 Rang 392: 1940 Rang LR 145: 41 Cr LJ 108: 185 Ind Cas 142.

—— S.369 — There is no conflict between S. 369 and S. 561-A. AIR (Vol 26) 1939 Lah 244: 41 PLR 794: 40 Cr LJ 763: 183 Ind Cas 348.

**—— Ss. 369, 561-A — High Court — Review.**

There is no inherent power in the High Court to alter or review a judgment in a criminal case and S. 561-A, Criminal P. C., will not confer such a power on the High Court. AIR (Vol 25) 1938 Nag 74: 39 Cr LJ 116: ILR (1940) Nag 267: 172 Ind Cas 299.

**—— Ss. 369, 561-A, 439 (as amended in 1923) — High Court passing order in revision — Power of review — S. 369, if modified by S. 561-A.**

The High Court has no power to review an order passed by itself in exercise of its revisional jurisdiction. It possessed no inherent power to review its judgment before the amendments of 1923 and it cannot be said that S. 561-A, Criminal P. C. either modifies the provisions of S. 369 of the Code or clothes the Court with any fresh power.

The revisional sections do not, in themselves, give the High Court power to revise an order of its own, and although it may be open to it to call for the record of a case which has already been dealt with in revision, there is no power to pass any order which would have the effect of setting aside or modifying an order passed in revision by itself. AIR (Vol 22) 1935 All 466: (1935) ALJ 317: 1935 AWR 337: 36 Cr LJ 128: 57 All 867: 157 Ind Cas 1044 (DB).

**—— Ss. 369, 430 — Dismissal of Jail appeal by Single Judge — Application for enhancement by Local Government — Jurisdiction of High Court — Exception in S. 430.**

The exception in S. 430, Criminal P. C. as regards the cases provided for in S. 417, and Chap. XXXII covers the power of enhancement of sentence. Where, after a Single Judge has disposed of a Jail appeal preferred by an accused, the Local Govt. applies for enhancement of the sentence, the High Court in exercising the power of enhancement does not in any way violate the provision of S. 369 inasmuch as the provisions of Section 369 should be read subject to the provision of S. 430. Further, the jurisdiction to enhance can only be exercised by a Bench and not by a Single Judge. Consequently, when a Single Judge disposes of a Jail appeal, the order cannot be taken to have been made in the exercise of the jurisdiction of the High Court under Chap. XXXII so far as the power of enhancement is concerned. AIR (Vol 20) 1933 All 485 : (1933) ALJ 957: 34 Cr LJ 1205: 55 All 715: 146 Ind Cas 157 (DB).

**—— Ss. 369, 561 — Judgment of two Judges of High Court constituting Criminal Bench — Whe-**

**ther any Judge or Bench has power to override it — Jurisdiction and powers of High Court Judges — Clerical errors — Inherent powers of Court.**

A judgment of two Judges of the High Court sitting as a Criminal Bench is a judgment of the High Court and no other Judge or Bench of Judges of the High Court has power to override such judgment. The judicial powers of the Chief Justice are not greater than or different from but exactly the same as those of any other Judge of the Court.

Under S. 369, Criminal P. C., the Court, when it has signed its judgment has no power to alter or review it, except to correct a clerical error.

Per Lort-Williams, J. — Where it appears to the Bench which decided a criminal case that the orders as drawn up are not in accordance with the judgment given, the Bench has power to correct the errors appearing in them, being mere errors of draftsmanship and, therefore, clerical errors within the meaning of Ss. 369 and 561, Criminal P. C. but when no injustice has been done to any one and the errors are only technical, they may stand uncorrected.

Per MacNair, J. — Section 561-A, Criminal P. C. in no way adds to the powers of the High Court. It merely doclares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The inherent powers of the Court do not include the power to revive an order which has been made in the Criminal Appellate jurisdiction.

Every Division Bench, when constituted in a Criminal case, is a Court in itself and once its judgment has been signed "this Court is functus officio and neither the Court itself nor any Bench of it has any power to review that decision or interfere with it in any way." No power of review resides in the Court or in any Bench of the Court. AIR (Vol 20) 1933 Cal 870: 34 Cr LJ 1100: 38 CWN 25: 61 Cal 155: 145 Ind Cas 937 (DB).

**—— S. 369 — Revision petition —Alteration after.**

Where a revision petition against conviction has been dismissed by a High Court Judge, that judgment cannot be again reviewed. AIR (Vol 16) 1929 Lah 797: 117 Ind Cas 669: 30 PLR 409: 1929 Cr 429: 10 Lah 241: 30 Cr LJ 815 (DB).

**—— S. 369 — High Court — Power to reconsider — S. 561-A, Cr. P. Code.**

Section 561-A does not confer any new powers but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. There is no conflict between that section and S. 369. AIR (Vol 15) 1928 Lah 462: 110 Ind Cas 221 : 10 Lah 1 : 10 AI Cr R 494 : 29 Cr LJ 669 : 30 PLR 247 (DB).

**—— S. 369 — Power to reconsider — S. 561-A, Cr. P. Code.**

Section 561-A is in no way limited or governed by S. 369 and the High Court has power to reconsider the question of sentence when the ends of justice require it. AIR (Vol 15) 1928 Oudh 402 : 111 Ind Cas 573: 5 OWN 641: 29 Cr. LJ 893: 3 Luck 680.

**—— S. 369 — Power to reconsider — S. 561-A, Cr. P. Code.**

Section 561-A is in no way limited or governed by S. 369 and High Court has power to reconsider the question of sentence when the ends of justice require it. AIR (Vol 14) 1927 Lah 139 : 9 LLJ 42 : 99 Ind Cas 1039 : 28 Cr LJ 239.

**—— S. 369 — Finality — Judgment in contemplation of enhancement of sentence.**

Where in appeal the Judicial Commissioner's Court alters the conviction but does not enhance the sentence and contemplates further action by that Court in case the Local Government decided to move in the matter, subsequent proceedings in revision by that Court at the instance of the Local Government must be regarded as a completion of or necessary addendum to the Judgment delivered by that Court in appeal. AIR (Vol 13) 1926 Nag 323: 27 Cr LJ 339: 92 Ind Cas 851 (DB).

**—— S. 369 — Power of Review.**

S. 369 expressly negatives (subject to certain exceptions) the power of Courts other than High Courts to review and, no other provision authorising High Courts to exercise that power, their exclusion from the purview of the section cannot be read as conferring it by implication. When a criminal appeal or a criminal revision petition is dismissed for default of appearance, there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may re-hear it. AIR (Vol 10) 1923 Mad 426: 44 MLJ 450: 72 Ind Cas 599: 46 Mad 382: 24 Cr LJ 439: 1923 MWN 94 (DB).

**——S. 369 — Review of order — High Court.**

The High Court has no power to review its order summarily rejecting a criminal appeal; but it may do so if the order is to the prejudice of the accused and he has been give no chance of defending himself. AIR (V 6) 1919 Cal 409 : 46 C 60: 20 Cr LJ 265: 50 Ind Cas 25 (DB).

**—— S. 369 — Judgment — No power to review.**

The High Court has no power to review its judgment pronounced in revision in a criminal case. 10 C. L. J. 80 Doubted. AIR (Vol 6) 1919 Pat 514: 20 Cr LJ 447: 51 Ind Cas 271.

**—— S. 369 — Review of judgment of High Court — Finality of order — Order not sealed.**

The High Court has no power under S. 369 to review an order dismissing an application for revision made by an accused person. But where the order had not been sealed, the applicant can apply to the Judge who passed the order. AIR (Vol 3) 1916 All 183: 38 All 134: 14 ALJ 61: 27 Cr LJ 47: 32 Ind Cas 335 (DB).

**——S. 369 — Default — Dismissal for — Right to restore.**

The High Court has no power to restore a petition once dismissed for default. Although there is no question of res judicata, still on grounds of justice and equity, Courts should discourage the agitation of the same matter once again before another Judge. If the dismissed petition cannot be restored, there is stronger ground for holding that new petition will not lie. AIR (V 3) 1916 Mad 516: (1915) MWN 786 : 16 Cr LJ 697 : 30 Ind Cas 745.

**——S. 369— Review — Order on revision — High Court's power.**

The High Court cannot review its own order made in criminal revision though the revision petition be dismissed for default. There is no distinction between an order made without hearing the petitioner and one made after hearing him. (1912) 12 MLT 350 : 23 MLJ 371 : 13 Cr LJ 710 : (1912) MWN 982 : 16 Ind Cas 518 (DB).

**——S. 370.**

**——S. 370 — Form of record — Duty of Presidency Magistrate to record plea of accused.**

Where a presidency Magistrate keeps the record of a case not in the form prescribed in S. 370, but in the order sheet itself, it must appear from the sheet that the actual statement of the accused under

S. 342, Cr. P. Code, is being taken and recorded. The order sheet must contain a reference to the statement under S. 342, Cr. P. Code. (1947) 231 Ind Cas 407: 48 Cr LJ 790 (DB).

**——Ss. 370, 421, 439(5), (6) — Appeal against conviction dismissed — Recommendation for enhancement made subsequently — Accused, if can show cause against conviction.**

When an appeal is preferred and it appears to the Judge that there is reason to believe that an enhancement of the sentence should be considered, it is the practice of the Rangoon High Court to issue notice in revision to the accused to show cause against enhancement, and the appeal and the revision are heard at one and the same time. Where a recommendation for enhancement of sentence has been made to the High Court after the decision of the appeal, the accused when called upon to show cause against the enhancement of the sentence cannot be allowed to show cause against his conviction, but may only show cause against enhancement of the sentence. The order of the High Court in appeal must be regarded as final, and the accused person cannot be heard to show cause against his conviction. It does not make any difference that the accused's appeal from jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and if necessary, the evidence. AIR (Vol 26) 1939 Rang 392: 1940 Rang LR 145: 41 Cr LJ 108: 185 Ind Cas 142.

**——S. 370 — Discussion of only defence evidence and findings — If proper judgment.**

The argument that a Presidency Magistrate under S. 370, Criminal P. C., is absolved from the necessity of writing a judgment and he need not even make a brief statement of the reasons for his conviction where he inflicts a fine of less than Rs. 200, will be a good argument if the Magistrate writes no judgment at all. But when he writes a judgment, he must record proper findings which go to constitute the offence. AIR (Vol 20) 1933 Cal 532: 60 Cal 656: 37 CWN 368: 34 Cr LJ 1059: 145 Ind Cas 660.

**——Ss. 370 (i), 537 — Merely recording evidence and saying case is proved — Defect, if curable under S. 537.**

Section 370, Criminal P. C., requires that the record kept by the Presidency Magistrate should furnish some indication that he has considered the evidence in a critical fashion and has satisfied himself that he is justified in disregarding the arguments put forward by the defence. Merely recording the evidence and saying that the case is proved, will not constitute compliance with the section. Though the defect is curable under S. 537 of the Code, the practice of following this defective procedure should be discontinued. AIR (Vol 19) 1932 Cal 655: 36 CWN 852: 33 Cr LJ 729: 139 Ind Cas 244 (DB).

**——S. 370 — Presidency Magistrate — Duty to keep records properly.**

Presidency Magistrate should see that the records are properly prepared and kept in compliance with the provisions of S. 370, Criminal P. C. AIR (Vol 19) 1932 Cal 64: 35 CWN 867: 33 Cr LJ 265 (1): 136 Ind Cas 136 (1).

**——S. 370 — Judgments of Presidency Magistrates — Contents.**

The records of Presidency Magistrate shou'd be properly kept and the provisions of S. 370, Criminal P. C., should be properly and strictly complied with. AIR (Vol 19) 1932 Cal 62: 33 Cr LJ 264: 35 CWN 868: 136 Ind Cas 135.

**——S. 370 — Plea of accused — Substantial compliance.**

While the column provided for making a record of the plea and examination of the accused in the form prescribed under S. 370, must be filled, there is no rule as to how that should be done. So the entry "denies" made in that column is sufficient if when the plea was taken and when the accused was examined he merely denied having committed the offence. AIR (Vol 16) 1929 Cal 406: 49 CLJ 261: 33 CWN 543 : 30 Cr LJ 526 : 56 Cal 1067 : 12 AI Cr R 334 : 1929 Cr C 30 : 115 Ind Cas 604.

**——S. 370 — Reasons for imprisonment — Bench of Magistrates.**

A Bench of Magistrates cannot imprison a person without giving its reasons. Where the record was too meagre and there was nothing to show that justice has been done, held, that it is a proper case in which the High Court should interfere. 1929 MWN 892.

**——S. 370 — Reference to documents.**

Under S. 370 there is no serious objection to the Magistrate's referring to a document on the record instead of taking the trouble to re-write those portions of it which should have been included in his final order. AIR (Vol 13) 1926 Cal 1109: 30 CWN 981: 27 Cr LJ 1131: 7 AI Cr R 168: 97 Ind Cas 651 (DB).

**——S. 370 — Omissions — Forms — Substantial compliance.**

Where the various particulars required to be recorded under S. 370 were not recorded in the usual way on the printed form provided for the purpose, but all the important items of these particulars were recorded.

Held, that the omission to comply with the provisions of S. 370 was no more than an irregularity and was not an illegality which vitiated the trial. AIR (Vol 13) 1926 Cal 1109: 30 CWN 981: 27 Cr LJ 1131: 7 AI Cr R 168: 97 Ind Cas 651 (DB).

**——S. 370 — Non-compliance — No record of examination under S. 342.**

Where the record of the case as made by the trying Magistrate was not in accordance with the requirements of S. 370, and where the trial Magistrate examined the accused under S. 342, but did not record the substance of his examination and his plea,

Held, that proper procedure had not been followed and the case should be re-tried after setting aside the order. AIR (Vol 13) 1926 Cal 692: 27 Cr LJ 110: 91 Ind Cas 542 (DB).

**——S. 370 — Reasons — Omission to record.**

Hony. Precy. Magistrate should record reasons for conviction where imprisonment is inflicted. The omission to record the reasons is, however, only an irregularity and where the accused has not been prejudiced revision will not be allowed. AIR (Vol 11) 1924 Mad 799: 20 MLW 330: 25 Cr LJ 1084: 81 Ind Cas 908 (DB).

——S. 370 — Absence of reasons for the finding vitiates conviction. AIR (Vol 10) 1923 Mad 144: 16 MLW 836: 31 MLT 400: 23 Cr LJ 602: 68 Ind Cas 826.

——**S. 370 — 'If any' — S. 342, Cr. P. Code.**

The words "if any" used in Cl. (f) cannot be properly used as modifying the provisions of S. 342 as regards the Presidency Magistrates. AIR (Vol 8) 1921 Bom 374: 45 Bom 672: 22 Cr LJ 17: 59 Ind Cas 129 (DB).

——**S. 370 — High Court, power of, to interfere with discretion of Magistrate.**

The rule that a Magistrate should state in his judgment the reasons for conviction in such a manner that the High Court on revision may judge whether there were sufficient materials before him to support the conviction, does not apply to the case of Presidency Magistrates, who are by law permitted to record only certain specified particulars mentioned in S. 370, Cr. P. C., instead of a regular judgment, and in all cases in which they inflict imprisonment or fine exceeding Rs. 200, or both, a brief statement of the reasons for the conviction must be recorded. (1904) 8 CWN 839 (841): 31 Cal 983 (DB).

——**S. 370 — Reasons for conviction, recording of.**

Although S. 370, Cr. P. C., empowers a Presidency Magistrate to merely record the reasons for his conviction instead of a judgment, this must be done in such a manner that the High Court in revision may be in a position to judge whether there were sufficient materials before him to support the conviction. Where a Presidency Magistrate convicted and sentenced the accused to a term of imprisonment under Ss. 61 and 74 of Act VII of 1878 (B.C.) but did not in his judgment give either the substance or a summary of the evidence and there was nothing on the record to show that the accused had been previously convicted the High Court set aside the conviction on the ground that the judgment was defective. (1904) 8 CWN 587 (588) (DB).

——**S. 370 (i) — Magistrate merely saying that he believed prosecution witnesses without noting their evidence and without any reference to defence evidence — Duty of Magistrate.**

Where the Magistrate merely said that he believed the prosecution witnesses without noting what the prosecution witnesses said and without any reference to the defence evidence, it cannot be said that S. 370 (i), Criminal P. C., was complied with. Under S. 370 (i), he should give a brief statement of the reasons for conviction which would necessitate a reference to what the prosecution witnesses had said so that it could be shown that that evidence, if believed, would establish the offence with which the accused had been charged. If there had been no defence witnesses, it would be sufficient if the Magistrate had said that he believed the prosecution witnesses; but when there is defence evidence which is inconsistent with the prosecution story, some brief reasons should also be given why the defence evidence should be discredited. AIR (Vol 29) 1942 Mad 603 : (1942) 2 MLJ 146 : 55 MLW 467 : 43 Cr LJ 859 : 1942 MWN 441 : 202 Ind Cas 603.

——**Ss. 370 (i), 441, 439 — High Court in revision sending for records of case — Magistrate can submit report under S. 441 and remedy defect by giving reasons for conviction.**

Where the requirements of S. 370 (i) are not complied with and the High Court in revision calls for the record of the case, the Magistrate can submit a report under S. 441, Criminal P. C., and remedy the defect in the original order by giving a brief statement of the reasons for conviction. In such a case, the High Court will not interfere in revision. AIR (Vol 29) 1942 Mad 603 : (1942) 2 MLJ 146 : 55 MLW 467 : 1942 MWN 441 : 43 Cr LJ 859 : 202 Ind Cas 603.

——**S. 370, Cl. (i) — Judgment should explain reasons for believing prosecution.**

Where the judgment of a Chief Presidency Magistrate simply mentioned the fact of conviction with a statement of his belief as to evidence of prosecution and complainant, it was held that it did not satisfy the requirements of S. 370, Cl. (i) which demands that the Magistrate should explain the reasons for believing the prosecution. AIR (Vol 2) 1915 Bom 137 : 17 Bom LR 890 : 16 Cr LJ 771 : 31 Ind Cas 371 (DB).

——**S. 373.**

——**S. 373 — Duty of High Court — Reference.**

The questions of misdirection are of less importance in a case of reference, for in a case of reference the High Court has to come to its own independent conclusion as to the guilt or innocence of the accused person independently of the verdict of the jury or of the opinion of the Judge. AIR (Vol 15) 1928 Cal 430 : 47 CLJ 240 : 32 CWN 345 : 29 Cr LJ 546 : 109 Ind Cas 482 : 10 AI Cr R 259 (DB).

——**S. 374.**

——**S. 374 — Scope of inquiry — Powers of High Court to go into facts and alter verdict of jury.**

In a reference under S. 374, Cr. P. Code, the practice of the High Court where an accused has been sentenced to death, even though the conviction is the unanimous verdict of the jury, is to regard the whole case as reopened before the High Court both on matters of law and on matters of fact, and the High Court is bound to go into the facts as well as the law. The High Court has power to substitute its own finding for the unanimous verdict of the jury in a trial for murder when the sentence comes on for confirmation. AIR (Vol 33) 1946 Bom 446 : 226 Ind Cas 495 : 48 Bom LR 163 : 47 Cr LJ 962 (DB).

——**Ss. 374, 439 — Submission of proceedings to High Court, if condition precedent — High Court can itself call for the case.**

Section 374, Criminal P. C., does not make it a condition precedent to the confirmation of a death sentence that the proceedings shall be submitted by the Court of Session. If it is brought to the notice of the High Court that the Sessions Judge had omitted to send the death sentence to the High Court, for confirmation the High Court can, in the exercise of its powers of revision, call for the case and deal with it according to law. AIR (Vol 31) 1944 Sind 83 : 45 Cr LJ 598 : 212 Ind Cas 352 (FB).

——**S. 374 — Appeal and reference — Valuable materials in favour of accused not brought on record — High Court, powers of.**

When in an appeal by the accused against his conviction and a reference under S. 374, the High Court is apprised of the fact that valuable material which could and should have been put in evidence in favour

of the accused was not put before the jury due to the inaptitude of the lawyers for the accused or to apathy or lack of vigilance on the part of the Judge, the High Court can make full use of those materials before it for the purpose of doing justice. AIR (Vol 30) 1943 Cal 521: 45 Cr LJ 99: 47 CWN 336: ILR (1943) 1 Cal 543: 209 Ind Cas 206 (DB).

**——S. 374 — Scope.**

The power conferred on the High Court on a reference under S. 374 is subject to the results of the appeal under S. 418. If the appeal itself succeeds on its own grounds, its result should not be allowed to be affected by the exercise of any power conferred on the High Court by Ss. 374 to 376. If the High Court finds the verdict of the jury erroneous, owing to the misdirection, the High Court can direct a re-trial. AIR (Vol 29) 1942 Cal 524: 75 CLJ 10: 46 CWN 108: 43 Cr LJ 860: 202 Ind Cas 604 (DB).

**——S. 374 — Powers of High Court.**

The powers of the High Court are not limited in the case of a reference as they are ordinari'y limited in the case of an appeal from a trial held by a jury. It is open to the High Court to come to the conclusion that the finding of the jury is unsafe and unjustified by the evidence on the record. But it does not mean that the Court is, for that purpose, to deal with the case merely on the paper-book. The Judge and the jury have had the advantage of seeing the witnesses and watching the development of the case for the prosecution and the defence in all its various stages and the High Court will always attach the greatest possible weight to the conclusion of the jury. AIR (Vol 18) 1931 Cal 178: 34 CWN 1154 (FB).

**——S. 374 — Sentence when confirmed — Doubt as to identification.**

Certain persons were tried with the aid of jury upon charges under S. 120-B read with Ss. 302 and 34 of Penal Code. The jury returned a unanimous verdict of guilty on both the charges and the Judge accepting and agreeing with the verdict sentenced the accused to death. There was no eye-witness to the occurrence, and there was a real doubt as to the identification of the accused. Inspiration and manipulation were apparent in the retracted confession of the accused. Murder was found to be the result of a severe struggle between the accused and the murdered.

Held, that verdict of jury was not justified under the circumstances. 32 CWN 702: 29 Cr LJ 833: 11 AI Cr R 123: (1928) 111 Ind Cas 385 (DB).

——S. 374— When a man rushes into a brawl with a heavy hatchet and strikes with all his force one of his neighbours who is unable to defend himse f upon the head with the hatchet and kills him, then it is not a case for the exercise of clemency and capital sentence should not be reduced. AIR (Vol 15) 1928 Oudh 221: 5 OWN 29: 29 Cr LJ 230: 9 AI Cr R 438: 107 Ind Cas 177 (DB).

**——S. 374 — Where there is no proper trial.**

No doubt the entire case is open to the High Court under S. 374, but that assumes that whatever has happened, before the case comes to the High Court, has been done in strict accordance with the provisions of the law. But if there has been no proper trial then the only course open to the High Court is to direct a re-trial. AIR (Vol 14) 1927 Cal 631: 46 CLJ 31: 31 CWN 881: 8 AI Cr R 316: 28 Cr LJ 742: 103 Ind Cas 790 (DB).

——S. 374 — In a reference under S. 374 the High Court must be sati fied that the finding of fact is justified by the evidence on the record. 30 CWN 166: 27 Cr LJ 378: (1926) 92 Ind Cas 890 (DB).

**——S. 374 — Principle — Certainly of guilt — Distinction between Ss. 374 and 423.**

If the evidence in a case affords such a degree of certainty of the guilt of the accused as is mentioned in S. 3 of the Evidence Act, the sentence must be based on the facts found proved by however little the proof of them exceeds the standard stated in that section; otherwise the accused must be acquitted. A Judge or Magistrate who says an accused person is proved guilty, but should be lightly punished because the proof of his guilt is weak, contradicts and stultifies himself. The sentence of death is not an exception to this principle either at the trial or in appeal. But the law naturally makes full provision for the undoubted fact that a capital sentence differs from all others in being irrevocable after it has been carried out, and if the matters to be considered under S. 423 are left out there is nothing left to be considered under S. 376 except the one matter whether the certainty of guilt is sufficiently in excess of the minimum certainty required by S. 3 of the Evidence Act to remove the danger of the carrying out of the sentence on an innocent person. AIR (Vol 13) 1926 Nag 368 : 27 Cr LJ 731 : 95 Ind Cas 59 (DB).

**——S. 374 — Misdirection — Result of.**

If there is misdirection in the charge to the jury by the Judge so as to cause failure of justice, the verdict of murder and the sentences of death passed upon the accused must be set aside. AIR (Vol 9) 1922 Cal 124 : 68 Ind Cas 407 : 26 CWN 1002 : 36 CLJ 171 : 23 Cr LJ 567 (DB).

**——S. 374 — Confirmation of sentence — Practice.**

Per Batchelor, J. —In the Bombay High Court where a prisoner has been sentenced to death even though the conviction was had on the unanimous verdict of jury, the whole case is reopened before the High Court both on matters of facts as well as on matters of law. AIR (Vol 2) 1915 Bom 243 : 17 Bom LR 1072 : 16 Cr LJ 818 : 31 Ind Cas 994 (DB).

**——S. 375.**

**——S. 375 — Scope of.**

Section 375, Criminal P. C., is not intended to apply to a case in which there has been an illegality, or an error which has occasioned a failure of justice. Section 375 is not meant to enable a Court to remedy an important error in procedure which might have been calculated to prejudice the accused in the trial and which, in fact, causes the trial to be vitiated. AIR (Vol 22) 1935 Sind 145: 28 SLR 397: 36 Cr LJ 1161 (2): 157 Ind Cas 697.

**——S. 375 — Scope — Distinction between Ss. 375 and 428.**

In S. 428 the word "necessary" does not import that it is impossible to pronounce judgment without the additional evidence. S. 375 says that "additional evidence may be taken upon any point bearing upon the guilt or innocence of the convicted person," whereas all that S. 428 (1) says is "in

dealing with any appeal the appellate Court if it thinks additional evidence to be necessary, etc." There is no restriction in the wording of the section either as to the nature of the evidence or that it is to be taken for the prosecution only that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. AIR (Vol 12) 1925 Mad 106: 77 Ind Cas 481: 25 Cr LJ 401 (DB).

**——S. 375 — Further evidence in appeal, when can be admitted — Inspection of spot.**

An Appellate Court may allow further evidence to be produced, where an application for the same has been made by the accused to the Lower Court and is rejected. An Appellate Court should inspect the site of an offence wherever such inspection is material to the case. 16 PWR 1911 Cr: 12 Cr LJ 412: 11 Ind Cas 596 (DB).

**——S. 376.**

**——S. 376 — Practice — Reference under — Appeal by accused — Procedure for hearing — Hearing of both together — Legality.**

S. 376, Cr. P. Code, must be read as conferring upon the High Court the powers mentioned in clauses (a), (b) and (c) of that section, unaffected by the provisions of S. 418 (1) and S. 423 (2). S. 376 deals with exceptional class of cases and to such class of cases the general provisions of Ss. 418 and 423 cannot apply. The uniform practice of the Court has been to hear both the reference under S. 376 and the appeal of the accused together and to deal with the case on its merits on the basis that all material questions of law and fact can be agitated by the accused. This practice is consistent with both the letter and the spirit of S. 376. AIR (Vol 35) 1948 Bom 244: 50 Bom LR 151: 49 Cr LJ 348.

**——Ss. 376, 418, 423 and 449 — Trial by jury — Appeal — Inadmissible evidence admitted in trial Court — High Court can maintain conviction if other evidence is sufficient for the purpose and need not order re-trial — Evidence Act, S. 167.**

Where inadmissible evidence has been admitted in a trial by jury, the High Court on appeal may, after excluding such evidence, maintain a conviction, provided the admissible evidence remaining is in the opinion of the Court sufficient clearly to establish the guilt of the accused. The High Court is not bound to order re-trial in such cases. The improper admission of evidence is by S. 167, Evidence Act, expressly declared not to be a ground of itself for a new trial. The power of the High Court thus to dispose of the case itself without ordering a re-trial is not confined to murder references and appeals under S. 449. AIR (Vol 33) 1946 PC 82.

**——S. 376 — Ss. 374, 376 — Error in charge entitling High Court to reverse jury's verdict — Re-trial, if must be ordered.**

Where while dealing under S. 376, Criminal P. C., with a reference under S. 374 the High Court finds that there has been such an error in the charge as would entitle the High Court to reverse the verdict of the jury under S. 423 (2), Criminal P. C., it is not open to High Court to look into the evidence in order to confirm the conviction on its own view of the facts and it is incumbent on it to direct a new trial, if, in its view, there is evidence on record for the jury.

Clause (b) of S. 376 really has in view the circumstances of S. 337, Criminal P. C., and does not empower the High Court to convict the accused on its own appreciation of facts. If the words "any offence" would include also the offence of which there was conviction, then at least when the accused is convicted again of the same offence, it amounts to confirmation of the conviction and not a conviction on annulment of the conviction. AIR (Vol 29) 1942 Cal 524: 75 CLJ 10: 46 CWN 108: 43 Cr LJ 860: 202 Ind Cas 604 (DB).

**——S. 376 — Interference with verdict.**

In a case submitted under S. 374, where the jury is unanimous in their opinion that certain evidence is true, the High Court should be reluctant to differ from such an opinion apart from strong reason which would induce it to do so. AIR (Vol 25) 1938 Cal 220: 65 CLJ 423: 39 Cr LJ 541 (2): 175 Ind Cas 193 (DB).

**——S. 376 — Questions of misdirection, how far important.**

The questions of misdirection are of less importance in a case of reference under S. 374, because on a reference to the High Court, it is bound to come to its own independent conclusion as to the guilt or innocence of the accused, independently of the verdict of the jury or of the opinion of the Sessions Judge. AIR (Vol 25) 1938 Cal 6: 41 CWN 1312: 39 Cr LJ 308: 173 Ind Cas 475 (DB).

**——S. 376 — Inadmissible evidence included in evidence in Sessions Court — All records not consulted — Re-trial.**

In a trial for murder, the recorded evidence in the Sessions Court included some evidence which should not have been admitted to record as being inadmissible under S. 122, Evi. Act, and some evidence was also totally inconsistent with other evidence. The statements of the prosecution witnesses before trial were inconsistent and the committing Magistrate had directed two of them to be prosecuted for perjury and they were examined at the trial on a date when presumably they might have been standing their trial for perjury. This fact was not noted by the trial Judge. Further, Counsel for the accused and the Court did not consult all records available :

Held that there was no fair trial for the accused and that he should, under S. 376, Criminal P. C., be directed to be re-tried. AIR (Vol 24) 1937 Pesh 71: 38 Cr LJ 741: 1937 Pesh LJ 71: 169 Ind Cas 257 (DB).

**——Ss. 376, 418 (2) — Appeal on trial by jury — When lies.**

Section 376, Criminal P. C., is to be read with S. 418 (2). It is now an exception to the general rule that an appeal on a trial by jury will lie only on a matter of law. In a confirmation case, the accused has full liberty to attack the verdict of the jury not only on question of law but on questions of fact. AIR (Vol 24) 1937 Sind 162: 31 SLR 82: 38 Cr LJ 808: 169 Ind Cas 716 (DB).

**——S. 376 — Reference and appeal — Delay in preparation of paper books and detention of accused — Effect of in considering sentence.**

Where in an appeal and reference from a death sentence, there is a delay of four months in getting the paper book ready, the delay is unreasonable requiring explanation and where due to the delay and the intervention of the long vacation, the accused have remained under sentence of death for ten months, the High Court will take this fact into consideration along with other facts and circumstances in reducing the capital sentence:

Held, that the sentence of death should be reduced to one of transportation for life. AIR (V 23) 1936 Cal 73 : 40 CWN 432 : 37 Cr LJ 394 : 63 C 929 : 64 Cal LJ 154 : 161 Ind Cas 74 (DB).

**——S. 376 — Appeal on facts and law — Maintainability**

In cases where the appellants have been sentenced to death, they have in the High Court an appeal on matter of fact as well as of law. In disposing of a reference under S. 374, Criminal P. C. and the appeals by the persons sentenced to death, the High Court is, therefore, obliged to come to their own independent conclusions as to the guilt or innocence of the accused independently of the verdict of the jury or of the opinion of the Judge. In these cases, the questions of misdirection are of less importance. But though the High Court is not bound by the verdict of the jury, they will attach greatest possible weight to the verdict of the jury if it answers a reasonable test. AIR (V 23) 1936 Cal 73 : 40 CWN 432 : 37 Cr LJ 394 : 63 Cal 929 : 64 CLJ 154 : 161 Ind Cas 74 (DB).

**——S. 376 — Ss. 418, 423 — Reference under S. 374— Duty of High Court.**

In disposing of a reference under S. 374 of the Code and the appeals by the accused, the High Court is bound to satisfy themselves by going through the evidence whether the accused have been rightly convicted, but in doing so, they must attach considerable weight to the verdict of the jury. If, after examining the evidence which is admissible in law, they find even without any opportunity of hearing witnesses and seeing their demeanour, that certain facts emerge from the evidence as proved beyond reasonable doubt and the decision in the case depends upon inference to be drawn from these proved facts, they are not bound to order a re-trial. When, however, the evidence cannot be properly weighed by the Court without hearing witnesses and seeing their demeanour in the witness-box and they are not in a position to say whether the facts from which inferences are to be drawn are true or false, re-trial should be ordered. AIR (V 23) 1936 Cal 73 : 40 CWN 432 : 37 Cr LJ 394: 63 Cal 929: 64 CLJ 154: 161 Ind Cas 74 (DB).

**——S. 376 — Sentence — Two accused equally guilty — One given lesser penalty — Whether ground for commuting sentence on other.**

Where of two accused persons equally guilty of a brutal and pre-meditated murder who should have received the same sentence, one was sentenced to death and the other to transportation and both appealed and there was no application by the Crown for enhancement:

Held, that this was no consideration which would entitle the High Court to commute the sentence of death passed on one of them. AIR (V 23) 1936 Lah 341 : 16 Lah 345 : 37 PLR 605 : 37 Cr LJ 504 : 161 Ind Cas 900 (DB).

**——S. 376 — Charge to jury found defective — Acquittal or re-trial — Tests — Absence of sufficient evidence to warrant conviction — Acquittal.**

Where in a reference under S. 374, Criminal P. C., it appears that in the charge to the jury on certain salient points, the Judge has put the prosecution case too strongly and has failed to put the defence case as strongly as it should have been put and the charge is, in general found to be defective, the Court has to consider whether the correct course is to acquit the accused or to direct a re-trial. When there is no chance of further evidence coming to light if a re-trial were ordered, the question to be considered is, whether, if upon proper direction, the jury on the evidence were to convict again and the matter were to come to the High Court again under S. 374, it would be possible for the High Court to let that conviction stand. If this test is applied and there is no sufficient evidence to warrant a conviction, the accused should be acquitted.



Capital offences are not to be tried as res integra on the paper-book. If there is no sufficient evidence to warrant a conviction, the High Court has an obligation to say so.

In capital sentence cases, though the High Court is not bound by the verdict of the Jury, they must rely on it if it answers a reasonable test. AIR (V 20) 1933 Cal 426 : 37 CWN 595 : 34 Cr LJ 533 (2) : 143 Ind Cas 173 (SB).

——S. 376 — Restrictions mentioned in S. 418 regarding only trials do not apply to references under S. 374. AIR (V 19) 1932 Pat 302 : 13 PLT 440 : 34 Cr LJ 83 : 140 Ind Cas 846 (DB).

**——S. 376 — improper sentence.**

While confirming sentence of death, if the High Court thinks that it would be wrong and improper that the sentence of death passed on the accused should be carried out, it may decline to confirm it. AIR (V 13) 1926 Nag 461 : 22 NLR 104 : 27 Cr LJ 955 : 7 AI Cr R 37 : 96 Ind Cas 507 (DB).

**——S. 376 — Verdict of jury — Powers and practice of High Court.**

In confirmation cases, the High Court in the exercise of its jurisdiction has power to go behind the verdict of the jury and substitute its own finding on fact for the unanimous finding of the jury.

(Per Kennedy, J. C.) — But, as a general rule, the confirming Courts should deal with matters of confirmation as if an appeal were under hearing, and that appeal covered all possible grounds which might and should have been raised, even if they are not actually raised in the appeal. The considerations that would weigh are, whether there has been a proper charge, whether the verdict is not perverse and whether proper evidence has been admitted. As a matter of practice the High Court will not generally allow the verdict to be attacked arbitrarily, it being necessary for the representative of the convict to show prima facie that the verdict is unsupported by evidence. AIR (V 8) 1921 Sind 84 : 64 Ind Cas 657 : 15 SLR 103 (FB).

**——Ss. 376, 374 (b) — Undefended accused — Capital charge — Power of High Court to order re-trial.**

A person accused of a capital charge ought not to be allowed to go undefended, the custom being for the Judge to appoint or request any member of the Bar to conduct the defence of the accused. Under S. 376 (b), Cr. P. C. the High Court has jurisdiction to order a new trial on the same or an amended charge. AIR (V 3) 1916 Cal 79 : 19 CWN 556 : 21 CLJ 495 : 16 Cr LJ 481: 29 Ind Cas 321 (DB).

**——S. 376 — Jurisdiction — Chief Court — Modification — In sentence.**

A person was tried for murder and concealment of murder; the Sessions Judge convicted him of murder but did not express any opinion on the charge of concealment. The Chief Court while acquitting him of murder can convict him on the minor charge, if there is sufficient evidence on record to support it. (1913) 14 Cr LJ 278 : 8 PR 1913 Cr : 223 PLR 1913 : 22 PWR 1913 Cr : 19 Ind Cas 710 (DB).

**——S. 377.**

**——S. 377 — Death sentence — Confirmation of — Procedure — Non-compliance with S. 377 — Effect.**

Where, in the case of a death sentence, the order of confirmation is only made, passed and signed by one of the two Judges of the Court of the Resident, the pre-emptory provisions of S. 377, Criminal P. C., are not complied with, and the sentence will be submitted to the Court of the Resident, who will require to dispose of the same under Ss. 375

to 379 of the Criminal P. C., and who should take into account, when considering their action under the alternative power of S. 376, their Lordships' views on the other contentions in the appeal and the commutation of sentence already made by the Resident. AIR (V 24) 1937 PC 119: 39 Bom LR 966 : ILR (1937) Bom 711 : 64 IA 143 : (1937) M WN 546 : 46 MLW 134 : (1937) 2 MLJ 323 : 39 P LR 334 : 41 CWN 741: 1937 OWN 412: 3 BR 426: 38 Cr LJ 498 : (1937) ALJ 1055 : 1937 AWR 1128: 167 Ind Cas 790.

**——S. 379.**

**——S. 379 — Scope.**

Section 379, Cr. P. Code., is not applicable to civil detention. AIR (V 12) 1925 Rang 202 : 86 Ind Cas 469 : 26 Cr. LJ 821: 4 Bur LJ 9: 3 Rang 93.

**——S. 380.**

**——Ss. 380, 438 and 439 and Criminal Rules of Practice, rule 263 — Acquittal by joint Magistrate — Legality — Procedure for setting aside order — Revisional powers of High Court in such cases.**

A joint Magistrate has no power to acquit under S. 380 of the Criminal Procedure Code. If he acquits, the District Magistrate if he thinks the order is wrong, can only ask the Government to appeal and cannot report the case to the High Court under S. 438, Criminal Procedure Code. Further, the High Court will not interfere in revision with such an acquittal as S. 439, cl. (5) of the Code, provides that where an appeal lies and no appeal is brought proceedings by way of revision shall not be entertained at the instance of the party who could have appealed. AIR (V 38) 1951 Mad 398 : (1050) 2 MLJ 774.

**——S. 380 — Setting aside conviction under S. 380.**

When an accused person comes before a Magistrate under S. 380, Criminal P. C., he can be treated only as a convicted person and the Magistrate is not empowered to set aside the conviction already recorded by the Magistrate who refers the case.

The kind of enquiry or the nature of the additional evidence contemplated by S. 380 is clearly such enquiry or evidence as may assist the Magistrate to whom the accused have been forwarded to exercise his discretion properly under S. 562, Criminal P. C. AIR (V 32) 1945 Mad 302 : 58 MLW 75 (2) : 1945 MWN 105 : (1945) 1 MLJ 178 : ILR (1945) Mad 891 : 47 Cr LJ 178 : 221 Ind Cas 421.

——S. 380 — There is a fundamental difference between the position of the accused person, dealt with under S. 349, and S. 562, Criminal P. C. Under the former section, they are sent by the Court to the superior Magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior Magistrate to pass judgments upon them according to law. Under S. 562, Criminal P. C., the accused persons come before the superior Magistrate as convicted persons and he has no other option but to proceed under S. 380 of the Code and pass sentences upon them in accordance with the powers. Section 349 (1) (a), Criminal P. C., has no application to the procedure under S. 562 of the Code. It is open to the Sub-Magistrate to sentence some of the accused to imprisonment and refer the remainder for the application of S. 562 of the Code. AIR (V 30) 1943 Mad 390 : (1943) 1 MLJ 126 : 56 MLW 69 : 1943 MWN 60 (1) : 44 Cr L J 568 : 206 Ind Cas 577.

——S. 380 — When a reference is made under S. 562, Criminal P. C., the Magistrate to whom it is referred has to proceed as in the manner provided by S. 380, which relates only to the passing of a sentence or making of an order, and does not empower the Magistrate to set aside a conviction. AIR (V 29) 1942 Mad 657 (1) : 1942 MWN 491 : (1942) 2 MLJ 277: 55 MLW 757 (2) : 44 Cr LJ 91: 203 Ind Cas 500.

**——S. 380 — Further enquiry under S. 380 — Object of.**

Section 380, empowers the Magistrate to make further enquiries so that he may decide whether or not it is a fit case for the passing of an order under S. 562, or whether, on the other hand, he ought to impose some substantial sentence under the I. P. C. AIR (V 29) 1942 Mad 657 (1) : 1942 MWN 491 : (1942) 2 MLJ 277 : 55 MLW 757 (2) : 44 Cr LJ 91 : 203 Ind Cas 500.

**——Ss. 380, 435, 438 — Proceedings submitted under S. 380 — Reference to District Magistrate under S. 435, or to High Court under S. 438 is incompetent.**

Where proceedings are submitted to the Sub-Divisional Magistrate under S. 380, Criminal P. C., he can only dispose of the case in the manner provided by S. 380. The reference to the District Magistrate under S. 435 is incompetent nor is it a proper case for submission to the High Court under S. 438. (1941) 191 Ind Cas 149 (150) : 1940 MWN 244 (1) : 51 MLW 480 : 42 Cr LJ 89.

——Ss. 380, 349 — There is a very clear difference between Ss. 349 and 380. When a Magistrate of the second or third class submits proceedings under S. 349, Criminal P. C., he does not convict, but merely expresses his opinion that the accused person is guilty. But when a case is submitted under S. 562, a conviction has first of all, to be recorded, and so when the proceedings reach the Magistrate for disposal under S. 380, that Magistrate has to deal with a person who has been convicted. AIR (V 20) 1933 Mad 728 : (1933) MWN 716 : 38 MLW 428 : 57 Mad 85 : 34 Cr LJ 1045: 65 MLJ 405: 145 Ind Cas 659 (DB).

**——S. 383.**

**——Ss. 383, 77 — Sentence of imprisonment and warrant of arrest of accused released on bail — Procedure.**

The procedure on the Sessions Court upholding a sentence of imprisonment is to issue a warrant to the jail under S. 383, Criminal P. C., and where the accused is on bail and is not present, the Court to issue a warrant for his arrest to a Police Officer under S. 77, Criminal P. C. There is no procedure laid down by the Code that the Court should ask the sureties to ask the accused to surrender. AIR (V 27) 1940 All 386 : (1940) ALJ 309 : 41 Cr LJ 741 : 1940 AWR 334 : ILR (1940) All 507 : 189 Ind Cas 468 (DB).

**——Ss. 383, 397 — Antedating of sentence — Whether warranted by the Code.**

There is no provision in the Criminal P. C., for the antedating of sentence of imprisonment and such antedating, if adopted is against the spirit of Ss. 383 and 397 of the Criminal P. C. AIR (Vol 20) 1933 Rang 28: 34 Cr LJ 447: 142 Ind Cas 728.

**——Ss. 383 and 541 — Sentence of imprisonment in Police custody — Legality.**

It is illegal to sentence an accused to undergo imprisonment in a Police lock-up. 7 LBR 62: 15 Cr LJ 10: 22 Ind Cas 154: AIR (Vol 1) 1914 LB 156.

**——S. 386.**

See also Criminal P. C., S. 88.

**1. Scope of fine — Recovery of fine.**

**2. Offender undergoing whole term of imprisonment in default. Sub-s. (1) (b), Proviso.**

**3. Execution against immovable property.**

**3-A. Attachment of moveable property.**

See also N. 4.

**4. Attachment of joint Hindu family property.**
**4-A. Attachment of salary.**
**5. Claims to property attached.**
**6. Execution by civil process.**
**7. Issue of distress warrant.**
**8. Recovery of allowance and cost under Sec. 488, Cr. P. C.**
**9. Revision.**

**1. Scope of fine — Recovery of fine.**

**——S. 386 (1) (b) and (3) — S. 386, whether controls S. 70, Penal Code — Effect of S. 386 (3).**

Section 70, I. P. C., is substantive law as to the payment of fine while S. 386, Criminal P. C., relates to the procedure of its recovery. Section 70, I. P. C., is not, therefore, controlled by the provisions of S. 386, sub-ss. (1) (b) and (3), Criminal P. C. The warrant issued under S. 386 (1) (b), Criminal P. C., is to be deemed to be a decree for certain purposes only and not for all purposes. For the purpose of limitation, therefore, the substantive law contained in S. 70 is not affected. The only effect of S. 386 (3), Criminal P. C., is that the warrant which is to be deemed to be a decree is to be executed according to the mode laid down in the Civil P. C. Section 48, Civil P. C., does not prescribe any period of limitation for taking out execution. Section 48, Civil P. C., does not, therefore, apply to the warrant under S. 386 (3), Criminal P. C. AIR (V 28) 1941 Bom 158 : 43 Bom LR 122 : 42 Cr LJ 534 : ILR (1941) Bom 147 : 194 Ind Cas 217 (DB).

**——S. 386 — Fine — Recovery of articles embezzled — Remission of fine.**

Fine imposed on a convict should not be beyond his capacity to pay.

Where the main items found to have been embezzled have been recovered, it will be proper to remit the fines imposed on the accused under those heads of charges where no loss has accrued to the complainant. AIR (V 21) 1934 Lah 677 : 35 PLR 649: 36 Cr LJ 424: 16 Lah 44: 153 Ind Cas 387.

**——S. 386 — Condition precedent — Sentence essential.**

Mere report from Traffic Inspector of a railway that a certain sum should be recovered from an owner of a motor car for covering damage to a carriage of the railway company is not sufficient for issuing warrant under S. 386. It is necessary that the Court issuing such warrant should have sentenced the offender to pay a fine. That is a condition precedent to the issue of any warrant under S. 386. AIR (V 16) 1929 Pat 108: 10 PLT 124 : 116 Ind Cas 524 : 30 Cr LJ 635 : 13 AI Cr R 67 :

**——S. 386 — Dekhan Agriculturists' Relief Act, S. 22.**

A Court is not justified in saying that because a warrant under S. 386, sub-S. (3), Cr. P. Code, is to be deemed a decree, therefore the exceptional provisions of S. 22 must be held applicable to such a warrant. AIR (V 13) 1926 Bom 582: 50 Bom 844: 28 Bom LR 1231 : 99 Ind Cas 310 (DB).

——S. 386 — Discretion in recovering fine — Only exercisable when there is sentence of fine and in default imprisonment. AIR (V 10) 1923 Pat 57 : 71 Ind Cas 254 : 3 PLT 762 : 24 Cr LJ 126

**2. Offender undergoing whole term of imprisonment in default — Sub-s. (1) (b) Proviso.**

**——S. 386, Proviso — Scope of — Sentence of fine and in default, penal servitude — Sentence in default served — Fine, if can be realised — Sentence of fine imposed by Special Magistrate — Special Criminal Court coming to end — Magistrate succeeding, if can realise the fine.**

Except in special cases, it is both undesirable and unfair to seek to realise a fine when the sentence ordered to be served in default of payment of the fine has already been served in full and the proviso to S. 386, Criminal P. C. is intended to deal with cases where, for some sufficient reason, the authorities have not been able to realise the fine before the default sentence has been served.

Where a sentence was passed by a Special Magistrate, A forming a Special Court under S. 23, Ordinance 11 of 1931 and the Court came to an end in 1932, a person who succeeds A as Sub-Divisional Magistrate, not being A's successor as Special Magistrate, cannot execute by issue of a warrant of attachment a sentence of fine imposed by A. AIR (V 23) 1936 Cal 149 : 40 CWN 604 : 37 Cr LJ 524 (2) : 63 Cal 1139 : 161 Ind Cas 979 (DB).

**——S. 386 (1) Proviso — Applicability — Whether requires withdrawal of warrant already issued before expiration of sentence in default.**

The proviso to S. 386 (1), Criminal P. C., applies in terms only to the issue of a fresh warrant and does not require the withdrawal of a warrant already issued before expiration of the sentence in default of payment. But in dealing with such existing warrants, the Court should follow the policy which seems to have inspired the proviso to S. 386.

The policy appears to be that in general, an offender ought not to be required both to pay the fine and to serve the sentence in default. But the proviso enables a warrant to be issued for recovery for the fine, even if the whole sentence in default has been served, if the Court considers that there are special reasons for issuing the warrant. The special reasons should be reasons accounting for the fact that the fine has not been served and any reasons which are directed to that point would be relevant. It may be that the authorities, through no negligence on their part, did not know of the existence of the property or the accused may have inherited property after he served his sentence in default or there may not have time to execute the warrant. Matters of that sort would all be special reasons for issuing a warrant after the sentence in default had been served; and in the same way, there are reasons justifying the Court in refusing to withdraw a warrant already issued.

Where before the sentence in default had been served, the authorities had taken steps to enforce the warrant by levying execution upon the immovable property of the applicant but it was not closed before the sentence in default was served, and the delay which had taken place was not shown to be due to any default on the part of the authorities :

Held, that the warrant need not be withdrawn AIR (V 22) 1935 Bom 160 : 37 Bom LR 99 : 59 Bom 350 : 36 Cr LJ 1034 : 156 Ind Cas 772.

**——S. 386 (1) (b) — Sentence of imprisonment in default of payment of fine — Fine not paid — Order for imprisonment — Order for realisation of fine by execution according to civil process — Legality of — Whole of imprisonment not undergone — Proviso to S. 386 (1) (b), if applies.**

Where a sentence of imprisonment is imposed by way of providing a sanction for the payment of a fine, if the fine is not paid, and that sentence is served out in its entirety, it is still possible to insist on payment of the fine being made.

The petitioner was sentenced to pay a fine within a period and in default to undergo imprisonment for a term. He subsequently surrendered himself and stated that he was unable to pay the fine. He was then committed to jail. On the same day, the Court directed that a warrant should be issued to the Collector of the District under the provi-

sions of S. 386 (1) (b), Criminal P. C. authorising the Collector to realise the amount of the fine by execution according to the civil process against the movable and immovable properties or both of the defaulter :

Held, that the order was proper and that the proviso to S. 386 '1) (b), Criminal P. C. did not apply as the offender had not undergone the whole of the term of imprisonment to which he was sentenced. AIR (V 22) 1935 Cal 546 : 36 Cr LJ 1267 : 157 Ind Cas 1031 (DB).

**3. Execution against immoveable property.**

—— S. 386 — **Punjab Land Alienation Act, S. 16.**

The combined effect of S. 386, Cr. P. Code, and S. 16, Punjab Land Alienation Act, is that the land belonging to a member of an agricultural tribe cannot be sold in pursuance of a warrant issued by a Magistrate to the Collector and sent to the nearest Civil Court for execution. AIR (Vol 16) 1929 Lah 667: 119 Ind Cas 227: 30 Cr LJ 1006: 1929 Cr C 212.

—— S. 386 — Immovable property of an agriculturist can be attached and sold in execution of an order passed under S. 336. AIR (Vol 13) 1926 Bom 582: 50 Bom 844: 99 Ind Cas 310: 28 Bom LR 1231 (DB).

——S. 386 — A sale of immoveable property for realizing a fine is illegal and passes no title to the purchaser. A suit for possession is maintainable and the Secretary of State is not a necessary party to it. (1921) 61 Ind Cas 527: 22 Cr LJ 399 (Lah) (No longer law.)

**3-A. Attachment of moveable property.**

See also N. 4

—— S. 386 — **Moveable property — "Distress," how affects the meaning of moveable property — Debt, if moveable property.**

The word 'distress' in S. 386 ordinarily refers to tangible moveable property which does not include mere debts or choses in action though it may include negotiable instruments, bonds or title-deeds. The provision of S. 386, being penal, must be strictly construed and therefore 'moveable property' which is the subject of distress and sale signifies only tangible or corporeal moveable property. AIR (Vol 4) 1917 Mad 748: 4 LW 613: 1917 MWN 105: 18 Cr LJ 1: 36 Ind Cas 833 (DB).

**4. Attachment of joint Hindu family property.**

—— S. 386 (1) (a) — **Fine imposed on co-parcener, if can be realized by sale of movable property belonging to co-parceners.**

Fine imposed upon a co-parcener cannot be realized by sale of movable property belonging to the co-parceners. Section 386 (1) (a), Criminal P. C., authorizes the Court passing a sentence of fine to recover the amount by sale of movable property of the offender. It cannot be said that movable property owned by a co-parcenary body is property of the 'offender'. It is the property owned by several persons in which the offender has an interest which is unascertained and this will be the state of affairs so long as the property is not partitioned and the joint condition continues. AIR (Vol 26) 1939 All 373: 1939 AWR 247: 183 Ind Cas 134.

—— S. 386 — **Movable property in which offender has only an undivided fractional share.**

Movable propety in which the offender has only an undivided fractional share, is not liable to attachment by seizure and subsequent sale. Section 386 (1) (a), Criminal P. C., which confers power to the Court to take steps for recovering the amount of fine, by issuing a warrant for the levy of the amount by attachment and sale of any movable property of the offender, does not entitle an officer executing such a warrant to attach by seizure and to sell movable property in which the offender has only an undivided fractional share. AIR (Vol 20) 1933 Cal 402: 34 Cr LJ 503: 60 Cal 932: 37 CWN 567: 143 Ind Cas 97 (DB).

—— S. 386 — **Attachment and seizure of undivided share of convicted person in movables, legality of.**

Section 386, Criminal P. C., does not entitle the Court to order the seizure and sale of movable property in which the convicted person has only an undivided share, without the consent of those jointly interested with him; and the amendment of the section in 1923, has not made any difference in this respect. AIR (Vol 20) 1933 Cal 401: 60Cal 851: 34 Cr LJ 579: 143 Ind Cas 238.

——S. 386 (1) (a) — **Undivided share of member of joint family in specific movable property — Attachment.**

As the undivided share of a member of a joint family in specific movable property is not capable of being seized and delivered to the purchaser, such a case cannot be dealt with under S. 386 (1) (a), Criminal P. C. and such share is not liable to attachment and sale. Capacity to give exclusive possession to the purchaser is the test of the applicability of S. 386 (1) (a). AIR (V 20) 1933 Nag 248 : 34 Cr LJ 1263 : 29 NLR 320 : 146 Ind Cas 371.

——S. 386 (a) (b) — **Attachment of delinquent's share in joint family property — Procedure.**

The attachment of the share of a delinquent in the movable property of a joint family for the realization of fine cannot be effected by ordering the Police to seize the property in the joint family house. The proper procedure is not under S. 386 (a), but under S. 386 (b), Criminal P. C. The Court which imposed the fine may issue its warrant to the Collector of the District, and that officer may proceed as the law directs. Where the whole property does not exclusively pertain to the delinquent, the seizure of the whole is not justified by law. AIR (V 20) 1933 Sind 43 : 34 Cr LJ 354 : 142 Ind Cas 524 (DB).

——S. 386 — **Attachment to realise fine — Delinquent's share in joint movable property — How to be effected — Civil Procedure Code (Act V of 1908), O. 21, R. 47 — Applicability — Crown — Right of, in attached property.**

The attachment of the share of a delinquent in joint movable property under S. 386, Criminal P. C., to realise fine imposed on him, cannot be effected by way of seizure, but it should be proceeded against as laid down in O 21, R. 47, Civil P. C. If necessary,either a Receiver can be appointed for the delinquent's share, or a prohibitory order can be issued against him and then his interest in the property can be brought to sale. Where any claim is made to such property, the onus should be regarded as lying in the same way as it does upon claimants to attached property under the Civil P. C.

The Crown has no right to anything more in joint movable property than the delinquent himself had and it cannot deprive the co-owners by seizing property of their right of possession in it. AIR (V 19) 1932 Mad 538 : (1932) MWN 457 : 33 Cr LJ 622 : 63 Mad LJ 142 : 55 Mad 1041 : 36 MLW 402 : 138 Ind Cas 548.

——S. 386 — Section 386 does not authorize the attachment of properties belonging to a person other than offender, and consequently movable property which belonged to the offender and the other members of the joint family of which he was a member, is not liable to attachment after the death of the offender. AIR (V 19) 1932 Pat

301 : 13 PLT 536 : 33 Cr LJ 958 : 140 Ind Cas 72 (FB).

——S. 386 (1) (a) — Attachment — Joint Hindu family — Undivided share in movable property.

Section 386 (1) (a), Criminal P. C., does not authorize the attachment of any property other than the movable property belonging to the offender and as no method can be conceived of by which the undivided share of an individual member of a joint Hindu family in movable property can be seized in the literal physical sense, without, at the same time, seizing the undivided shares of other persons, and as the statute does not authorise the seizure of such other shares, the undivided share of an individual member cannot be seized under S. 386 (1) (a), Criminal P. C. AIR (V 19) 1932 Pat 292 : 13 PLT 549 : 33 Cr LJ 872 : 12 Pat 29 : 140 Ind Cas 101 (SB).

——S. 386 — Joint family property.

Per Fawcett, J. — The words "moveable property belonging to" suffice to cover a share in a joint Hindu family estate so far as it consists of moveable property. AIR (V 13) 1926 Bom 103: 49 Bom 906 : 27 Bom LR 1363 : 27 Cr LJ 652 : 94 Ind Cas 604 (DB).

——S. 386 — Deposits. — By surety for appearance.

Money deposited in Court by a surety for the appearance of an accused cannot be seized in levy of the fine imposed on the accused, even assuming that the accused and the surety were brothers and were members of a joint Hindu family. AIR (V 8) 1921 All 71 : 64 Ind Cas 136 : 19 ALJ 887 : 22 Cr LJ 744.

4-A. Attachment of Salary.

——S. 386 — Salary — Whether can be attached — 'Movable property', meaning of.

The expression 'movable property' as used in S. 386, Criminal P. C. does not include salary not yet drawn by a salary-earner. Consequently a Magistrate acting under S. 386, Criminal P. C. cannot attach salary, which the salary-earner has not only drawn, but has not even yet earned. The warrant can issue only after the salary has come into the salary-earner's possession or into that of the bailiff in his behalf. AIR (V 21) 1934 Rang 82 : 36 Cr LJ 850 : 155 Ind Cas 742.

5. Claims to property attached.

——S. 386 — Bengal Government Rules — Determination of claims to property attached under S. 386 — Procedure of O. 21, R. 58, Civil P. C. (Act V of 1908), if should be followed — Services of Police Officers.

While determining ownership of property attached under S. 386, Criminal P. C, there is no necessity for a Magistrate in Bengal to follow the procedure laid down in O. 21, R. 58, Civil P. C., but on the other hand, he is not entitled to utilise the services of a Police Officer in investigating such claims, nor is he entitled to rely simply on the report of a Police Officer. AIR (V 26) 1939 Cal 337 : 43 CWN 443 : ILR (1939) 1 Cal 471 : 40 Cr LJ 654 : 182 Ind Cas 315 (DB).

——S. 386 — Duty of Magistrate — Everything should be done in order.

The authority of the Court must be vindicated and its orders carried out, but all things should be done decently and in order. AIR (V 25) 1938 Cal 15 : 41 CWN 1344 : 39 Cr LJ 259 : ILR (1938) 1 Cal 558 : 172 Ind Cas 954.

——S. 386 (b) — Attachment by seizure of crop belonging to Hindu co-parcenary in execution of warrant for recovery of fine against member — Claim by manager.

Where in execution of a warrant under S. 386 (b), Criminal P. C, for recovery of the fine imposed on one of the members of a Hindu coparcenary, the entire crops belonging to the coparcenary are attached by actual seizure, the attachment infringes the rights of the other members and consequently, a claim preferred by the manager of the co-parcenary on the ground of such infringement of his rights must be allowed. AIR (V 23) 1936 Mad 560 : 70 MLJ 717 : 37 Cr LJ 836 : 43 MLW 760 : (1936) MWN 728 : 163 Ind Cas 480 (2).

——S. 386 — Attachment of property by Magistrate — Objection and claim — Duty of Magistrate to investigate — Civil Procedure Code (Act V of 1908), O. 21, R. 58.

Where objection is made to an attachment by a Magistrate under S. 386, Criminal P. C., and a claim is preferred, the Magistrate is bound to investigate the claim by holding a proper inquiry as provided by O.21, R. 58, Civil P. C.

The language used in O. 21, R. 58, is mandatory. AIR (V 20) 1933 All 135 (1) : (1933) ALJ 265 : 34 Cr LJ 847 : 144 Ind Cas 882 (1).

——S. 386 — Magistrate acting solely on report of Police Officer — Legality of.

Where a petition is filed alleging that the property of the petitioner has been attached and that he had paid fine under protest, the Magistrate should not act solely on the report of the Police as it is not evidence. The procedure is wholly unwarranted and it is the duty of the Magistrate himself to record the evidence of the parties and to come to a decision on the evidence. AIR (V 20) 1933 Pat 693 (1) : 14 PLT 639 : 35 Cr LJ 458 : 147 Ind Cas 730 (1).

——S. 386 — Attachment of property to recover fine — Claim by third party — Stay of sale to enable claimant to establish his right in Civil Court.

Where property is attached for recovery of a fine under S. 386, Criminal P. C., and a third party claims the property to be his the Magistrate should stay the sale to give the claimant time to establish his right to the property in a Civil Court.

(The desirability of framing rules regarding the execution of warrants under S. 386 (1) (a) and for the summary determination of claims to property attached in execution of such warrant, by the Local Govt. pointed out.) AIR (V 19) 1932 Bom 476 : 56 Bom 864 : 34 Bom LR 1102 : 33 Cr LJ 805 : 139 Ind Cas 541 (DB).

——S. 386 (b) — Costs awarded in proceedings under S. 145 — Attachment of property — Claim that property is joint :

Held, that as there was dispute as to whether the property was the joint property, better method would be to proceed under Sub-Cl. (b) of S. 386, Criminal P. C. AIR (V 19) 1932 Pat 212 : 13 PLT 235: 33 Cr LJ 671 : 138 Ind Cas 310 (DB).

——S. 386 — Conviction of son — Attachment of household property to realise fine — Objection by father — Duty of Magistrate.

A person was convicted and sentenced to a fine. A warrant of attachment was issued by the Magistrate for recovery of the amount of fine and some household property was attached. The convict's father objected to this attachment on the ground that the property belonged to himself and not to his son, but the Magistrate dismissed this petition on the report of the Naib Tahsildar to the effect that father and son used to live together and mess together and that the property was joint property of the whole family :

Held, (1) that the household properties must be taken as belonging to the father and could not be attached :

(2) that it was obviously the duty of the Magistrate himself to record all the evidence of both the parties and then to pronounce his judgment upon it and the dismissal of the father's petition on the report of the Naib-Tahsildar, without any enquiry by the Magistrate himself was entirely illegal. AIR (V 18) 1931 Lah 943 (1) : 32 Cr LJ 812 : 131 Ind Cas 912.

**——Ss. 386 and 439 — Attachment — Objection —Claim — Revision.**

An order of attachment made under S. 386, Cr. P. C. is not open to revision. The principles applicable to attachments under S. 88, Cr. P. C., apply equally to attachments under S. 386. The Code does not contain any provision for the trial of claims which may be preferred to property distrained under S. 386 and when the Magistrate has acted under it, no further proceedings in the Criminal Courts are admissible. AIR (V 2) 1915 Lah 227 : 28 PLR 1915 : 16 Cr LJ 166 : 27 Ind Cas 550 (DB).

**——S. 386 — Attached property — Property attached under warrant by a Magistrate — Claim to — Jurisdiction of Magistrate to inquire :—Quaere:**

Whether a Magistrate issuing a warrant of attachment of property is competent and bound to inquire into any claim made by third parties to the same. (1902) 4 Bom LR 109 (116).

**6. Execution by Civil Process.**

**——S. 386 (as amended in 1923) — Magistrate issuing warrant to Collector to realize fine from accused's immovable property — Warrant should be accepted as decree by Civil Court.**

The plain reading of S. 386, Criminal P. C., as it now stands after its amendment of 1923, is that the warrant which is issued to the Collector by a Magistrate authorising him to realize fine from accused's immovable property must be accepted as a decree by the nearest Civil Court competent to execute it. AIR (V 25) 1938 Pesh 40 : 177 Ind Cas 162.

**—— S. 386 — Civil court's power — Execution of warrant.**

Where a civil Court is executing a warrant of attachment issued by a Magistrate which becomes a decree of such Civil Court under S. 386, Cr P. Code the mere fact that that procedure of Criminal Courts is different from that of Civil Court is not sufficient to give jurisdiction to such executing Court, when it tries summarily a claim petition, to go behind such decree. AIR (Vol 16) 1929 Mad 383: 119 Ind Cas 33.

**7. Issue of Distress warrant.**

**—— S. 386 (1) (b), Proviso — Distress warrant.**

Section 386 (1) (b), Proviso, Criminal P. C., require the Magistrate to record his special reason for issuing a distress warrant only when the warrant is issued after the offender has undergone the whole of the imprisonment in default but it is not necessary where it is issued before. The law does not require that reasons should be given for selling attached property after the disposal of claims. AIR (Vol 26) 1939 Cal 337: 43 CWN 443: 40 Cr LJ 654: ILR (1939) 1 Cal 471 : 182 Ind Cas 315 (DB).

—— S. 386 — Where a distress warrant for realisation of amount due by way of cost of Additional Police quartered in a village is entrusted for execution to the Assessment Officer, there is no provision either in the Code or the rules framed by the Local Govt. under S. 386, Criminal P. C. enabling him to endorse the warrant to his clerk.

Where the warrant is not for realisation of fine imposed on any individual but for the realisation of cost of the Additional Police quartered in a particular village which was apportioned on the inhabitants of that village, the entire family is the defaulter and the warrant for realisation is issued against its head, not in his individual capacity but in his capacity as head of the family which was assessed to that cost and the family property is liable to be seized. The cost may be realised as a fine but is not fine.

When an officer is entrusted with the warrant to attach the property of certain persons his first duty is to ascertain by all means possible what property belonged to that person which is liable to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised, which raises in his mind a reasonable doubt that the property does not belong to that person against whom the warrant has been issued. When no objection is raised, the Assessment Officer will be performing a legal duty when he proceeds to attach property. AIR (Vol 22) 1935 Pat 214: 16 PLT 295: 1 BR 446: 36 Cr LJ 714 195 Ind Cas 421 (2) (DB).

**—— S. 386 — Warrant of distress — Civil writ — Moveable property.**

Surplus proceeds with the mortgagee for payment of the mortgagor after appropriation and payment under S. 69, T. P. Act are moveable property within S. 386 Cr. P. Code, and are liable for distraint. A warrant for distress issued by a Criminal Court is preferable to a civil writ though the fine if levied, does not go to the Crown but payable to a private person only. AIR (Vol 5) 1918 Mad 1111 : 40 Mad 767 : (1917) MWN 20 : 21 MLT 71: 5 LW 664: 18 Cr LJ 426: 38 Ind Cas 986 (DB).

**8. Recovery of allowance and cost under S. 488, Cr. P. C.**

**—— S. 386 — Recovery of allowance under S. 488.**

Magistrate under S. 488, cannot attach immovable property — Amount can be recovered in the same manner as fines and if immovable property has to be attached, the warrant of sale should be sent to the Collector. AIR (Vol 28) 1941 Lah 360: 43 Cr LJ 61: 196 Ind Cas 691.

—— S. 386 — The only method of recovering costs awarded in proceedings under S. 488 is by distress warrant and it is only for default of payment of each month's allowance that imprisonment may be awarded. AIR (Vol 28) 1941 Rang 247: 1941 RangLR 403: 43 Cr LJ 30: 196 Ind Cas 563.

**9. Revision.**

**——S. 386 — Revision — Karachi Port Trust Act, S. 84.**

Order of a Magistrate directing a warrant to issue under S. 386, Cr P. Code, for recovery of an amount due to the Karachi Port Trust on application being made to him for the purpose under S. 84 of the Karachi Port Trust Act, is not a judicial order but is merely a consequential or an executive order passed for the purpose of carrying out the effective order of the Port Trust directing the applicant to pay a certain sum of money in consequence of his failure to pay their dues and is therefore not subject to revision. AIR (Vol 13) 1926 Sind 57: 20 SLR 63: 26 Cr LJ 1263 : 88 Ind Cas 1007 (DB).

—— S. 388.

**—— S. 388 — Sentence of imprisonment in addition to fine — Execution of sentence of imprisonment in default — Applicability.**

Whenever a sentence of imprisonment is passed in addition to a sentence of fine, even if the sen-

tence of imprisonment is a nominal sentence only, the provisions of S. 388 of the Criminal P. C., have no application, and the execution of the sentence of imprisonment in default of payment of fine cannot be suspended. AIR (Vol 21) 1934 Rang 11: 35 Cr LJ 608: 11 Rang 451: 148 Ind Cas 112 (DB).

**—— S. 388 (2), object and scope of.**

The provisions of S. 388 (2) refer to an order for payment of money which order is not a sentence passed upon an accused person and refer to cases like that of the payment of compensation, under S. 250 of the Criminal P. C. or the payment of the penalty due on a bond, under S. 514. AIR (Vol 21) 1934 Rang 11: 11 Rang 451: 35 Cr LJ 608: 148 Ind Cas 112 (DB).

**——S. 388, if applies to case of sentence of fine only — Fine, when can be realised by instalments.**

Section 388, Criminal P. C., does not apply to a case where the sentence is one of fine only and there is no provision except S. 388 by which a fine can be ordered to be realised by instalments. AIR (Vol 20) 1933 Cal 308: 56 CLJ 73: 34 Cr LJ 530 : 143 Ind Cas 120 (DB).

**—— S. 390.**

**—— Ss. 390, 391 — Borstal Institution, if jail — Superintendent of Senior Training School, if can carry out sentence of whipping — Procedure.**

A Borstal Institution being clearly not a jail under S. 391, Criminal P. C., the Superintendent of the Senior Training School at Thayetmyo is not an officer in charge of a jail and cannot, in his position as Superintendent of the Training School, carry out a sentence of whipping ordered by the Magistrate. Where a youthful offender, for one offence, is ordered to be detained in a training school or a Borstal Institution, and, for another offence tried at the same trial, is sentenced to whipping, the Magistrate must act under the provisions of S. 390, Criminal P. C., and either order the whipping to be inflicted in his own presence or direct that it shall be inflicted at some convenient jail in the presence of the officer-in-charge of the jail. AIR (Vol 23) 1936 Rang 485: 14 Rang 626: 38 Cr LJ 33: 165 Ind Cas 575 (FB).

**—— S. 390 — Time of execution — S. 391, Cr. P. Code.**

It cannot be held that under S. 390 the sentence of whipping must be executed on the very day that the sentence is passed. The words "at such place and time as the Court may direct" are very wide and give a discretion to the Court; and a direction that the sentence of whipping should be executed as soon as practicable" is one that in a case not falling under (a) or cl. (b) sub-s. (1), S. 391 is a proper order to pass. AIR (V 15) 1928 Bom 138: 30 Bom LR 389: 29 Cr LJ 573: 109 Ind Cas 509: 10 AICrR 306 (DB).

**—— S. 391.**

—— S. 391 — A Borstal Institution, being clearly not a jail under S. 391, Criminal P. C., the Suprintendent of the Senior Training School at Thayetmyo is not an officer in charge of jail, and cannot, in his position as Superintendent of the Training School, carry out a sentene of whipping ordered by the Magistrate. AIR (Vol 23) 1936 Rang 485: 38 Cr LJ 33: 14 Rang 625: 165 Ind Cas 575 (FB).

**—— S. 391 — Conviction for two offences arising out of same facts — Sentence of imprisonment in two cases exceeding seven years — Sentence of whipping.**

Where a person has been convicted of two offences arising out of the same facts and the terms of imprisonment awarded in these two cases exceed seven years, he cannot be punished with whipping. (1935) 156 Ind Cas 1015: 36 Cr LJ 1050 (Rang).

**——Ss. 391, 439, 561-A — Sentence of whipping along with imprisonment — Sentence of whipping to be executed after imprisonment — Legality of — Illegal order by lower Court — High Court — Power of.**

Where the Additional Sessions Judge sentenced the accused to undergo rigorous imprisonment for two years and to whipping of twenty stripes after the sentence of imprisonment passed by his order has been undergone :

Held, that the last portoin of the order which said that the stripes will be given after the sentence of imprisonment has been undergone, was clearly incorrect in this sense that the time mentioned for inflicting the corporal punishment was not in accordance with law.

If a lower Court finds that it has passed an illegal oder and informs the High Court of the mistake and the High Court is of opinion that the order is illegal, it is competent to the High Court to set right the illegality. The forms of the information being immaterial, the High Court can do so even when it has dismissed the appeal against the order. AIR (Vol 21) 1934 Pat 551: 15 PLT 475: 1 BR 37 (2): 36 Cr LJ 100: 152 Ind Cas 291.

**—— Ss. 391, 407 — Whipping sentence — Postponement of, pending appeal.**

A Magistrate imposing a sentence of whipping only has no power to suspend its execution pending appeal. It is only when whipping is added to imprisonment in an appealable case that whipping may and ought to be postponed. The unsatisfactory state of the law pointed out. (1902) 26 M 465 (466) (DB).

**——S. 393**

**——S. 393 — Whipping — Cumulative sentence of imprisonment for more than five years.**

The cumulative sentence of imprisonment of more than five years cannot be maintained in the case of an accused who has been sentenced to undergo punishment of whipping and vice versa, AIR (V 26) 1939 Pesh 17 : 1939 Pesh LJ25 : 40 Cr LJ 631 : 182 Ind Cas 530 (DB).

**——S. 393 — Sentence of whipping to person sentenced to more than five years' rigorous imprisonment in aggregate in different cases—Legality.**

A person who is sentenced to imprisonment for more than five years, shall not be punishable with stripes and S. 393, Criminal P. C., applies even if the sentences aggregating more than five years' rigorous imprisonment are passed in different cases. AIR (V 24) 1937 Lah 104 : 39 PLR 226 : 39 Cr. LJ 4 : 171 Ind Cas 864.

**——S. 393 — Sentence of seven years' imprisonment plus whipping.**

An order sentencing the accused to imprisonment for seven years' and whipping in addition to it, is against the provision of S. 393, Criminal P.C. AIR (V 24) 1937 Pesh 22 : 38 Cr LJ 429 : 167 Ind Cas 655.

**——S. 393—(as amended by Whipping (Burma Amendment) Act, 1927) — Computation of maximum period of imprisonment—Period for which accused is already sentenced.**

It is not justifiable to take into account the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping with

or without imprisonment is passed in the computation of the maximum period of imprisonment fixed by S. 393, Criminal P.C., as amended by the Whipping (Burma Amendment) Act, 1927. AIR (V 21) 1934 Rang 58 : 35 Cr LJ 1027 : 12 Rang 404 149 Ind Cas 1073.

**——S. 393 — Interpretation — Burma Act VIII of 1927.**

The word "sentenced" which occurs in S. 393, Cr P. Code, and in the Burma Act (8 of 1927), must be read in a general sense, and, if a person is sentenced for any period exceeding the period fixed by the Act whether in conviction in one case or more than one he cannot be punished with whipping. AIR (V 17) 1930 Rang 138 : 120 Ind Cas 697: 7 Rang 769 : 31 Cr. LJ 176 : 1930 Cr C 305.

**——S. 393 (b) — Whipping — Liability of — Seven years' rigorous imprisonment.**

A sentence of whipping in addition to 7 years' rigorous imprisonment is illegal as a sentence cannot be passed of which the execution is prohibited by law. 1 Mad 56, Ref. The provision contained in S. 293(b) exempting certain persons from the sentence of whipping refers to the execution not to the passing thereof. AIR (V 7) 1920 Lah 364 : 30 PR 1919 (Cr.) : 21 Cr LJ 306 : 55 Ind Cas 466 (DB).

**——S. 394**

**——S. 394 — Whipping — Magistrate, if can reject on ground that accused is too young and frail without taking medical opinion.**

While considering the question as to whether a sentence of whipping is appropriate in any particular case, the Magistrate should not reject this form of punishment on the ground that the accused is too young or frail unless he has medical opinion in support of his own. AIR (V 26) 1939 Rang 383 : 41 Cr LJ 22 : 184 Ind Cas 464.

**——Ss. 394, Cl. (2), 395— Whipping — Certificate before sentence that accused was fit only to receive partial sentence of whipping—"During the execution of a sentence of whipping" —Sentence partially executed—Sentence in lieu of the unexecuted portion.**

There is no provision of law authorizing a medical officer to give a certificate, before the commencement of the execution of the sentence of whipping that the accused is fit to receive only a portion of the sentence and such a certificate, if given, is not a certificate given "during the execution of the sentence" within the meaning of S. 394, Cr P. C., and consequently, the Magistrate was not competent in the case to have sentenced the accused under S. 395, Cr P.C., to a term of imprisonment in lieu of so much of the sentence of whipping as was not executed. (1907) 17 MLJ 555 : 31 M 84 (85) : 3 MLT 31 (DB).

**——S. 395**

**——Ss. 395, 411 — Contradictory findings — Dacoity and receiving stolen property.**

Conviction of a man both for dacoity and for receiving stolen property are contradictory to each other and bad in law, inasmuch as a man who steals an article cannot also be convicted of receiving it. (1902) 26 M 467 (468) : 2 Weir 48 (DB).

**——Ss. 395 (1), 502 — Sentence of whipping found inexecutable due to bad health — Bond under S. 562.**

The accused was sentenced to 25 lashes under S. 379, I. P. C., and as it was reported that owing to an enlarged spleen, the sentenced of whipping could not be executed, the Magistrate directed him to enter into a bond under S. 562, Criminal P.C., for one year.

Held, that this order was clearly beyond the Magistrate's powers. Section 395 (1), Criminal P.C. in such a case allows the Court to remit the sentence altogether or to sentence the offender in lieu of whipping to imprisonment or fine. AIR (V 25) 1938 Rang 218 : 39 Cr LJ 707 (1) : 176 Ind Cas 224.

**——S. 397**

1. **Several Sentences—Execution of**
2. **Already undergoing a sentence of imprisonment.**
3. **Second proviso**
4. **Reversal of one of two sentences.**
5. **Imprisonment in default of payment of fine.**
6. **Detention under Madras Borstal Schools Act.**
7. **Ante-dating sentence.**
8. **Power of High Court to pass concurrent sentences.**

**1. Several sentences — Execution of**

**——S. 397 —Separate trials — Sentences to run separately unless otherwise ordered.** (1936) 38 PLR 223.

**——S. 397 — Separate trials.**

In respect of three separate acts of offence there were three separate trials of the same accused, and three separate sentences of imprisonment, passed by the same Magistrate and on the same date; the Magistrate ordered in each case that the sentence was to run from the date of conviction. As a result the sentences were to run concurrently.

Held, that inasmuch as there had been three separate trials under S. 397, the sentences could only run consecutively and that S. 35 did not give the Court power to direct them to run concurrently inasmuch as S. 35 relates to sentences in cases of convictions of several offences at one trial. AIR (V 8) 1921 All 125 : 62 Ind Cas 408 : 19 ALJ 310 : 22 Cr LJ 520.

**——S. 397—Concurrent and consecutive sentences —When to be passed.**

The question whether a sentence should run consecutively or concurrently arises when there are separate convictions in one trial and not when there are separate trials for separate offences 20 PLR 1912 : 13 PWR 1912 (Cr) : 13 Cr LJ 3 : 13 Ind Cas 109.

**——S. 397 — Concurrent sentences.**

In the event of two separate convictions of an accused, the direction in the subsequent sentence to run both the sentences concurrently, is an error in law. (1912) 11 MLT 213 : (1912) MWN 396 : 13 Cr LJ 466 : 15 Ind Cas 306. (FB).

**——S. 397 — Concurrent sentences— Legality of.**

The passing of concurrent sentences is illegal except where S. 35 of the Criminal Procedure Code applies. (1902) 4 Bom LR 876 (877) (DB).

**2. Already undergoing a sentence of imprisonment.**

——S. 397 — In a case where the accused is undergoing imprisonment in a State jail a Magistrate in British India cannot order the sentence to run concurrently with the sentence he is already undergoing in State jail. (1935) 1935 MWN 949.

**——S. 397 — Two independent and unconnected offences by same accused — Sentences.**

Sentences are usually ordered to run concurrently when two offences are akin or intimately connected with each other. Where the offence has nothing whatever to do with the offence for which the accused was convicted in another case, the only connecting link being that both appear to have been inspired by the same desire, the sentence in the two cases should not be directed to run concurrently. AIR (V 22) 1935 Rang 456: 37 Cr LJ 217: 159 Ind Cas 1065 (DB).

**——S. 397 — Sections 401, 457 and 411, I. P. C.**

Where accused are sentenced under Ss. 457 and 411, Penal Code, and also they are sentenced for

an offence under S. 401 with other accused, the sentences being passed on the same day although in separate trials the sentences can be ordered to run concurrently. The accused may be considered to have been convicted of the offence under S. 401 first and from the moment of their conviction the term of imprisonment may be deemed to have begun. AIR (V 13) 1926 Nag 426: 27 Cr LJ 807: 95 Ind Cas 471.

**——S. 397 — Consecutive sentences — Conviction under S. 400, I. P. C., for dacoity.**

A conviction can be had under S. 400 even where no actual commission of a dacoity is proved. The element of the offence is association with the knowledge that it is formed for the purpose of committing dacoities habitually. Hence where sentence is already passed for the offence of committing dacoity there is no bar to the passing of a sentence under S. 400. AIR (V 12) 1925 Oudh 374: 89 Ind Cas 836: 27 OC 385: 26 Cr LJ 1412 (DB).

**——S 397 — 'Undergoing.'**

A prisoner begins to undergo the sentence of imprisonment from the moment at which the sentence is pronounced. AIR (V 11) 1924 Rang 307: 82 Ind Cas 478: 3 Bur LJ 32: 25 Cr LJ 1310.

**——S. 397 — "Undergoing imprisonment" — Meaning of — S. 108, Cr. P. Code.**

For the application of S. 397 the accused should have been undergoing a sentence of imprisonment on the date on which sentence was passed on him for a substantive offence. Where a person has been asked to furnish security under S. 108 and he has furnished security, he cannot be deemed to be "undergoing imprisonment" for the purposes of S. 397. AIR (V 10) 1923 Oudh 56: 73 Ind Cas 321: 25 OC 249: 10 OLJ 593: 24 Cr LJ 577.

**——S. 397 — Concurrent sentences — Imprisonment — Separate trials.**

An order that sentences of imprisonment passed upon an accused in two trials held on the same day should run concurrently is not illegal for until an accused has actually passed in the jail he is not undergoing a sentence of imprisonment within S. 397. AIR (V 5) 1918 All 303(1): 19 Cr LJ 207: 43 Ind Cas 623.

**——S. 397 — Sentence of imprisonment — Detention in Civil Prison — Imprisonment.**

A "sentence of imprisonment" implies the punishment awarded on conviction of an offence. A person detained in the civil prison is not undergoing "a sentence of imprisonment". Therefore, when such a person is convicted of an offence and sentenced to a term of imprisonment, such term cannot, under S. 397, commence on the expiry of the period for which he is detained in the civil prison, but must commence from the date of the order. 30 All 334, Diss. AIR (V 4) 1917 LB 159: 17 Cr LJ 480 : 10 Bur LT 266 : 36 Ind Cas 160.

**3. Second proviso.**

**——S. 397 Proviso 2 and S. 123 — Substantive sentence of imprisonment.**

Under S. 397 Proviso 2 an order directing the substantive sentences of imprisonment to take effect on the expiry of the periods of imprisonment imposed under S. 123, Criminal P. C., is illegal. (1942) 197 Ind Cas 867: (1941) 2 MLJ 694: 1941 MWN 1031: 43 Cr LJ 303.

**——Ss. 397, 123, 120, 118 — Sentence under Criminal Tribes Act (III of 1911), S. 22 (2) (a) — S. 397, Proviso 2 and Proviso 1, if apply — Proper procedure in awarding sentence indicated.**

The Magistrate directed a sentence of six months' rigorous imprisonment under S. 22(2)(a), Criminal Tribes Act, to commence after the expiry of two other sentences of imprisonment, one of 12 months for an offence of theft and another sentence of one year's rigorous imprisonment passed in default of giving security under an order made under S. 118, Criminal P. C.:

Held, (i) that proviso 2 to S. 397, Criminal P. C., did not apply because the sentence for the offence under the Criminal Tribes Act was not passed while the sentence of imprisonment under S. 123, Criminal P. C., was being undergone;

(ii) reading Ss. 120 and 123, Criminal P. C., together, the accused person who was sentenced to undergo imprisonment in default of security and at the same time was undergoing a substantive sentence of imprisonment for another offence should be called upon to give security only after the expiry of the substantive sentence of imprisonment and the order committing the accused, under S. 123, Criminal P. C., in default of giving security, should not be made until after the sentence of substantive imprisonment has been undergone;

(iii) that the first proviso to S. 397 also would not apply and so far as the substantive part of S. 397, Criminal P. C., was concerned, the sentences for the offence of theft and under the Criminal Tribes Act would only run concurrently if a special order was made by the Magistrate.

The order of the Magistrate was modified by directing that the sentence of imprisonment for the offence under the Criminal Tribes Act should commence on the expiry of the sentence of the imprisonment for theft and that the order of imprisonment for failing to give security should be passed and the period of imprisonment for default should commence from the date of expiry of the sentence of imprisonment for the offence of theft. AIR (V 28) 1941 Sind 190: ILR (1941) Kar 63: 43 Cr LJ 105 : 196 Ind Cas 891 (DB).

**——S. 397, Proviso (2) — Ss. 20 to 26, Sind Frontier Regulations should be read with S. 397, Proviso (2).**

Sections 20 to 26, Sind Frontier Regulations should be read with S. 397, Criminal P. C., Section 397 Proviso (2), therefore, applies to cases where imprisonment has been imposed under Ss. 21 and 24, Sind Frontier Regulations. AIR (V 28) 1941 Sind 29 : 42 Cr LJ 342 : ILR (1941) Kar 161 : 192 Ind Cas 865 (DB).

**——Ss. 397, Proviso 2, 123 — Accused undergoing sentence under S. 123 — Subsequent conviction under S. 176, Penal Code — Commencement of latter sentence, time for.**

Where a person who was ordered to undergo rigorous imprisonment in default of furnishing security under S. 123, Criminal P. C., was subsequently convicted for an offence under S. 176, I. P. C., his sentence cannot be made to commence after the expiry of the previous sentence but should commence immediately. (1937) 1937 MWN 95.

——S. 397 Proviso — Sentence should be made to commence immediately. (1934) 1934 MWN 928.

——S. 397 — Imprisonment for default in furnishing security under S. 109 — Subsequent conviction under Opium Act for offence committed prior to order under S. 109 — Order that sentence under Opium Act should commence after expiry of sentence under S. 109:

Held, that the order was incorrect and should be set aside. AIR (V 20) 1933 Oudh 381: 34 Cr LJ 1152: 10 OWN 786: 145 Ind Cas 1007.

——S. 397 — The word 'sentence' in S. 397, Criminal P. C., and its provisos includes an order of committal or detention in prison under S. 123 of that Code. AIR (V 19) 1932 Rang 50: 9 Rang 612: 33 Cr LJ 174: 135 Ind Cas 644.

——S. 397 — The word 'sentence' in S. 397, Criminal P. C. and its proviso, includes order of committal to or detention in prison within meaning of S. 123 of the Code. AIR (V 18) 1931 Rang 127: 32 Cr LJ 714: 9 Rang 110: 131 Ind Cas 501 (FB).

**——S. 397 — Sentence, what is — S. 123, Criminal Procedure Code.**

The order detaining a person who has failed to furnish security under Chapter 8 is not a sentence of imprisonment. 30 All 334, Not foll. AIR (V 8) 1921 Sind 96: 23 Cr LJ 255: 66 Ind Cas 191: 15 SLR 205 (DB).

**——Ss. 397, 123 — Sentence of imprisonment — Committal to prison for failure to give security — Object of.**

A sentence of imprisonment passed under S. 123 for failure to give security is not a sentence of imprisonment under S. 397. Object of section explained. AIR (V 3) 1916 Pat 182(1): 1 PLJ 212: (1917) Pat 32: 2 PLW 369: 17 Cr LJ 528: 36 Ind Cas 496 (DB).

**——Ss. 397, 123 — Person undergoing a sentence.**

A person cannot be said to undergo a sentence within S. 397 if he is committed to prison under S. 123 and hence subsequent punishment for an offence cannot be postponed till imprisonment under S. 123 is over. (1912) 37 Bom 178 : 14 Bom LR 965 : 13 Cr LJ 849 : 17 Ind Cas 785 (DB).

——S. 397 — Sentence — Order for imprisonment on failure to furnish security for good behaviour is sentence. (1908) 1908 AWN 133 (136) : 5 ALJ 405: 30 All 309.

### 4. Reversal of one of two sentences.

**——S. 397 — Scope — Conviction of same person on two separate offences under separate judgments — Trial and conviction on same day by same Court — Conviction and sentence in one set aside — — Sentence already undergone — If to be appropriated to other conviction.**

Where an accused person is convicted by the same Court on one and the same day of two different offences by two separate judgments and awarded two separate sentences, one a longer and the other a shorter term, but subsequently the conviction and sentence awarding the longer sentence are set aside, the term of imprisonment already suffered should be appropriated to the judgment still in force. There is no ground for holding that, when a judgment has been set aside, the imprisonment already suffered can be, as it were, passed by or that the imprisonment which the accused has suffered under the judgment which is set aside should be counted as nothing against a judgment which is still in force. AIR (V 34) 1947 Sind 63: ILR (1946) Kar 95: 230 Ind Cas 260: 48 Cr LJ 577 (DB).

**——S. 397 — Consecutive sentences — Sentence already served must be taken into account — R. 392 of Jail Mannual.**

When a conviction is set aside, the sentence imposed is not terminated from that date; it is destroyed and rendered null and void from its inception and the part of the sentence served cannot be attributed to the conviction.

Where a person is awarded two consecutive sentences for separate offences and while undergoing the first, the same is set aside with the result that there is no sentence on that count, the sentence on the second count which is upheld must commence from the date of conviction and any part of the sentence already served must be attributed to the only sentence legally existing. Rule 392 of the Jail Manual is invalid. AIR (V 29) 1942 Bom 342: 44 Bom LR 807: ILR (1943) Bom 82: 44 Cr LJ 130: 204 Ind Cas 23.

**——Ss. 397, 439 — Two successive sentences — Appeal — Quashing of first imprisonment — Second imprisonment, when begins.**

Where a person, on being convicted under the Arms Act, was sentenced to four months' rigorous imprisonment on September 19, 1930, and on October 11, 1930, he was again sentenced to four years' rigorous imprisonment under S. 243, I. P. C., and on appeal, his conviction under the Arms Act was quashed and he was acquitted on January 15, 1931:

Held, that under S. 397, Criminal P. C., the second sentence commenced on January 15, 1931, the date on which he was acquitted under the first conviction.

Held, further, that equitable considerations, however, required that the period of imprisonment already undergone under the sentence inflicted on September 19, 1930, which had been set aside should be deducted from the imprisonment subsequently inflicted on October 11, 1930. AIR (V 19) 1932 Sind 159: 34 Cr LJ 24: 140 Ind Cas 481 (DB).

### 5. Imprisonment in default of payment of fine.

——S. 397 — There is no provision of law enabling a Court to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials. AIR (V 28) 1941 Lah 209: 43 PLR 163: 42 Cr LJ 642: 195 Ind Cas 3.

**——Ss. 397, 398 — "Imprisonment" — Scope — Subsequent imprisonment — When begins.**

The word "imprisonment" as used in S. 397, Criminal P. C., includes imprisonment in default of payment of fine which by virtue of S. 64, I. P. C., is a sentence; and, therefore, any subsequent sentence of imprisonment would not begin until the expiry of the sentence of imprisonment in default. AIR (V 26) 1939 Bom 174: 41 Bom LR 277: ILR (1939) Bom 160: 40 Cr LJ 602: 181 Ind Cas 979 (DB).

### 6. Detention Under Madras Borstal Schools Act.

**——S. 397 — Direction that sentence of detention in Borstal School should commence after expiration of previous one — Legality — Madras Borstal Schools Act (V of 1926), S. 8.**

Section 397, Criminal P. C., is not applicable to sentences of detention under S. 8, Madras Borstal Schools Act and the direction that the sentence of detention should commence after the expiration of the previous sentence of detention is illegal. AIR (V 25) 1938 Mad 613 : 47 MLW 473 : (1938) MWN 352 : 39 Cr LJ 795 : 176 Ind Cas 768.

### 7. Ante-dating sentence.

——S. 397 — There is no provision in the Criminal P. C. for the antedating of a sentence of imprisonment and such antedating, if adopted, is against the spirit of Ss. 383 and 397, Criminal P. C. AIR (Vol 20) 1933 Rang 28 : (1933) Cr Cas 275 : ILR (1933) Rang 45 : 34 Cr LJ 447 : 142 Ind Cas 728.

### 8. Power of High Court to pass concurrent sentences.

**——Ss. 397, 423, 561-A — Separate sentences — Power of High Court.**

The High Court has power in view of the provision of Ss. 423 and 561-A, Criminal P. C., to direct separate sentences passed in separate trials to run concurrently. AIR (Vol 18) 1931 Bom 529 (1) : 33 Bom LR 1163 : 33 Cr LJ 77 : 134 Ind Cas 1239 (DB).

**——S. 397 — Powers of High Court.**

High Court has power to direct separate sentences of separate trials to run concurrently. AIR (Vol 16) 1929 All 585 : 1929 ALJ 800 : 10 LRA Cr 103 : 30 Cr LJ 904 : 12 AI Cr R 92 : 51 All 888 : 1929 Cr C 175 : 118 Ind Cas 384.

**——S. 398.**

**——S. 398 — Sentences of imprisonment in default of fines — If can run concurrently — Criminal P. C. (1898), Ss. 35 and 398 (2).**

It is not competent for the Court to direct that sentences for imprisonment imposed for default in payment of fines should run concurrently. Such order, if passed is illegal; such direction can only be given in respect of substantive sentences of imprisonment or transportation and not to imprisonment in default of fines. AIR (Vol 37) 1950 All 625 : 1950 ALJ 447.

**——S. 399.**

**——S. 399 — Penal Code, Ss. 324, 326 — Sentence of detention in Borstal School and whipping for separate offences — Legality of — Criminal P. C. (Act V of 1898), S. 401 — Remission of sentence of whipping.**

Where the accused was convicted of two offences, one under S. 324 and the other under S. 326, I. P. C. and ordered to be sent to the Borstal School instead of being sentenced to a term of imprisonment for the offence under S. 324 and in respect of the separate offence under S. 326 he was sentenced to be whipped :

Held, that the infliction of these separate punishments for separate offences was legal, just and sensible and that there was no ground which would justify the High Court in altering or revising it :

Held, also, that the Local Govt. should not have remitted the sentence of whipping until the question of the legality of the sentence was decided by the Court. AIR (Vol 21) 1934 Rang 125 : 12 Rang 344 : 35 Cr LJ 959 : 149 Ind Cas 107 (DB).

**——S. 399 — Approver — Sanction to prosecute for perjury — Accused reverting to truth — Propriety of sanction.**

If a person has made contradictory statements but in the later statement he has reverted to truth, it is undesirable that he should be prosecuted for perjury.

Where an approver is being prosecuted for the original offence with which he was charged, a prosecution for perjury is unfair and cannot be sanctioned. AIR (Vol 19) 1932 Lah 307 : 33 PLR 321 : 33 Cr LJ 485 : 137 Ind Cas 748.

**——S. 399 — Youthful offender — Reformatory Schools Act (VIII of 1897) — Applicability of, to the Punjab.**

The Reformatory Schools Act, 1897, having been extended to the Punjab, S. 399, Cr. P. Code, stands repealed but youthful convict under S. 304, I. P. C., is not liable to be dealt under the Reformatory Schools Act. AIR (Vol 5) 1918 Lah 27 : 17 PR (Cr) 1918 : 91 PLR 1918 : 25 PWR (Cr) 1918 : 19 Cr LJ 917 : 47 Ind Cas 433.

**——S. 401.**

**——S. 401 — Suspension of sentence without condition — Power of Provincial Government to rearrest accused.**

Section 401, Criminal P. C., clearly provides both for remission and for suspension of a sentence with or without conditions. Suspension clearly means that the sentence has not been remitted and it is only in abeyance at the pleasure of the person, who is authorised to suspend the sentence and if no conditions are imposed then the Provincial Government has the right to have the accused re-arrested and direct that he should undergo the rest of the sentence without assigning any reason. AIR (Vol 36) 1949 All 626 : 50 Cr LJ 999 : 1949 AWR 441 : 1950 ALJ 219.

**——S. 401 and (Mad.) Criminal Rules of Practice and Orders, Part I, R. 259 — Accused convicted for murder of his child — Great attachment to the child and expression of remorse after the stabbing — Not extenuating circumstances warranting recommendation for mercy.**

The appellant was convicted of the murder of his child and sentenced to transportation for life with a recommendation for mercy. The evidence disclosed that he was fond of his child and had never injured it previously, and that immediately after stabbing the child he regretted for having done so.

Held, these are not extenuating circumstances ; on the other hand, the murder of an innocent child is something even graver than the attack on a person against whom the accused has some spite, and would not warrant a recommendation for mercy. AIR (Vol 36) 1949 Mad 8 : 1948 MWN 575 : 50 Cr LJ 76 : (1948) 2 MLJ 162 (DB).

**——S. 401 — Order of unconditional remission of sentence — If can be cancelled and sentence restored, later than date on which prisoner is due for release under order of remission — Powers of Local Government under S. 401 — Order under S. 401, signed by Governor — It is still an order of Provincial Government.**

Once the Govt. remits a sentence unconditionally, it is not open to it, in the absence of fraud or mistake to cancel the remission and restore the sentence. Even assuming that it could do so, an order of this kind which has been acted upon to the extent of altering the History Ticket, to the extent of informing the Legislature of the remission, cannot be amended or cancelled or suspended by the Assistant Legal Remembrancer writing to the Superintendent of the Central Jail a memorandum telling the Superintendent to keep a prisoner in custody until he is told to let him go. That is not the way that orders are amended. When the amending order is passed eight days after an application for habeas corpus writ under S. 491, was launched and one month and 12 days after the prisoner was entitled to be released under the original order of remission, only possible locus poenitentiae is clearly at an end.

Per Bose, J. — The Executive Govt. has not got unfettered and unqualified freedom of action in these matters. Viewed in a broad and liberal light, its powers in this respect are in a sense derived from a statutory delegation of the Royal Prerogative of pardon ; not co-extensive with it, and not superior to it ; in fact S. 401 (5), Criminal P. C., leaves the right of His Majesty and of the Governor-General, when such right is delegated to him, intact ; but certainly of a like general character. That being so, the rights of the executive cannot be greater than those of His Majesty himself except and unless, & only in so far as, they are specially enlarged by statute. It cannot be said that an order of remission is never open to re-call. It may be in certain circumstances ; fraud and mistake for example, might justify such action. But it cannot be done arbitrarily. The matter vitally affects the liberty of the subject, and so, if such power exist at all, it can only be exercised in circumstances which a Court of Justice would uphold on general grounds of justice, equity and good conscience, and of public policy. In every case, Govt. must be prepared to substantiate and justify its action and that means that it must give reasons, first to

the person concerned, and then, if the matter reaches Court, to that Tribunal. It cannot merely say : "I have done it and that is all that need be said. I have the right and I have the power."

The effect of an order of remission is to wipe out the unremitted portion of the sentence altogether and not merely to suspend its operation.

Though an order under S. 401, passed by the Local Govt. is in the name of the Governor, it is in reality an order of the Provincial Govt.

Viewing sub-s. (1) of S. 401 as a whole, it is the clear intention of the Legislature to confer a "power" to suspend or remit a sentence. AIR (Vol 25) 1938 Nag 513 : 1938 NLJ 423 : 40 Cr LJ 397 : ILR (1940) Nag 1 : 180 Ind Cas 594 (FB).

——**S. 401 — Murder case — Accused girl of 17 — Her statements leading to investigation of crime — Husband and mother, the principal acors in crime — Considerable sentence already served — Giving birth to child in jail — Case fit for mercy.**

The accused was a girl less than 17 years old at the time of the murder. Her husband and mother were the chief actors in the plot and though she failed to earn her pardon, her statement as approver led to a successful investigation and to the conviction of the principal criminal. She had already served a considerable sentence and had also suffered by reason of the birth of her child in jail :

Held, that the situation of a girl whose mother and husband were determined on murder was not an enviable one and that though her sentence of transportation for life on the charge of murder could not be reduced, there could be a stronger case for prerogative of mercy. AIR (Vol 24) 1937 Lah 689 : 39 Cr LJ 16 : 39 PLR 394 : 171 Ind Cas 954 (DB).

——**S. 401 — Woman of weak intellect committing murder of child on account of ill-treatment by relations and extreme poverty — Sentence — Recommendation to reduce sentence.**

A woman of 20 years of age was turned out by her husband soon after marriage on account of her weak intellect and for seven years she led a roaming life. She became pregnant and was turned out by her relations. When left alone with a child and unprovided for, she became desperate by the ill-treatment by her relations and poverty and threw the child in a pond. She was sentenced to transportation for life :

Held, that the sentence had to be affirmed but in view of the fact that her weak intellect, the treatment of her relations and extreme poverty led her to commit the crime, this was a fit case for recommendation to the Local Govt. that her sentence be reduced to one year's rigorous imprisonment. AIR (Vol 21) 1934 Lah 31 : 35 Cr LJ 652 : 148 Ind Cas 326 (DB).

——S. 401 — Remission of sentence of whipping by Local Govt. before judicial determination of question is not proper. AIR (Vol 21) 1934 Rang 125 : 35 Cr LJ 959 : 12 Rang 344 : 149 Ind Cas 107 (DB).

——**S. 401 — Boy of fifteen along with his brother and maternal uncle mercilessly beating another — Death — Presumption.**

Where the petitioner, a boy of fifteen, along with his brother and maternal uncle took part in mercilessly beating the deceased from the effects of which he died, and the assailants were convicted under S. 302, I. P. C., and sentenced to transportation for life :

Held, that the presumption was that the petitioner acted under the influence of his maternal uncle and that his case was one which called for the intervention of Govt. in exercise of their powers under S. 401, Criminal P. C. AIR (Vol 20) 1933 Lah 1021 : 35 Cr LJ 430 (1) : 35 PLR 139 : 147 Ind Cas 578 (DB).

——S. 401 — Where an illiterate young woman living in the midst of the environments reminiscent only of the dark ages and where gross ignorance and superstition prevailed and throughout whose life all opportunities of receiving education and enlightenment had been denied, believed, that the death of her children was the direct result of the influence of the 'evil shadow' cast upon her by another woman, her husband's brother's wife and in this superstitious state of mind, picked up the latter's child and caused its death :

Held, that under the circumstances, it was sufficient that the lessor penalty, provided by S. 302, I. P. C., that is, transportation for life, was inflicted on her and in view of the extraordinary circumstances of the case, the Court would invite the attention of Local Govt. to take steps for further mitigation of the sentence under S. 401, Criminal P. C. AIR (Vol 20) 1933 Lah 718 : 34 Cr LJ 1251 : 146 Ind Cas 228 (DB).

——**S. 401 — Tender age of accused — Provocations.**

Where an offence of murder is committed by youth of tender age who was naturally provoked by the conduct of the deceased in having sexual intercourse with a relative of his in an open and barefaced manner three days before the murder, the case is a fit one for exercise by the Local Govt. of its prerogative of mercy under S. 401, Criminal P. C. AIR (Vol 19) 1932 Lah 308 : 33 PLR 279 : 33 Cr LJ 580 : 138 Ind Cas 410 (DB).

——S. 401 — Murder — Illegitimate child — Possession of opium by mother — Death of child due to opium :

Held, that it was pre-eminently a case where the Local Govt. should exercise its prerogative reducing the sentence from transportation for life to one year's rigorous imprisonment. AIR (Vol 19) 1932 Lah 297 : 33 PLR 223 : 33 Cr LJ 448 : 137 Ind Cas 259 (DB).

——**S. 401 — Murder by lad of seventeen under influence of father and brother.**

Where a lad of seventeen years of age is found to have participated in a murder under the influence of his father and elder brother it is a fit case for the Local Govt. to exercise its powers under S. 401, Criminal P. C. AIR (Vol 19) 1932 Lah 259 : 33 PLR 191 : 33 Cr LJ 484 : 137 Ind Cas 293 (DB).

——**S. 401 — Grounds.**

Offence under Penal Code, Ss. 302 — 149 — Young age, minor part played, and influence of bad company were considered as extenuating circumstances. AIR (Vol 16) 1929 Lah 601 : 11 LLJ 203 : 1929 Cr C 165 (DB).

——**S. 401 — Accused suffering from epileptic fits.**

Where the accused, convicted on a charge of murder had and was suffering from epileptic fits, and owing to them he was of irritable temper, liable to lose self-control on the most trivial provocation, a recommendation of the exercise of the prerogative of mercy was made. AIR (Vol 14) 1927 Lah 674 : 8 Lah 684 : 28 Cr LJ 598 : 29 PLR 104 : 102 Ind Cas 774 (DB).

——S. 401 — Where a young girl of 18 years was married to a boy 13 years old, and she contracted an intimacy with one S. and became pregnant, and when she suddenly gave birth to an illegitimate child, she strangled it owing to her anxiety to conceal her shame,

**Held, that she was rightly convicted of murder and sentenced to transportation for life, but that it was a fit case in which, in view of the mitigating circumstances, the Local Government should exercise the powers vested in it by Ss. 401 and 402.** AIR (Vol 13) 1926 Lah 271 : 7 Lah 70 : 27 Cr LJ 627 : 27 PLR 534 : 94 Ind Cas 403 (DB).

**——S. 401 — Effect of upholding conviction — Discovery of innocence — Procedure.**

**An application from the Sessions Judge of Meerut requesting the High Court to set aside a conviction passed by his predecessor and affirmed by a Judge of the High Court in appeal, on the ground that on certain materials that had since come to the knowledge of the District Magistrate, the conviction was wrong, cannot be entertained in revision. In such cases the District Magistrate may refer the matter to the Local Government who have power under Chapter XXIX of the Code of Criminal Procedure to do the needful.** AIR (Vol 10) 1923 All 473 : 45 All 143 : 24 Cr LJ 766 : 74 Ind Cas 270.

**——S. 402.**

**——S. 402 — Sentence — Death — High Court refrained from awarding death sentence on account of inevitable delay due to necessity of case being referred to Full Bench.**

**After taking into consideration the fact that the prisoners were tried before the Sessions Court as far back as December 1942, and a certain amount of inevitable delay was occasioned by the necessity of making a reference to the Full Bench, the High Court refrained from passing capital sentences.** AIR (Vol 33) 1946 Cal 36 : ILR (1944) 2 Cal 287 : 47 Cr LJ 446 : 222 Ind Cas 411 (DB).

**——S. 402 — Evidence not clear as to actual part taken by accused — Recommendation to Local Govt.**

**Where the evidence is not clear as to what part the accused actually took in the riot, the High Court will be justified in recommending that the Local Govt. might consider the question of reducing the sentence of transportation for life imposed on them.** AIR (Vol 21) 1934 All 776 : 35 Cr LJ 919 : 4 AWR 191 : 149 Ind Cas 210 (DB).

**——S. 403.**

1. **Appeal.**
2. **Applicability.**
3. **Burden of proof.**
4. **Court of competent jurisdiction.**
5. **Dismissal of complaint — Effect of.**
6. **Discharge — Meaning of.**
7. **Fresh trial barred.**
8. **Fresh trial not barred.**
9. **Miscellaneous.**
10. **Principle.**
11. **Procedure.**
12. **Revision.**
13. **Scope.**
14. **Trial — Meaning of.**

**1. Appeal.**

**——S. 403 — Acquittal, effect of — Evidence consideration of, in other proceedings — Trial for murder and robbery — Conviction for murder and acquittal as to robbery — Appeal only from conviction for murder — Appellate Court can accept evidence as to robbery as corroborative evidence of murder.**

**Where in a trial for murder and robbery the accused is convicted of murder and acquitted of robbery and an appeal is preferred from the conviction for murder, the High Court is entitled to accept the evidence which has been disbelieved by** the trial Court on the charge of robbery, as corroborative evidence of murder.

An acquittal from an offence of theft no doubt entitles the accused man to plead autrefois acquit if again charged with the same offence, but it would not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence. Such evidence cannot be objected to as evidence in another case, criminal or civil, though no doubt its weight would be diminished. AIR (Vol 33) 1946 PC 16: (1945) 2 MLJ 486: 1945 MWN 778: 50 CWN 145: 59 MLW 9: 1946 ALJ 29: 72 IA 305: 12 BR 280: 222 Ind Cas 273.

**——Ss. 403, 423 — Conviction under S. 409, Penal Code — Appellate Court acquitting accused of offence under S. 409 but directing trial Court to frame charge under S. 420, Penal Code, for which he could have been convicted under S. 237 — S. 403 is no bar as there is no fresh prosecution.**

The accused was convicted by the Joint Magistrate of an offence under S. 409, I. P. C. On appeal the Sessions Judge was of opinion that the facts alleged did not constitute an offence punishable under S. 409 and accordingly acquitted him but directed that the papers be sent to the lower Court for a charge being framed under S. 420 for which the accused could have been convicted, under the provision of S. 237, Criminal P. C., and evidence being let in. The accused preferred an application to quash the proceedings relying on S. 403, Criminal P. C.:

Held, that the appellate Court as a Court of error had powers to rectify a mistake committed by the trial Court, which the trial Court itself could have exercised if it had noticed the error. Section 403, Criminal P. C., was not applicable as it was not a case for fresh trial or fresh prosecution. AIR (Vol 33) 1946 Mad 496.

**——S. 403 (1) — Acquittal under Ss. 147 and 148, Penal Code on appeal — Remand for re-trial for offences under Ss. 323 and 324, when no charges had been framed originally — Legality.**

Where the Sessions Judge on appeal set aside the conviction of the accused under Ss. 147 and 148, I. P. C., he has no jurisdiction to remand the case for fresh disposal on the ground that evidence disclosed that offences under Ss. 323 and 324 in respect of which no charges were framed, were committed. It would amount to trial on the same facts as those which formed the subject-matter of the case under Ss. 147 and 148 in respect of which the accused were acquitted. Thus the accused would; in fact, be tried again for the same offence within the meaning of S. 403 (1), Criminal P. C. AIR (Vol 32) 1945 Mad 472: 58 MLW 337: (1945) 2 MLJ 95: 1945 MWN 428 (1).

——S. 403 — Order under S. 107 — Appeal — Retrial can be ordered — S. 403 is no bar. AIR (Vol 29) 1942 Oudh 416: 1942 OWN 387: 43 Cr LJ 729: 1942 AWR 251: 201 Ind Cas 60.

**——S. 403 — Conviction under S. 408 or in the alternative, under S. 408/109, Penal Code — Sessions Judge on appeal directing committal to stand trial under S. 477-A — Procedure, legality of.**

The applicant was convicted under S. 408 or in the alternative Ss. 408/109, Penal Code, by a First Class Magistrate. The Sessions Judge on appeal set aside the conviction and sentence under S. 408 or Ss. 408/109 and directed that the applicant be committed to the Sessions to stand his trial for an offence under S. 477-A, Penal Code:

Held, that by the amendment of the Code in 1923, Magistrates of the First Class were given jurisdiction to try charges under S. 477-A, Penal Code, and, in view of the provisions of sub-ss. (1),

Held, that S. 235, Sub-S. (1), Criminal P. C. would have justified in the other trial, the framing of a charge under Ss. 161-116, I. P. C., as a charge for a distinct offence to be tried along with the two offences for which that trial was being held. Sub-section (2) of S. 403, Criminal P. C. would enable the Court to hold a second trial in the case of this distinct offence, for which no charge was framed and which was not tried in the previous trial. But the clause itself had no application in the case. The evidence that was led in that case as regards the present offence was adduced for the purpose of proving the charges that were being tried in that case. The Court did not consider the question of the guilt under this offence. In such circumstance even though Ss. 236 or 237, Criminal P. C. might apply, S. 403, Sub-S. (1) was not applicable. The general principle of autrefois acquit was also inapplicable. AIR (V 21) 1934 Cal 240 : 35 Cr LJ 1270 : 151 Ind Cas 259 (DB).

——S. 403 — **Duty of Court.**

Courts can quash the proceedings in second case when there was a complete trial in the first case even though the plea of autrefois acquit would not be available. (1933) 1933 MWN 246.

——S. 403 — **Charge for allowing prisoner to escape — Acquittal — Subsequent prosecution for violation of departmental rule in not having roused night officer — S. 403, if applies — Penal Code (Act XLV of 1860), S. 223 — Police Act (V of 1861), S. 29.**

Where the accused, who was on the sentry duty when a prisoner escaped from custody, was tried under S. 223, I. P. C., and S. 29, Police Act, for negligently suffering the prisoner to escape and acquitted but subsequently he was prosecuted for violating another departmental rule, R. 77 (c), Police Manual, which requires a sentry on night duty to rouse the night officer for public service:

Held, that the principle of S. 403, Criminal P. C., did not apply to the case and that acquittal on the charge of having allowed the prisoner to escape was no bar for the prosecution of the accused for omission to rouse the night officer as the two acts of omission were distinct and acquittal for one did not involve the acquittal for the other. AIR (V 20) 1933 Pat 670 : 35 Cr LJ 486 : 147 Ind Cas 773 (1).

——S. 403 — **Prior proceeding for offence under S. 291, I. P. Code — Acquittal — Later proceeding for offence under S. 188, I. P. Code — Bar.**

Where a person has been proceeded against under S. 291, Penal Code, for flagrant disobedience of an order of the Court to discontinue a nuisance and acquitted before anything can be done against such a person under S. 188, Penal Code, a complaint is necessary under S. 195, Cr. P. Code, and S. 403 is no bar to such proceedings. AIR (V 17) 1930 Lah 1055 : 1930 Cr C 1231.

——S. 403—S. 403 does not apply to a case where the accused has once been convicted for misappropriation of particular sums of money on certain date and is again tried for the misappropriation of a different sum of money on a date falling within the same interval. In such a case, the second trial is not illegal. AIR (V 17) 1930 Mad 978: 59 MLJ 854: 1930 MWN 1097 : 32 MLW 789 : 1930 Cr C 1194.

——S. 403 — **Plea can be raised at any stage.**

It is for the accused to show that he has been acquitted in circumstances which entitle him to a verdict of not guilty on the plea of auter fois acquit, and he can raise this plea and substantiate it at any stage of the proceeding. AIR (V 15) 1928 Pat 577 : 11 AI Cr R 29 : 29 Cr LJ 760 : 110 Ind Cas 792 : 10 PLT 446.

——S. 403 — A's trial and acquittal with Magistrate's expression that further proceedings in regard to the subject-matter should not be taken — Plea of autre fois acquit is not available to B but Magistrate may consider the acquittal of A for the same offence for determining sufficient ground for issue of process under S. 204. 7 C. W. N. 493 and 7 C. W. N. 711, Diss. from. AIR (V 13) 1926 Cal 795 : 95 Ind Cas 388 : 53 Cal 606: 44 CLJ 114: 27 Cr LJ 788 : 30 CWN 546 (DB).

### 3. Burden of proof.

——S. 403 — **'Competency to try' explained.**

The words "competency to try the offence" mean that in order to obtain the advantage of the common-law-rule, the accused on the second occasion must show that the former Court was in a position had it so chosen, to try and acquit or convict the accused of the offence subsequently charged. The words "competent to try" are also equivalent to "in a legal position to have tried and acquitted or convicted." They refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence committed by the accused and not broadly to the jurisdiction of the Court with regard to the class of offence in general. 36 Mad 308, not followed. AIR (Vol 17) 1930 Pat 26: 117 Ind Cas 625: 30 Cr LJ 806: 1930 Cr C 2: 11 PLT 722: 9 Pat 585 (DB).

——S. 403 — **Receipt of stolen properties.**

Property stolen on different dates. That it is received by Receiver on different dates, can be presumed — Burden lies on accused receiver to prove that he received it at one and the same time — Otherwise previous acquittal of receiver does not bar his subsequent trial for receiving another item. 15 Cal 511, AIR 1923 All 547 and AIR 1925 Pat 20, not foll. AIR (Vol 14) 1927 Sind 53: 21 SLR 154: 27 Cr LJ 1256: 98 Ind Cas 104.

——S. 403 — **Burden of proof — Autrefois acquit.**

The onus of establishing facts necessary for the application of the maxim 'autrefois acquit' lies upon the accused. AIR (Vol 2) 1915 Mad 315: 1 LW 847: 15 Cr LJ 672: 25 Ind Cas 1000 (DB).

### 4. Court of competent jurisdiction.

(a) General.
(b) Want of sanction—effect of.

#### (a) General.

——S. 403 — **Previous conviction of theft — Second conviction under S. 188, I. P. Code, in connection with same incident — Legality.**

The accused were convicted of an offence under S. 188, I. P. Code, on the allegation that they reaped the paddy of a certain plot in defiance of an order by a Magistrate under S. 144, Cr. P. Code. They had been previously convicted of theft in connection with the same incident.

Held, that as the Magistrate who enquired into the complaint of theft had no jurisdiction to take cognisance of the offence under S. 188, I. P. Code, in view of the provisions of S. 195, Cr. P. Code, and as it was not known whether on the date of the complaint under S. 188, I. P. Code, the former case was still pending or not, S. 403, Cr. P. Code, was not a bar to a proceeding under S. 188, I. P. Code. AIR (Vol 36) 1949 Cal 532: 50 Cr LJ 895: ILR (1945) 2 Cal 470.

——S. 403 — Sections 403 and 531, Criminal P. C., must be read together, and a Court is a Court of competent jurisdiction within the meaning of S. 403, Criminal P. C., where the finding, sentence or order of the Court could have been set aside under the provisions of S. 531, Criminal P. C., but has not in fact been so set aside. AIR (Vol 24) 1937 Sind 179: 38 Cr LJ 959: 170 Ind Cas 314 (DB).

**——S. 403 — Previous trial without jurisdiction — Subsequent trial.**

Section 403, Criminal P. C., is only a bar in respect of a previous trial by a Court of competent jurisdiction. The fact that the accused was placed on trial without jurisdiction and acquitted, will not operate as bar to a regular trial or a complaint properly instituted and of which cognizance has been fully taken. AIR (Vol 21) 1934 Pat 411 (1): 35 Cr LJ 686: 15 PLT 554: 148 Ind Cas 437.

**——S. 403 — Subsequent charge for which the original Magistrate cannot try.**

While a Magistrate, with first class powers, was conducting a trial, the accused, suddenly stood up in Court, shouted "Jai Mahabir" and beat another person with a shoe. The accused thereby committed two offences under Penal Code, Ss. 228 and 355. The presiding Magistrate exercising his powers under S. 480, Cr. P. Code, punished him for the offence under S. 228, Penal Code. Thereafter the assaulted person filed a complaint in Sub-Divisional Officer's Court who convicted the accused under S. 355. In appeal and revision the accused pleaded bar of S. 403, Cr. P. Code.

Held, that the Magistrate had no cognizance of the offence under S. 355, Penal Code and therefore, in the absence of this condition precedent was incompetent to try the accused for it. Consequently the accused was never in peril of punishment and cannot rely on the plea of the autrefois convict. AIR (Vol 17) 1930 Pat 26: 117 Ind Cas 625: 30 Cr LJ 806: 1930 Cr C 2: 11 PLT 722: 9 Pat 585 (DB).

——S. 403 — When the acquittal is not by a Court of competent jurisdiction, there can be no bar under S. 403. AIR (Vol 15) 1928 Bom 530: 113 Ind Cas 70: 30 Cr LJ 54: 53 Bom 69: 11 AI Cr R 510: 30 Bom LR 1435 (DB).

——S. 403 — Where a person is acquitted under S. 498, Penal Code, by a Magistrate, who was not competent to try him under S. 494, he can subsequently be tried under S. 494, and the finding of the former Magistrate is not binding on the Magistrate trying him under S. 494. AIR (Vol 15) 1928 Lah 844: 110 Ind Cas 333: 29 PLR 533: 10 AI Cr R 500: 29 Cr LJ 701.

——S. 403 — An accused is not entitled to have a verdict of not guilty entered on the plea of autre fois acquit in a second prosecution for an offence constituted by the same acts, if the Court by which the first case was tried was not competent to try the offence subsequently charged. AIR (Vol 15) 1928 Pat 577: 110 Ind Cas 792: 11 AI Cr R 29: 29 Cr LJ 760: 10 PLT 446.

**——S. 403 — Absence of complaint under S. 195.**

Absence of a complaint in writing as required by S. 195 (1), of the public servant concerned or his superior makes the Court a Court not of competent jurisdiction and, therefore, renders valueless the plea of previous acquittal as a bar to his re-trial on the same facts after proper complaint is made. S. 537 (a) does not apply, as in the first trial, there cannot be said to be an error, omission or irregularity in a complaint, but an absence of complaint altogether. AIR (Vol 14) 1927 Sind 10: 97 Ind Cas 417: 21 SLR 1: 27 Cr LJ 1105 (DB).

——S. 403 — S. 403, cl. (4) allows a second prosecution for an offence constituted by the same acts if the Court by which the first case was tried was not competent to try the offence subsequently charged. S. 403 does not apply to such cases. AIR (Vol 12) 1925 Mad 711: 48 MLJ 490: 88 Ind Cas 31: 26 Cr LJ 1087: 22 MLW 205: 1925 MWN 553.

**——S. 403 — Where a trial was pending before a Deputy Magistrate against some persons on a charge of conspiracy, and on the day when he made an order which amounted to a discharge, the District Magistrate on complaint by the police against them and some others enquired into the charge and committed them to sessions.**

Held, that there was no illegality on the part of the District Magistrate in taking cognizance of the case and that there was no ground for quashing the commitment.

The complaint subsequently filed before the District Magistrate was not for all practical purposes the same as that filed and taken cognizance of by the Deputy Magistrate. AIR (Vol 10) 1923 Cal 652: 73 Ind Cas 934: 37 CLJ 327: 50 Cal 482: 24 Cr LJ 710 (DB).

**——S. 403 — Same facts.**

The petitioner was originally summoned to answer a charge under S. 426, I. P. C. During the pendency of that case the Magistrate acquitted him under S. 247, Cr. P. C., on the ground of the absence of the complainant. The complainant submitted a petition to the District Magistrate who revived the complaint but directed that prosecution should proceed under S. 379, I. P. C., instead of under S. 426.

Held, the proceedings from the date of the revival of the case are vitiated by want of jurisdiction. AIR (Vol 10) 1923 Cal 407: 76 Ind Cas 293: 37 CLJ 253: 25 Cr LJ 149 (DB).

**——Ss. 403 and 530 (k) — Competent Court — Complaint under Ss. 409 and 477, I. P. C. — Acquittal by Second-class Magistrate — Complaint under same sections to Dt. Magistrate — If cognizable.**

On a complaint under Ss. 409 and 177, I. P. C. an honorary Magistrate exercising the power of a Magistrate of the second class to whom the case was sent for trial to deal with the case as one under S. 408 and acquitted the accused. The complainant afterwards presented a further complaint to the Dt. Magistrate under Ss. 409 and 177, I. P. C. Held, that having regard to S. 530 (k) of the Code the Dt. Magistrate was competent to take cognizance of the second complaint as the Magistrate of the second class who dealt with the first complaint was not empowered to commit accused person for trial to the Court of Sessions. 23 CWN 518: 29 CLJ 30: 20 Cr LJ 112: 48 Ind Cas 992: AIR (Vol 6) 1919 Cal 511 (DB).

**——S. 403 (4) — Competency of Court — Trial before village headman — Subsequent trial before Magistrate.**

A person having been tried and convicted by a Village Headman under the Burma Village Act, for assault, cannot be tried for assault by a Magistrate. He may, however, subsequently be tried by a magistrate for causing hurt upon the same facts, the Village Headman not being competent to try the offence of voluntarily causing hurt. AIR (Vol 6) 1919 UB 32: (1919) 3 UBR 135: 20 Cr LJ 533: 51 Ind Cas 773.

——S. 403 — A previous order of acquittal or conviction for a minor offence is no bar to a subsequent charge, on the same facts, in relation to an offence which the Magistrate who tried the previous case, could not try. AIR (Vol 5) 1918 Mad 481: 18 Cr LJ 643: 40 Ind Cas 291 (DB).

**——S. 403 — First trial void ab initio for want of complaint — Fresh trial if barred.**

The phrase "has once been tried by a Court of competent jurisdiction" in S. 403 (1) is wide enough to cover a case where the first trial was ab initio void owing to the absence of a complaint and S. 403 (1) is therefore no bar to a fresh trial of the accused. 36 M. 308, Diss. AIR (Vol 5) 1918 Nag 126: 19 Cr LJ 796: 46 Ind Cas 716.

——S. 403 — Previous acquittal — First trial not initiated on a proper complaint — Penal Code, Ss. 366, 368, 376 and 498.

The accused was tried for offences punishable under Ss. 366, 368 and 376, I. P. C., and was acquitted. There was no complaint by the husband of the woman. He was again convicted, on the same facts on the complaint of the husband, of an offence under S. 498, I. P. C.

Held, that inasmuch as the earlier Court was incompetent to try the accused for an offence under S. 498, I. P. C., in the absence of a complaint by the husband of the woman, the later trial of the accused under S. 498, upon the husband's complaint did not violate S. 403 of the Cr. P. Code. AIR (Vol 2) 1915 Bom 194: 17 Bom LR 678 : 16 Cr LJ 657: 30 Ind Cas 641 (DB).

——S. 403 — Acquittal if a bar.

A Magistrate who acquits the accused on the ground that the complainant is dead having issued process to the accused acts without jurisdiction and a second complaint is not barred. AIR (Vol 2) 1915 Cal 263: 18 CWN 1211: 15 Cr LJ 726: 26 Ind Cas 174 (DB).

——S. 403 — Discharge — Subsequent committal — Bar to — Conviction set aside for want of Jurisdiction — Effect of.

Where conviction by a Magistrate who had no jurisdiction to try the case has been set aside by the appellate court, S. 403, Cr P. C., is no bar to a fresh commitment of the accused by a competent Magistrate. (1902) 6 CWN 640: 29 C 412 (414) (DB).

——S. 403 — Court by which he was first tried — Court competent to try offence subsequently charged.

Where a person was acquitted by assessors on a charge of abetment of dacoity with murder and was afterwards charged before a jury with receiving stolen property, the facts on which he was charged with so receiving being the same as those on which he had been acquitted of abetting dacoity with murder.

Held,, that the court by which he was first tried, viz., the Court of Sessions was competent to try the second offence, and that the words "was not competent to try" means 'had no jurisdiction to try', and that hence the conviction must be set aside under S. 403 (4). (1901) 24 M 641 (644): 2 Weir 458 (DB).

(b) Want of sanction — Effect of.

——S. 403 — Acquittal in a prosecution launched without proper sanction — Effect — If can be pleaded as a bar to a subsequent trial on same facts but with a fresh proper sanction — Failure to appeal against such acquittal — Effect — Magistrate finding sanction bad after hearing prosecution evidence — Procedure to be followed at that stage — Acquittal of accused — Operation as discharge.

The whole basis of S. 403 (1) of the Cr. P. Code is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal. A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited in the absence of a valid sanction and hence a prosecution launched without a valid sanction would be nullity.

Where in a prosecution launched without a sanction as required by law an order of acquittal is passed, it would not, on the omission of the Government to appeal against it, become binding on the expiration of the period limited for appeal by Art. 157 of the Limitation Act, because the order being a nullity there is nothing to appeal against. The Government might apply to the High Court, if they so desired, to quash the proceedings. But the omission of Government to take such a step which was not incumbent, could not convert an order made without jurisdiction into an order passed by a Court of competent jurisdiction.

An order of acquittal passed in such prosecution cannot be pleaded as a bar to a subsequent prosecution on the same facts, but after obtaining a proper sanction.

Where after a trial had proceeded to the point at which much of the prosecution evidence had been given, the prosecution refuses to attempt to prove that proper sanction has been given and the trying Magistrate comes to the conclusion that the sanction given was bad and the prosecution incompetent, he ought to discharge the accused on the ground that he had no jurisdiction to try him. But if an order of acquittal is passed instead, it would be an order without jurisdiction and could only operate as an order of discharge.

To rely apart from the terms of S. 403, Cr. P. C., upon the Common Law rule, that no man should be placed twice in jeopardy it must be shown that the first trial was before a Court competent to pass a valid order of acquittal or conviction. For this purpose there is no distinction between a conviction and an acquittal. AIR (V 36) 1949 PC 264 : 62 LW 677 : 30 PLT 244 : (1949) 2 MLJ 461 : 76 IA 158 : ILR (1949) Bom 496 : 52 Bom LR 1 : 1950 MWN 21 : 50 Cr LJ 889 : 51 PLR 405 : 53 CWN 850.

——S. 403 — Previous trial void for want of sanction — Subsequent trial after obtaining sanction — Plea of autrefois acquit — If available.

The accused was tried and convicted under Ss. 7 and 8 of the Essential Supplies (Temporary Powers) Act, 1946, for contravention of the provisions of the Cotton Cloth Movements Control Order, 1943. That order had, however, ceased to be in force long before the date of the alleged contravention and the order which was operative on the relevant date was the Cotton Textile (Control of Movement) Order, 1946. The trial of the accused for contravention of the earlier order was, therefore, illegal, and the appellate Court quashed his conviction. Thereafter, the requisite sanction under Cl. 10 of the Order of 1946 for the prosecution of the accused was obtained and he was in due course prosecuted for contravention of that order. Overruling the accused's plea of autrefois acquit,

Held, that the accused could have been tried solely for contravention of the provisions of the Order of 1946, but only after the requisite sanction for that prosecution under Cl. (10) of the Order had been obtained and that as no such sanction had, in fact, been obtained, the Court by which he was first tried was incompetent to try him and that rendered the trial illegal and void ab initio. That being so, the subsequent trial of the accused by a Court of competent jurisdiction after obtaining the requisite sanction was not barred under the provisions of S. 403, Cr. P. C. AIR (V 36) 1949 Nag 327 : 50 Cr LJ 927 : 1949 NLJ 247 : ILR (1949) Nag 461 : 3 AI Cr D 426.

——S. 403 — Acquittal on ground of sanction for prosecution being invalid in law — Fresh trial on same facts after valid sanction — If barred.

The bar to a fresh trial on the ground of a prior trial and acquittal can apply only when the previous trial was a proper or a legal trial. Where an accused charged under the Hoarding and Profiteering Prevention Ordinance of 1943 was acquitted on the ground that the sanction required under S. 14 of that Ordinance was not valid in law, the trial itself would be completely null and void, because the

prosecution itself was not validly instituted. The acquittal of the accused at such trial would not therefore operate as bar to his being charged and tried again for the same offence after a valid sanction. AIR (V 35) 1948 Bom 153 : 49 Cr LJ 153 : ILR (1947) Bom 874 : 49 Bom LR 802 (DB).

**——S. 403 (4) — "Competent to try the offence" — Meaning of — Consent of Municipal Commissioner to prosecute not obtained under S. 375, Bihar and Orissa Municipal Act — Criminal Court not competent to try offence under S. 403 (4).**

The words "competent to try the offence" in S. 403 (4), mean that in order to obtain the advantage of the common law rule that no one may be punished twice for the same offence the accused on the second occasion must show that the former Court was in a position, had it so chosen, to try and acquit or convict the accused of the offence subsequently charged. The words "competent to try" are also equivalent to "in a legal sense to have tried and acquitted or convicted". They refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence committed by the accused, and not broadly to the jurisdiction of the Court with regard to the class of offence in general. Where therefore, the consent of the Municipal Commissioners under S. 375, Bihar and Orissa Municipal Act, was not obtained for the prosecution of the accused for an offence under the Municipal Bye-law, the Criminal Court which tried the offence cannot be said to have jurisdiction to try it within the meaning of S. 403 (4). AIR (V 31) 1944 Pat 328 : 10 Cut LT 55.

——S. 403 — Where the appellate Court acquits the accused on the ground that the conviction was recorded without the sanction necessary under S. 195, and that therefore the Magistrate had no jurisdiction, the provisions of S. 403 will not bar a second prosecution. AIR (V 16) 1929 All 940 : 30 Cr LJ 1153 : 1930 ALJ 218 : 11 LRA Cr 25 : 1929 Cr C 668 : 120 Ind Cas 121.

**——S. 403 — First trial failing for want of sanction.**

Where a previous prosecution has failed on the ground that sanction under S. 196 has not been obtained, a subsequent prosecution on the same facts and for the same offence, is not illegal if it is launched after obtaining of such sanction, the first Court not being competent to try for the offence subsequently charged within S. 403 (4). AIR (V 13) 1926 All 231 : 24 ALJ 180 : 7 LRA Cr 18 : 27 Cr LJ 705 : 94 Ind Cas 897.

**——S. 403 — Want of sanction.**

A previous order of acquittal in order to bar a subsequent trial must be the order of a competent Court. A person was tried under I. P. C., S. 419, for cheating by false personation before a Registration Officer and was acquitted in appeal.

Held, that as the Court was not competent for want of sanction by a proper authority, to deal with the offence, the acquittal did not preclude another trial of the accused for an offence under S. 82 of the Registration Act. AIR (V 8) 1921 All 205 : 19 ALJ 813 : 22 Cr LJ 750 : 64 Ind Cas 142.

**——S. 403 — Otherwise competent — Want of sanction.**

A Court, which is otherwise competent to try the case is a Court of competent jurisdiction, to try an offence under S. 188, Penal Code, although no sanction had been obtained. AIR (V 8) 1921 Sind 137 : 16 SLR 1 : 66 Ind Cas 657 (DB).

**——S. 403 — Questioning of prior conviction for want of jurisdiction — If bars fresh trial.**

Section 403 does not prevent the re-trial of a person whose previous conviction had been set aside for want of jurisdiction on the ground that no permission had been given for the prosecution. AIR (V 4) 1917 All 410 : 15 ALJ 136 : 39 A 293 : 18 Cr LJ 546 : 39 Ind Cas 690.

**——S. 403 — Previous trial without sanction — Second trial of accused on same facts after sanction.**

Where the law requires a previous sanction to be given before a charge can be entertained by a Court, the Court is not a Court of competent jurisdiction until the sanction has been obtained and the first trial and the acquittal by the Court will in such a case not be a bar to a second trial after sanction. AIR (V 2) 1915 All 114 : 37 All 107 : 13 ALJ 4 : 16 Cr LJ 144 : 27 Ind Cas 208.

**——S. 403 — Plea of autrefois acquit — When excluded.**

The plea of autrefois acquit is excluded by S. 403, sub-s. (4) if the Court which tried and acquitted the prisoner under Ss. 467 and 109, I. P. C., could not at the time of the trial try him under S. 471, I. P. C., without the previous sanction of the Civil Court where the forged document was used. AIR (V 2) 1915 Bom 203 : 40 Bom 97 : 17 Bom LR 881 : 16 Cr LJ 761 : 31 Ind Cas 361 (DB).

### 5. Dismissal of complaint — Effect of.

——S. 403 — Dismissal of complaint and accused ordered to be released on the absence of complainant on the day of hearing in a case where the accused is charged both with summons case offence and a warrant case offence. AIR (V 35) 1948 All 135 : 1947 ALJ 585.

**——Ss. 403, 203, 436 — Dismissal of complaint under S. 203 — Second complaint — Interference.**

A dismissal of complaint under S. 203, Criminal P. C. does not bar the second complaint on the same facts. But the order of dismissal will not be set aside unless that order is manifestly perverse or foolish or based on a record of evidence which was obviously incomplete. AIR (V 29) 1942 Pesh 24 : 43 Cr LJ 611 : 200 Ind Cas 60.

——S. 403 — Dismissal of application to direct complaint under S. 476, Criminal P. C., is no bar for entertaining a second application for same purpose. 1936 MWN 1339 (1).

**——Ss. 403, 200 — Framing of charge — Discovery by Magistrate that complainant had not been examined under S. 200 — Order dismissing the complaint — Fresh complaint directed to be filed — Conviction — Order of dismissal, if amounts to acquittal — Whether bars subsequent trial — Plea, if can be taken in revision.**

On a complaint under S. 297, Penal Code the Magistrate proceeded to record evidence for the prosecution and framed a charge. Then he discovered some time after the charge was framed, that the complainant had not been examined under S. 200, Criminal P. C. When he presented his complaint and considering this to be a serious flaw in the proceedings, he proceeded to remedy this defect by recording an order "dismissing the complaint" and directing the complainant to file a fresh complaint which was done. The Magistrate recorded the statement of the complainant and re-examined all the witnesses who had been previously examined, framed a charge and directed the accused to enter on their defence. The latter produced their witnesses and were eventually convicted:

Held, that the Magistrate did not intend to acquit the accused and the so-called order of dismissal did not amount to an acquittal within the meaning of S. 403, Criminal P. C. That order was

wholly ineffective for terminating the trial which had taken place up to the time it was passed. The mere fact that the Magistrate recorded the whole of the evidence for the prosecution a second time cannot affect the legality of the trial. Consequently, the convictions based on the evidence so recorded cannot be considered to be bad in law.

Held, also, that the plea might be taken in revision if well founded even if not taken before the Magistrate. AIR (Vol 21) 1934 All 877: 35 Cr LJ 1177: 1934 ALJ 648: 4 AWR 213: 150 Ind Cas 1006.

——**S. 403, Expl. — Summary dismissal of complaint — Re-trial on fresh complaint — Legality of — Fresh proceedings.**

The explanation to S. 403, Criminal P. C., implies that the re-trial will not be barred if the complaint has been summarily dismissed or the accused has been discharged. The mere fact that there is a special procedure under which the District Magistrate or the Sessions Judge or the High Court can order further enquiry does not necessarily mean that a fresh complaint is legally barred cannot be entertained. An enquiry even on a second complaint whether after the accused has been discharged or the complaint has been summarily dismissed, is not absolutely barred.

Where a Magistrate examined the complainant only and did not take down any evidence and without even suggesting that he disbelieved the prosecution case, he merely threw out the complaint on the supposition that the matter was of a civil nature and thereafter on the complainant making a report to the Police the accused were challenged and the successor of the previous Magistrate took cognizance of the case:

Held, that the re-trial was not illegal & that it was not a fit case in which in the exercise of the revisional powers of the High Court they should interfere and quash the proceedings, although in a proper case, if the matter is brought up to the High Court on revision, it would be open to the High Court either to revise the previous order, set aside the dismissal and direct further enquiry, or to quash the subsequent proceedings. AIR (Vol 21) 1934 All 514: 35 Cr LJ 1059: 1934 ALJ 241: 3 AWR 571: 150 Ind Cas 376 (DB).

——**S. 403 — Dismissal of complaint by competent tribunal — If can be entertained by another tribunal of co-ordinate jurisdiction.**

There is no bar to the trial of a second complaint by the same Magistrate who had dismissed the first complaint and passed an order of discharge. Where a competent tribunal has dismissed the complaint, another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it. It is utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance, deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent Magistrate of co-ordinate authority. AIR (Vol 21) 1934 All 87: 35 Cr LJ 1062: 56 All 425: 3 AWR 569: 150 Ind Cas 373.

——**S. 403 — Order 'filing' complaint and releasing accused, whether amounts to acquittal — Subsequent trial.**

Where a Magistrate made an order on a complaint to the following effect, namely: "The accused are released. File" and it appeared that the only ground for mak g the order was that there was no proper complaint before the Court:

Held, that the order did not, in the circumstances of the case, amount to an order of acquittal and did not bar a subsequent trial of the accused on the same facts. AIR (Vol 19) 1932 Cal 871: 36 CWN 1038: 60 Cal 149: 34 Cr LJ 181: 141 Ind Cas 636.

——S. 403 — Where a complaint is dismissed by a Sub-Divisional Magistrate under S. 203, Criminal P. C., a Sub-Magistrate has jurisdiction to entertain a charge sheet framed on a subsequent complaint, the order of dismissal not having been set aside, there is no difference in principle between the entertainment of a second complaint by the same or by a different Magistrate. AIR (Vol 19) 1932 Mad 369: 62 MLJ 469: 35 LW 478: 1931 MWN 1149: 55 M 622: 33 Cr LJ 454: 137 Ind Cas 317 (2) (FB).

——Ss. 403, 204 (3) — Transfer of Magistrate after framing of charge — Accused claiming de novo trial — Dismissal of complaint for failure to pay process fees for witnesses — Dismissal of complaint held did not amount to order of acquittal and second trial was not barred under S. 403, Criminal P. C. AIR (Vol 18) 1931 Nag 39: 27 NLR 13: 32 Cr LJ 603: 130 Ind Cas 825.

——**S. 403 — Default of complainant.**

After the dismissal of a complaint of simple hurt under S. 259 for default of appearance of complainant and consequent discharge of the accused, the complainant submitted a fresh complaint in the same terms with an application that it should be restored to file. The Magistrate deeming the explanation for the complainant's absence satisfactory took the case on file and convicted the accused.

Held, that the Magistrate had jurisdiction to restore the case after having passed the order of discharge. 28 Cr LJ 304: 100 Ind Cas 384: AIR (Vol 14) 1927 Mad 503.

——S. 403 — Where a complaint is dismissed under S. 203 and the order dismissing the complaint is not set aside under S. 437, fresh complaint on the same facts is not barred. 22 All 106, Not. Foll. 27 Cr LJ 383: 7 LRA Cr 89: 92 Ind Cas 895: AIR (Vol 13) 1926 All 298.

——S. 403 — A complaint dismissed under S. 259 can be revived on a fresh complaint as it is not an acquittal. Where the original complaint was entertained by Magistrate A only because another Magistrate D who had the jurisdiction in the place was on leave.

Held, that a subsequent complaint could be taken up by Magistrate D. 87 Ind Cas 928: 26 Cr LJ 1040: AIR (Vol 12) 1925 Nag 432.

——**Ss. 403 and 195 — Dismissal of application for sanction — Autrefois acquit — Dismissal of application for sanction to prosecute for false statement on oath.**

The dismissal of an application by a party to a judicial proceeding for sanction to prosecute the opposite party under Ss. 181 and 193 for statements made by the latter on oath is no bar to a prosecution started prior to the application for sanction. Its dismissal further does not attract the operation of S. 403, Cr P. Code. 32 CLJ 94: 24 CWN 982: AIR (Vol 8) 1921 Cal 1 (FB).

——**Ss. 403 and 203 — Dismissal of complaint — Fresh complaint entertained by another Magistrate.**

Section 403, Cr. P. Code, does not apply to dismissal of complaint under S. 203, Cr. P. Code, and a fresh complaint on the same facts can be entertained. When a complaint has been dismissed under S. 203, a fresh complaint on the same facts can be entertained by another Magistrate. 21 Cr LJ 660: 1 PLT 293: 57 Ind Cas 820: AIR (Vol 7) 1920 Pat 523.

**6. Discharge — Meaning of.**

**——S. 403 — Explanation — Order of discharge not set aside by higher authority — Fresh proceedings on same facts before another Court — Permissibility and propriety.**

The effect of the Explanation of S. 403, Cr. P. Code, is that a fresh trial is barred only in cases of acquittal or conviction. An order of discharge has not got that effect. It is open to the same Court or any other Court of co-ordinate jurisdiction to take fresh proceedings against an accused person even on the same facts without getting the order of discharge set aside by any higher authority.

Although a fresh enquiry or trial after the order of discharge is not actually illegal, it can be undertaken only in exceptional cases. If a person is discharged after inquiry and the order of discharge is even affirmed by the revisional authority, further or fresh inquiry would be unfair unless the order of discharge is manifestly perverse or foolish, or is on a record of evidence which is obviously incomplete. AIR (Vol 34) 1947 Pesh 19 : 48 Cr LJ 750 : 231 Ind Cas 228 (DB).

——S. 403 — Complaint under Ss. 452 and 392, I. P. C., withdrawn — Offences being non-compoundable, the accused must be held to have been discharged and not acquitted — They can be tried and convicted under same sections subsequently on same facts — On second occasion, accused not found guilty under Ss. 452 and 392, I. P. C., but under S. 323, I. P. C. — Offence under S. 323, I. P. C., included in original complaint under Ss. 452 and 392, I. P. C. — Accused cannot be convicted under S. 323, I. P. C., as he must be taken to have been acquitted under that section, in view of S. 345 (6), Criminal P. C. AIR (Vol 28) 1941 Oudh 510 : 1941 OWN 869 : 1941 AWR 243 : 42 Cr LJ 746 : 195 Ind Cas 488.

——S. 403 — Charge framed before proceedings recommenced under S. 350 — Discharge thereafter amounts to acquittal. (1940) 1940 MWN 962 : 52 MLW 348.

——S. 403 — Section 437, Criminal P. C., is only an enabling section and does not take away by implication the jurisdiction vested in a Magistrate to hear the complaint again.

Hence where a Magistrate dismisses a complaint for default under S. 203, Criminal P. C. or discharges an accused under S. 259, Criminal P. C., it is competent for that Magistrate or to his successor-in-office or to another Magistrate of his co-ordinate jurisdiction to entertain second complaint on the same facts although the order of dismissal or discharge, as the case may be, may not have been set aside by a higher Court.

When entertaining a second complaint a Magistrate should, however, keep in mind the default committed in the earlier proceedings, for his default may have a bearing not only upon any subsequent default committed, but also upon the merits of the complaint. AIR (Vol 26) 1939 Sind 193 : 40 Cr LJ 745 : ILR (1940) Kar 74 : 183 Ind Cas 283 (FB).

**(Overrules AIR (V 16) 1929 Sind 61 : 29 Cr LJ 1097 : 112 Ind Cas 681.)**

**——S. 403 (Expl.) — Ss. 436, 253 — Discharge before or after hearing prosecution evidence, whether acquittal within Ss. 403 and 436.**

Discharge, whether before or after hearing all prosecution evidence, is not an acquittal so as to bar further trial for the same offence under S. 403, Criminal P. C., and S. 436 empowers the Magistrate to order further inquiry when he thinks that a prima facie case has been made out against the accused. AIR Vol 21) 1934 All 944 (945) : 36 Cr LJ 202 : 4 AWR 37 : 152 Ind Cas 884.

——S. 403 — Accused discharged for non-appearance of complaint — Fresh complaint under same facts held is not barred. AIR (Vol 21) 1934 Nag 215 : 36 Cr LJ 57 : 31 NLR 93 : 152 Ind Cas 223.

**——Ss. 403, 494 (a), (b) — Police charge for warrant case — Charge withdrawn and accused acquitted — Subsequent private complaint — 'Acquittal' nature of — Penal Code (Act XLV of 1860), Ss. 147, 323, 341.**

A charge-sheet was filed by the Police against certain persons under Ss. 147 and 323, I.P.C. The Prosecuting Inspector subsequently withdrew from the prosecution under S. 494, Criminal P. C., and the Magistrate signed an order acquitting the accused. A private complaint was subsequently made against the accused under Ss. 147, 323 and 341, I. P. C.

Held, that as the previous case was a warrant case, S. 494 (a) applied and the order of acquittal was really only an order of discharge and a subsequent trial on the private complaint was not barred under S. 403, Criminal P. C.

Held, further, that the fact that the subsequent complaint included a charge under S. 341, I.P.C., did not make any difference.

An order that purports to be one of acquittal has to be regarded as one of discharge when under the provision of law that was applied, only a discharge order could be passed.

Dictum. — There might be a printed form for withdrawals under S. 494, Criminal P. C., containing both the words "acquitted" and "discharged", the one written over the other, so as to allow of the scoring out of whichever of the two words is, in the circumstances, unsuitable. AIR (Vol 20) 1933 Mad 98:36 MLW 641:34 Cr LJ 12 : (1932) MWN 1230 : 140 Ind Cas 322.

——S. 403 — The fact that the Court adopted a warrant case procedure for the offences under Ss. 447 and 426, I.P.C., as disclosed by the complaint, does not affect the right of the accused to an acquittal under S. 247, Criminal P. C. Order of discharge in such cases amounts to an acquittal and the accused cannot be tried afresh. 1933 MWN 1278.

**——S. 403 — No bar.**

An order dismissing a complaint or discharging an accused person does not operate as an acquittal under S. 403 and does not bar the taking cognizance of a fresh complaint of the same offence even though the order of dismissal or discharge has not been set aside by a competent authority. AIR (V 17) 1930 Rang 156 : 8 Rang 11 : 1930 Cr C. 588 : 125 Ind Cas 341 : 31 Cr. LJ 824.

**——S. 403 —What is.**

Where the Magistrate states that he did not frame a charge under a particular section, that is tantamount to the discharge of the accused from that offence and not to acquittal. AIR (V 16) 1929 All 940 : 120 Ind Cas 121 : 30 Cr LJ 1153 : 1930 ALJ 218 : 11 LRA Cr 25 : 1929 Cr. C 668.

**——S. 403 —Complainant's default — No bar.**

Where an order of discharge is passed merely because the complainant and his pleader were absent at the appointed hour, the same Magistrate can take cognizance of second complaint by the same complainant on same facts for the same offence. AIR (V 16) 1929 Bom 134 : 116 Ind Cas 251 : 31 Bom LR 146 : 30 Cr LJ 594 : 13 AI Cr R 7 (DB).

——S. 403 — Though there is no absolute bar to an accused person being put in peril of a fresh trial

has ended in an order of discharge, it is a well recognized and salutary rule of law, that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which were known to the complainant and on evidence which was available when the first trial was held, merely on the ground that he had no proper hearing on his previous complaint. (1929) 115 Ind Cas 309 (Sind) (DB).

——S. 403—Fresh complaint is not debarred by reason of discharge of accused person under S. 494. AIR (V 11) 1924 Pat 797 : 83 Ind Cas 689 : 1924 PHCC 226 : 26 Cr. LJ 129

**——S. 403 — Complaint under S. 107 — No bar.**

After the notice were cancelled and the accused were discharged, the complainant filed a fresh complaint upon which the Deputy Magistrate recorded the statement of the complainant and then passed orders for process to issue to the accused.

Held, a Court which has passed an order of discharge cannot re-open the same case but there is no bar to a second case being instituted. The order of discharge does not stand in the way of such proceedings being taken. There is no acquittal but merely a discharge in such a case which does not prevent another case being instituted. AIR (V 10) 1923 All 332 : 71 Ind Cas 696 : 21 ALJ 215 : 24 Cr LJ 232 : 4 LRA Cr. 67.

**——S. 403 — Discharge of accused.**

Section 403 of the Cr P Code applies only to acquittal or conviction and not to a case in which the accused has been discharged. AIR (V 6) 1919 All 315: 17 ALJ 867 : 1 UPLR (HC) 98: 20 Cr LJ 403 : 51 Ind Cas 163.

**——Ss. 403, 494 and 495 — Discharge of accused.**

Law does not prevent the entertainment of a second complaint on the same facts as a discharge does not amount to an acquittal but a person once charged and discharged should not be harassed again on the same charge except on very strong grounds. AIR (V 5) 1918 Mad 494 : 18 Cr. LJ 329 : 38 Ind Cas 441.

**——Ss. 403 and 259 — Discharge of accused.**

An accused who is already discharged under S. 259 can again be charged on complaint on the same facts. AIR (V 3) 1916 Pat 109: 2 PLJ 34 : 18 Cr LJ 296: 3 PLW 432: 38 Ind Cas 328 (DB).

**——Ss. 403 and 437 — Discharge without enquiry—Second complaint.**

A discharge of an accused without any judicial inquiry into the merits of a complaint does not bar a fresh inquiry into the same charge on a second complaint AIR (V 1) 1914 Oudh 406: 17 OC 273 : 1 OLJ 487 : 15 Cr LJ 638 : 25 Ind Cas 838.

**——S. 403 — Discharge of accused — High Court—Discharge at Sessions — Retrial on complaint.**

An order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under S. 190 (c) of the Cr. P. Code. A Magistrate has jurisdiction and is bound to adjudicate on any criminal information properly laid before him against the accused person, who had been discharged by the High Court in the exercise of its original criminal jurisdiction without the order of discharge being set aside. (1913) 40 Cal 71 : 16 CWN 983 : 13 Cr. LJ 488 : 15 Ind Cas 488 (DB)

**——S. 403 —Fresh proceedings on the same facts—Jurisdiction of Magistrates — Bar — Section 437.**

Held, by Full Bench (Ghose J. dissenting) as to when a discharge is on the merits, that an order of discharge does not bar fresh proceedings being taken on the same facts by the Magistrates discharging the accused. There is no distinction between Presidency Magistrate and other Magistrates in this matter. (1902) 6 CWN 633 : 29 Cal 726 (732) (FB).

**7. Fresh trial barred.**

**(a) General**
**(b) For the same offence**
**(c) On the same facts**

**(a) General**

——S. 403 — Acquittal for an offence under S. 396, I.P. Code — Bar of fresh trial and conviction under S. 395 or S. 396 I. P. C. AIR (V 36) 1949 Mad 195 : (1948) 2 MLJ 267.

**——S. 403 — Order of acquittal in application for transfer or withdrawal — Bar to fresh complaint on same facts.**

An order of acquittal passed on an application for transfer or withdrawal in proceedings which are with jurisdiction, is of full effect and bars fresh proceedings on the same charge, so long as such order of acquittal stands, though it may have been passed under a complete misapprehension of the law. AIR (V 35) 1948 Cal 128 : 52 CWN 261 : 231 Ind Cas 44 : 48 Cr LJ 668 (DB).

**——S. 403 — Acquittal in — Prosecution under Cloth and Yarn Control Order due to want of sanction of Provincial Government — Subsequent trial on same facts under Bihar Cloth and Yarn Control Order (1944) — Bar of.**

A prosecution was started against the petitioner for contravention of the Cloth and Yarn Control Order (Central), but it was unsuccessful and could not end in conviction as sanction of the Provincial Government was not obtained as required by Cl. 23 of that order. Subsequently, the petitioner was prosecuted on the same facts for having contravened Cl. 3 of the Bihar Cloth and Yarn Control Order, 1944, as amended in 1945, and he was tried and convicted.

Held, that the second prosecution was barred by the principle of autrefois acquit, under S. 403, Cr P. Code. AIR (V 35) 1948 Pat 32 : 13 BR 363 : 229 Ind Cas 282 : 48 Cr LJ 356.

——S. 403 — The accused was found to have misappropriated a sum of Rs. 655-0-6. The accused produced an amount of Rs. 642 and the balance of Rs. 13-0-6 was recovered from him by means of a warrant issued under the Land Revenue Code. On these facts, two complaints were filed against the accused. One for breach of trust in respect of two sums, one of Rs. 10 and the other of Rs. 40, between March 19, and June 19, 1941, and it was further alleged in that complaint that the accused had also forged two counter-foil receipts. The other in respect of the sum of Rs. 572-15-8 committed between April 25 and June 19, 1941. The Magistrate heard the evidence in both the cases at the same time and committed the accused to the Sessions Court in both. The accused was first tried in respect of the offence on the first complaint. The offence under S. 409 was tried with a jury and that under S. 466 with the aid of assessors. The accused was acquitted on both the counts. On the second complaint the trial was before another Sessions Judge. The accused claim to be tried and at the same time made an application contending that the proceedings were barred under S. 403 and that he was, therefore, entitled to an acquittal:

Held, that the plea under S. 403 was not raised late.

Held, further that even if the plea of autrefois acquit was not technically available, the principle of it was available for the accused when the interests of justice required its extension in his favour and that the accused should not be tried

again in respect of the third offence (on the 2nd complaint) and should be acquitted. AIR (V 32) 1945 Bom 413 : 47 Bom LR 138 : 47 Cr LJ 138 : 1946 Bom Rule 51 (CN 10) : 221 Ind Cas 266 (DB).

**——S. 403 — Accused discharged and acquitted — Federal Court holding Special Criminal Courts Ordinance of 1942 as ultra vires — Promulgation of new Ordinance of 1943 — Re-arrest — Privy Council reversing Federal Court's decision — Effect — Persons cannot be called upon to stand a second trial on the same charge.**

The accused were prosecuted under Defence of India Rules 35 and 121, Railways Act, S. 126 and I.P.C., Ss. 34, 435 and 511. Some of them were discharged in trial and some were acquitted in trial and Appellate Court. Meantime, Special Criminal Courts Ordinance of 1942 was held ultra vires by Federal Court and the Special Criminal Courts (Repeal) Ordinance XIX of 1943 having been promulgated by the Governor-General, the Federal Court held that re-trial of persons whose convictions were confirmed by High Court, be held. Accused persons who were discharged and acquitted under the above mentioned charges were thereupon re-arrested and re-tried. Meantime their Lordships of the Privy Council had reversed the decision of the Federal Court and had held that the Ordinance of 1942 was intra vires:

Held, that under these circumstances the accused persons who were re-arrested and re-tried were entitled to the plea of autrefois acquit and they could not be called upon to stand a second trial on the same charges. AIR (V 32) 1945 Mad 355 : (1945) 1 MLJ 274 : 1945 MWN 185 (1) : 47 Cr LJ 126 : 221 Ind Cas 242 (DB).

**——S. 403 — Autrefois acquit, plea of — Charges under Ss. 406, 420, Penal Code based on same facts —Charge of cheating compounded with Court's permission — Accused acquitted of cheating — Effect on charge of criminal breach of trust.**

The complaint alleged that the accused had committed the offence of cheating and criminal breach of trust. The accused, by false representation, obtained certain bonds from the complainants and sold them the same day and misappropriated the proceeds. Summonses were issued under Ss. 406 and 420, I.P.C., But when the parties appeared, it was stated that the complainant wished to compound the offences as the only offence was one of cheating under S. 420, I.P.C. This was sanctioned by the Magistrate, and an order made acquitting the accused. The Crown appeal against the acquittal alleging in the first place that the acquittal of cheating was bad as the Magistrate was not shown to have exercised a discretion in allowing the composition; and secondly that as the complaint disclosed the offence of criminal breach of trust and a summons had been issued in respect of that offence, which was a non-compoundable offence, the Magistrate must be deemed to have sanctioned the composition of this offence likewise in acquitting the accused. The Appellate Court upheld the acquittal of cheating but directed the Magistrate to restore the summons in respect of the alleged breach of trust to his file and to dispose of it according to law. The accused at the time of the trial by the Chief Presidency Magistrate, raised the plea of autrefois acquit, i.e., they relied on S. 403, Criminal P. C. The Magistrate refused to entertain the plea and a revision against this order to the High Court was also dismissed. The accused were committed to Sessions. There also they raised the same plea along with a further plea, that there could not on the facts of the case, be an "entrustment" in law of the property and consequently the charge of the criminal breach of trust could not lie. The presiding Judge, under Cl. 25, Letters Patent, received both the points and proceeded with the trial of the first accused which ended in his conviction. Before the Full Bench, the Crown raised a preliminary objection to the reference on the ground that the points had already been the subject of a decision by a Bench of the High Court at an earlier stage of the proceeding against the accused and that the plea of autrefois acquit did not arise "in the trial" or "in the course of the trial" according to Cl. 25 of the Letters Patent or S. 434, Criminal P. C., but was taken before the commencement of the trial:

Held, (overruling the objection) that the plea of autrefois acquit was raised at the proper time and the trial Judge was entitled to reserve the question if he thought fit as a point of law which had arisen in the trial. Therefore the Full Bench had jurisdiction to entertain points of law referred.

Per Cornish and Mockett, JJ. (Lakshmana Rao, J., dissenting) (1) that S. 235 (1), Criminal P. C., had no application when an offence is based upon the identical facts on which another offence had been charged, that the facts of the cheating offence of which the accused has been acquitted are identical with the facts on which he has been put upon his trial for criminal breach of trust. Therefore, the acquittal of cheating furnished a valid plea of autrefois acquit in bar of the accused being tried for criminal breach of trust.

(2) that there was no "entrustment" in law within the meaning of S. 405, I.P.C., when the property was otained by cheating. AIR (V 23) 1936 Mad 353 : 1936 MWN 281 : 43 MLW 548: 70 MLJ 635 : 37 Cr. LJ 637 : 162 Ind Cas 592 (2) (FB).

**——S. 403 — Implied acquittal.**

Appellate Court reversing under S. 423 (b) finding and sentence — Neither acquittal nor re-trial ordered — Judgment must be taken to be one of acquittal — Further trial would be barred. 1933 MWN 224.

**——S. 403 — Effect.**

When a person is acquitted of the charge brought against him in respect of the possession of cartridges, he cannot, as long as the order of acquittal remains in force, be deemed to have committed that offence. AIR (V 20) 1933 Oudh 470 : 10 OWN 895 : 35 Cr LJ 36 : 146 Ind Cas 354 (2).

**——S. 403 — Fresh trial barred — Connected offence — Person acquitted of charge of abduction— His subsequent prosecution for alleged rape of same female during the abduction is barred.**

Where a person has been acquitted of the charge of abduction, he cannot be subsequently prosecuted for the alleged rape of the female involved in the abduction prosecution during the abduction in question. On the grounds of public policy too non-success in a prosecution for abduction, ought not to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction, even when further evidence is relied upon. AIR (V 17) 1930 Rang 360 : 128 Ind Cas 843 : 1930 Cr. C 1238.

**——S. 403 — Charge of abduction — Acquittal — Subsequent prosecution for alleged rape.**

Where a person has been acquitted of the charge of abduction, he cannot be subsequently prosecuted for the alleged rape of the female involved in the abduction prosecution during the abduction in question. This view is also supported by grounds of public policy. AIR (V 17) 1930 Rang 360 : 1930 Cr C 1238.

**——S. 403 — Separate charges.**

Reading Cl. (2) in conjunction with Cl. (1) it follows that when a separate charge has been framed against person under any of the sub-sec-

tions other than sub-S. (1) S. 235, he cannot be tried for separate charge when he has once been convicted or acquitted of one charge. AIR (V 16) 1929 All 899 : 119 Ind Cas 575 : 1929 Cr C 491 : 10 LRA Cr. 122 : 1929 ALJ 1056 : 30 Cr LJ 1089 : 51 All 977 : 12 AI Cr R 202.

**——S. 403 — Acquittal — When can be passed.**

Under S. 247 it is not necessary that the summons should be served on the accused or that he should be present in the Court before an order of acquittal can be passed in his favour on account of the absence of the complainant. The word "tried" in S. 403 does not necessarily mean tried on merits and such acquittal bars fresh trial. Case-law discussed. AIR (V 16) 1929 Bom 408 : 126 Ind Cas 321 : 31 Cr LJ 1000 : 53 Bom 693 : 31 Bom LR 795 : 1929 Cr C 436 (DB).

**——S. 403 — Fraud — Acquittal by.**

Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings. AIR (V 11) 1924 All 778 : 83 Ind Cas 658 : 22 ALJ 820 : 5 LRA Cr 143 : 26 Cr LJ 98.

**——S. 403 — Charge which could have been joined.**

The trial Judge acquitted the accused from the offence of abetment of theft though he found him guilty of receiving stolen property but he did not charge him for it as he could have done under S. 236, Ill. (a) and acquitted him on a charge under S. 411, I. P. C.

Held, that a second trial was barred as the charges could have been joined in the first trial under S. 236, Illus. (a) of Cr P.C. AIR (V 11) 1924 Bom 448 : 86 Ind Cas 479 : 26 Bom LR 440: 26 Cr LJ 831 (DB).

**——S. 403 — Acquittal under S. 247.**

Section 403 is imperative and bars a second trial of the accused when he is once acquitted on the same charge. The Code does not make any distinction between acquittals after trials and acquittals under Ss. 247, 345 and 494 of the Code at the initial stage of the case. AIR (V 8) 1921 Pat 311 : 61 Ind Cas 59 : 2 PLT 170 : 22 Cr LJ 331 (DB).

**——Ss. 403 and 435 — Fresh trial barred — Trial and acquittal on charge of kidnapping — Subsequent trial for offences under Ss. 336 and 368, I.P.C.**

Where accused was tried and acquitted of an offence under S. 363, I.P.C., he could not be put on trial again under Ss. 365, 366 or 368 unless and until the prosecution established that he committed the offence of kidnapping. AIR (V 6) 1919 Pat 70 : 20 Cr. LJ 526 : 51 Ind Cas 686.

**——Ss. 403 and 494 — Fresh trial barred — Summons case — Withdrawal from prosecution — Acquittal — Bar.**

An acquittal under S. 494 of the Code in a summons case is a bar to the institution of a fresh complaint on the same facts. The plea of autrefois acquit can be successfully raised by the accused acquitted under S. 494. An acquittal under S. 247, Cr. P. Code, is on the same footing. AIR (V 5) 1918 Mad 231: 40 Mad 976: 33 MLJ 121: 22 MLT 69: 6 LW 175: 19 Cr LJ 501: 45 Ind Cas 261.

**——S. 403 — Bar to suit — Acquittal under one charge.**

Acquittal on the charge of murder is a bar to trial on a charge of causing disappearance of evidence of murder. (1910) 4 SLR 174: 11 Cr LJ 731: 8 Ind Cas 936 (DB).

**——S. 403, Cl. (1) — Previous acquittal — Summons — Process issued for offences including previous offence.**

Where a Magistrate issued processes against & summoned accused persons for one of several offences alleged against them and acquitted them of the offence for which they were summoned, no fresh processes could in view of the provisions of S. 403, Cl. (1) of the Code of Criminal Procedure be issued against them in respect of all the offences alleged against them on the previous occasion including the one for which they were summoned and acquitted. (1905) 2 CLJ 622(623) (DB).

**(b) For the same offence.**

**——S. 403 — Accused acquitted of offence under S. 426, I. P. Code — Whether can be retried under S. 427, I. P. Code.**

An accused who has been acquitted of an offence under S. 426, I. P. Code, cannot be retried for an offence under S. 427, I. P. Code, in respect of the same occurrence. AIR (V 36) 1949 Cal 252 : 50 Cr LJ 487: ILR (1945) 1 Cal 494.

**——Ss. 403 and 242 — Autrefois acquit — Applicability of the doctrine of — Prior prosecution for offence under Ss. 194 and 207 of the Madras Local Boards Act — Summons case — Withdrawal of complaint before questioning under S. 242, Cr. P. Code — Fresh prosecution if barred — Erection of a factory if a continuing offence under S. 207 of the Madras Local Boards Act.**

The petitioner was acquitted on a previous occasion of an offence under Ss. 194 and 207 of the Local Boards Act for having erected a factory without permission from the prescribed authority. He was subsequently prosecuted and convicted for running the factory. After that conviction a fresh charge-sheet was filed against him for erection of the factory and he was prosecuted, under the same sections, viz., 194 and 207. On a plea that the fresh prosecution was barred by reason of the provisions of S. 403 of the Cr. P. Code,

Held, as under S. 242 of the Code, the trial of a summons case begins when the accused appears or is brought before the Magistrate and not when he is asked to show cause why he should not be convicted, even though the executive officer withdrew the complaint on the prior occasion before the accused was questioned, the doctrine of autrefois acquit applied and was a bar to the fresh prosecution.

Held, further, that the erection of the factory was not a continuing offence under S. 207 of the Act. AIR (V 34) 1947 Mad 306(1): (1947) 1 MLJ 172: 1947 MWN 163: 60 LW 159.

——S. 403 — Previous acquittal — Fresh complaint alleging the same offence but with variation of date of occurrence — Trial prohibited. AIR (V 24) 1937 Mad 181: 1936 MWN 1149(1).

**——S. 403 — Trial Magistrate framing charge and discharging accused — Prosecution of the accused for same offence — Legality of.**

Where the trial Magistrate has framed a charge against an accused person, and discharged him, the Sessions Judge cannot order his prosecution for the same offence, as to try him again for the same offence will be in contravention of the provisions of S. 403, Criminal P. C. AIR (V 21) 1934 Oudh 259(1): 11 OWN 264(2): 35 Cr LJ 570: 147 Ind Cas 1144(2).

**——S. 403 — Different complainants.**

A judgment-debtor escaped from the Amin who had arrested him. The decree-holder then lodged a complaint against him but he was acquitted. Thereupon the Amin lodged another complaint.

Held, that the judgment-debtor's acquittal in the decree-holder's complaint is an effective bar against the subsequent complaint by the Amin under S. 403. AIR (V 17) 1930 Mad 785: 58 MLJ

579: 31 MLW 755: 1930 MWN 532: 1930 Cr C 896: 127 Ind Cas 645.

**——S. 403 — Imprisonment for failure to give security.**

Where accused were sent to jail for failure to furnish security under S. 108, Cr. P. Code, on a charge of sedition and they were subsequently convicted under S. 124-A for same offence.

Held, that the latter conviction was not proper. AIR (V 15) 1923 Rang 135: 116 Ind Cas 477: 13 AICrR 66: 30 Cr LJ 630.

——S. 403 — When one Magistrate has discharged an accused person, another Magistrate of different Court cannot entertain a fresh complaint on the same facts for the same offence. AIR (V 14) 1927 All 815: 7 AI Cr R 532: 8 LRA Cr 79: 102 Ind Cas 344: 28 Cr LJ 536.

**——S. 403 — Receipt of stolen properties.**

Where stolen properties are found in possession of the accused at one and the same time and he has already been convicted under S. 411, I. P. C., for the receipt of one of the properties, he cannot be convicted again, for the other property unless there is distinct evidence that the property of the second case was received by the appellant under different circumstances and at a different time from those of the first property. AIR (V 12) 1925 Oudh 298: 83 Ind Cas 481: 26 Cr LJ 1.

**——S. 403 — Stolen properties in possession of accused — Prescription as to a single offence.**

Where some items of stolen property, viz., some carpets, some postage stamps and some padlocks were found in the possession of one accused and they were charged under S. 411, I. P. C., as regards possession of the carpets and one was convicted and subsequently they were again charged as regards the possession of the postage stamps and they pleaded autrefois acquit and convict.

Held, they in effect claim the presumption in their favour that their retention of all these goods was one offence and one transaction and to the benefit of this presumption they are entitled. The fact that one has been acquitted and the other convicted makes no difference. The contention that as the articles recovered from their possession were of very diverse character, the offences of the dishonest retention of each set of articles were distinct offences is negatived by the definition of what the same offence is as defined in sub-S. (2) of S. 234 of the Criminal Procedure Code. It is there prescribed that offences are of the same kind when they are punishable with the same section of the Indian Penal Code, (1888). AIR (V 12) 1925 Pat 20: 81 Ind Cas 226: 3 Pat 503: 5 PLT 319: 1924 PHCC 126: 2 Pat LRCr 131: 25 Cr LJ 738 (DB).

**——S. 403 — Trial in Native State.**

Where accused committed dacoity in British India but were caught with the stolen property in a Native State and were tried and convicted under S. 411 by the State Court and had undergone the period of imprisonment, held another trial for the same offence on the same facts in British India was barred. AIR (V 11) 1924 Lah 238: 73 Ind Cas 939: 5 Lah LJ 574: 24 Cr LJ 715.

**——S. 403 — Burma Village Act (III of 1889).**

The Burma Village Act has conferred on the village Headman the power to try, as a Court, offences under S. 294, I. P. Code, and other offences and therefore where the accused has been once tried by him for an offence and has been convicted of such offence, he is not liable to be tried again for the same offence by the Township Magistrate. AIR (V 11) 1924 Rang 23: 1 Rang 449: 2 Bur LJ 149: 76 Ind Cas 697: 25 Cr LJ 233.

**——S. 403 — Criminal breach of trust and falsification of accounts.**

An accused was tried, under S. 408 of the Penal Code, for criminal breach of trust of three sums of money alleged to have been dishonestly misappropriated on three dates, and the prosecution case at the trial alleged that he had made three false entries to conceal the acts of misappropriation and he was acquitted by the jury.

Held, he should not, on the facts of the case, be tried again on the same facts for an offence under S. 477-A. AIR (V 10) 1923 Cal 179: 72 Ind Cas 973: 49 Cal 924: 24 Cr LJ 509.

**——S. 403 — Additional evidence available.**

S. 403, Cr. P. Code bars the trial of the accused for an offence under S. 16 of the Motor Vehicles Act, so long as the acquittal of the accused under S. 338, I. P. C., on the same facts remains in force. Applicability of S. 403 does not depend upon additional evidence being available or not. AIR (V 8) 1921 Pat 22: 59 Ind Cas 207: 2 PLT 31: 22 Cr LJ 63: 1921 PHCC 108.

**——S. 403 — Autrefois acquit — Same offence.**

The accused were tried on charges of kidnapping a minor girl with the common object of kidnapping her. The trying Magistrate acquitted them on this point but convicted them of being members of an unlawful assembly with the common object of causing assault and wrongful restraint. The Sessions Judge in appeal set aside the conviction and ordered a retrial on charges of abducting the girl in order to confine her secretly and of rioting with that common object. Held, that the accused were proteced by S. 403. Cr P. C. AIR (V 7) 1920 Cal 568: 21 Cr LJ 689: 24 CWN 856: 57 Ind Cas 929 (DB).

**——S. 403 — Autrefois acquit — Second trial on the complaint of different person — Bar.**

There was a riot between Brahmins and Kurmis. A Brahmin filed a complaint whereupon four Kurmis were convicted under S. 323, I. P. C. Afterwards another Brahmin filed a similar complaint against the same accused on the same facts. Held, the second trial was barred by S. 403, Cr. P. C. AIR (V 6) 1919 All 90: 18 ALJ 85: 2 UPLR (HC) 46: 54 Ind Cas 772.

**——Ss. 403 and 247 — Fresh trial barred — Acquittal operates as.**

An acquittal under S. 247 of the Cr. P. Code operates as a bar to a trial for the same offence. AIR (V 1) 1914 Mad 628: 38 Mad 1028: 26 MLJ 160: (1914) MWN 273 : 15 Cr LJ 236: 23 Ind Cas 188 (DB).

**——S. 403 — Charge of an offence under S. 414 — Previous conviction under S. 411 in respect of other property stolen at the same time and from the same person.**

Held, that where a person had been convicted under S. 411 of the Indian Penal Code in respect of certain property stolen on a particular occasion from a particular person, he could not subsequently be tried for an offence under S. 414 of the code in respect of other property stolen on the same occasion from the same person. 1906 AWN 22: 28 A. 313(314).

**(c) On the same facts.**

**—S. 403, Illus. (e) — Charge under S. 323, Penal Code — Acquittal — Subsequent trial on same facts under S. 324.**

An accused once acquitted by a Second Class Magistrate of an offence under S. 323, I. P. C., cannot afterwards be tried on the same facts under S. 324, I. P. C., as that charge could have been framed in the first trial. AIR (V 25) 1938 Lah 614 : 40 PLR 1036 : ILR 1938 Lah 127: 39 Cr LJ 870 : 177 Ind Cas 339.

**——S. 403 — Madras Local Boards Act, S. 159(1) — Encroachment — Notice to remove — Prosecution for non-compliance — Acquittal — Fresh prosecution after issusing fresh notice.**

Failure to obey a notice issued under S. 159(1) of the Madras Local Boards Act, to remove or alter an encroachment is ex necessitate rei continuous in character and a separate or distinct offence is not brought into being by the issue of a subsequent notice when that notice is by the same authority and to the same person and relates to the same encroachment or contains the same direction. Consequently, when the Court has once decided that there has been no failure to remove an encroachment and acquitted the accused it would be illegal to make the same person liable to be tried again for failure to remove the same encroachment by issuing a fresh notice. AIR (V 22) 1935 Mad. 56 (2):1934 MWN 1088:40 LW 834: 67 MLJ 873: 36 Cr LJ 311: 58 Mad 513: 153 Ind Cas 322.

**(Overruled in AIR (V 25) 1938 Mad 847: 176 Ind Cas 395 (DB).)**

**——Ss. 403 and 247 — Complainant and counsel absent due to their mistaking the date — Acquittal under S. 247 — Fresh complaint.**

The fact that the complainant and his Counsel mistook the date and did not appear, does not give a right to the complainant to institute a fresh complaint on the same facts. The accused once having been acquitted under S. 247, Criminal P. C., no further complaint lies against him on the same facts. AIR (V 21) 1934 Lah 211(2): 36 Cr LJ 29: 152 Ind Cas 156.

**——S. 403 — Fresh trial barred — Under different law.**

Where the goods which formed the subject of a charge under Ch. 17, Penal Code, and of a charge under S. 54-A, Calcutta Police Act, were identical.

Held, that the accused should have been tried for all these offences at one trial should not have been subjected to two trials in respect of his possession of the same goods. AIR (V 15) 1928 Cal 240 (DB).

——S. 403 — An accused once acquitted cannot be convicted for another offence in respect of the same facts. AIR (V 15) 1928 Lah 332: 107 Ind Cas 766: 29 Cr LJ 282.

**——S. 403 — Burma Forest Act, S. 61 and R. 21 — Ss. 379 and 411, I. P. Code.**

On the same facts a plea of autrefois acquit cannot be sustained for a different offence unless the requirements of S. 403(1) are fulfilled. Conversely the plea of autrefois acquit in similar circumstances cannot be defeated except under sub-S. (2) of the same section. The key to sub-S. (2) lies in the words "distinct offence". By "distinct offence" is meant that it must be an offence entirely unconnected with a former offence charged. A general offence of theft is wholly not unconnected with an offence of extracting teak timber without a license. A was prosecuted under Burma Forest Act u/r. 21 for extracting teak timber without a license and under S. 61 for counterfeiting akauk mark upon teak timber stolen by him. He was acquitted of these charges. Subsequently, A was prosecuted on the same facts under Ss. 379 and 411, Penal Code. It was contended that A was entitled to set up a plea of autrefois acquit.

Held, that in the circumstances the plea was maintainable. AIR (V 15) 1928 Rang 252: 6 Rang 386 : 111 Ind Cas 850 : 29 Cr LJ 930.

**——S. 403 — S. 160, Penal Code — Bombay District Police Act, S. 61(o).**

Failure to frame alternative charges both under S. 160, I. P. Code, and also under S. 61(o), Bombay District Police Act, and acquittal under the former operates as a bar to the fresh prosecution under the latter. AIR (V 14) 1927 Bom 629: 29 Bom LR 1478: 28 Cr LJ 1032: 106 Ind Cas 216 (DB).

**——S. 403 — Identical facts.**

Accused were charged on a charge under S. 193, Penal Code and were acquitted after a careful trial. Subsequently the accused were charged with offences under Ss. 467 and 471 read with S. 120-B, Penal Code, upon the facts wholly inseparable from the facts upon which the previous case was proceeded with.

Held, that the subsequent charges could not be proceeded with. AIR (V 13) 1926 Cal 450: 87 Ind Cas 847 : 30 CWN 384 : 26 Cr LJ 1023 (DB).

——S. 403 — Where accused were convicted under S. 297, I. P. C., for entering a Muhammedan graveyard and cutting a tree there and were acquitted in appeal.

Held, that they cannot be again prosecuted for theft on the same facts. AIR (V 13) 1926 Lah 639: 96 Ind Cas 875: 8 Lah 52: 28 PLR 518: 27 Cr LJ 1019.

**——S. 403 — Ss. 121-A and 120-B, I. P. C.**

There do not exist two conspiracies, one for the overawing the Government and the other for killing Europeans, where a conspiracy to overawe the Government by means of criminal force, namely, by causing bombs to be thrown at British officers is proved. The conspiracy is one and the same the killing of Europeans being only the means to an end, viz., the object of overawing the Government by criminal force. In such a case when once there has been a conviction under S. 121-A a fresh conviction, under S. 120-B, cannot be founded on the same facts. AIR (V 12) 1925 Lah 157: 82 Ind Cas 169: 25 Cr LJ 1241.

——S. 403 — Where an accused was alleged to have gone with a number of others to a palmyra tope and it was alleged that some of the members in that assembly climbed up the trees and cut the spathes of the palmyra tress and threw down the pots attached to the spathes in which toddy was being collected and the accused was once charged with mischief under S. 427 of the Penal Code and acquitted on the ground that he was not present at the scene of occurrence.

Held, he could not subsequently be charged with rioting under S. 147 of the Penal Code on practically the same allegations because the two transactions were so closely overlapping that it was open to the prosecution to have framed an alternative charge of mischief and rioting under S. 236. Section 403 is not a section easy of construction but the general principle underlying it is to be borne in mind, namely, that a man should not be put upon his trial twice over on the same facts as it is a great hardship for a man to stand more than one trial for any one offence. AIR (V 11) 1924 Mad 478: 76 Ind Cas 708: 19 MLW 31: 33 MLT 269: 1924 MWN 153: 25 Cr LJ 244.

——S. 403 — Acquittal even under wrong section is a bar to further trial on same facts. AIR (V 11) 1924 Oudh 64: 26 OC 282: 81 Ind Cas 314: 25 Cr LJ 794.

**——S. 403 — Acquittal under S. 247.**

Order under S. 247 Cr. P. Code, before accused was served with summons is a bar to fresh complaint on the same facts. AIR (V 11) 1924 Pat 140: 74 Ind Cas 719: 5 Pat LT 15: 2 Pat LRCr 10: 24 Cr LJ 815.

——S. 403 — Forgery — Registration Act.

Where an accused has been tried and acquitted under sections of the I. P. Code of offences of forgery and abetment thereof, his subsequent trial for offences under the Registration Act, on the same facts is barred under S. 403, Cr. P. Code. AIR (V 11) 1924 Rang 213: 1 Rang 299: 25 Cr LJ 191: 76 Ind Cas 431.

——S. 403 — Under S. 403, an accused once acquitted of an offence under S. 247, Indian Penal Code, cannot again be tried for the same offence on the same facts. AIR (V 10) 1923 All 360: 74 Ind Cas 1054: 45 All 58: 24 Cr LJ 862.

——S. 403 — Acquittal on wrong charges — S. 237 (1).

Where the facts were certain but a wrong charge was based on them and the accused was acquitted instead of being convicted under the right charges as he might have been, he cannot by virtue of S. 403(1) be subsequently tried on those charges based on the facts. AIR (V 8) 1921 Sind 137: 66 Ind Cas 657: 23 Cr LJ 305: 16 SLR 1 (DB).

——S. 403 — A person who has been acquitted of an offence of building a house without sanction of the municipality cannot be re-tried for the same offence on the ground that the house continued to exist and that therefore the offence is a continuous offence. AIR (V 4) 1917 Lah 143: 14 PWR 1917 Cr: 18 Cr LJ 324 : 38 Ind Cas 436.

——S. 403 — Conviction of minor offence — Subsequent facts showing major offence — Bar of trial—Rangoon Police Act, S. 31—Penal Code, S. 457.

Where a man has been convicted of an offence, and further facts come to light subsequently which show a major offence, he cannot, on that ground alone, be put on his trial for the graver offence. A man convicted under S. 31 of the Rangoon Police Act cannot again be tried and convicted for an offence under S. 457, I. P. C., when some further evidence is available. AIR (V 2) 1915 Low Bur 60: 8 Bur LT 129: 16 Cr LJ 267 : 28 Ind Cas 155.

### 8. Fresh trial not barred.

(a) General.
(b) For distinct offences.
(c) On the same facts arising out of the same transaction.

#### (a) General.

——S. 403 — "Same offence" — Acquittal of offence under S. 412, I. P. Code, in respect of certain articles — Subsequent conviction in respect of those and other articles — Legality — Second prosecution, if barred.

The retaining of stolen property under S. 412, I. P. Code, is a continuing offence. Where therefore an accused person is acquitted of an offence under that section in respect of certain stolen articles, that acquittal creates no bar to his prosecution, trial and conviction later in respect of a greater number of articles than was mentioned in the former charge and trial. AIR (V 34) 1947 Bom 467: 49 Bom LR 391: 48 Cr LJ 873 (DB).

——S. 403 — Acquittal on ground of want of proper sanction to prosecution under S. 197, Cr. P. Code — Effect of — Subsequent trial after proper sanction — If barred.

Where the proceedings are held to be void by the appellate Court on the ground of want of proper sanction for prosecution under S. 197, Cr. P. Code, and the conviction and sentence are consequently quashed, the order of the Appellate Court does not amount to an order of acquittal within the meaning of S. 403, Cr. P. Code, so as to bar a fresh trial on the same facts after proper sanction. AIR (Vol 34) 1947 Cal 290 : ILR (1946) 1 Cal 317: 48 Cr LJ 118: 228 Ind Cas 187 (DB).

——S. 403 — If an offence is committed on every day on which the factory is working without permission, the acquittal of so working the factory in July 1939, cannot operate as a bar under S. 403, Criminal P. C., to a charge against the accused of so working the factory in Jaunary 1941. AIR (Vol 29) 1942 Bom 326 :44 Bom LR 756:44 Cr LJ 120:203 Ind cas 592.

——S. 403 — Servant collecting several sums from tenants of his master and misappropriating same—Prosecution in respect of some specific acts—Acquittal—Subsequent prosecution in respect of other specific act.

Where a servant of a person has collected sums from tenants of his master and misappropriated them and the prosecution exercises the discretion which the law gives it and decides to prosecute him in respect of three separate and specific acts of misappropriation and he is acquitted on these charges, there is nothing in law to prevent him being prosecuted again in respect of other specific and distinct acts of misappropriation. AIR (Vol 28) 1941 Pat 606:8 BR 308:43 Cr LJ 286:7 Cut LT 64:197 Ind Cas 832.

——Ss. 403, 423 — Re-trial, order for — Conviction has to be reversed — Reversal, if acquittal.

Before an Appellate Court passes an order for re-trial or commitment of the accused for trial, the conviction and sentence already passed have to be reversed. This reversal of the conviction and sentence does not amount to an acquittal such as is referred to in S. 403, Criminal P. C. Section 403 does not bar a re-trial ordered by an Appellate Court under S. 423, Cl. (b). 1935 AWR 1070: 36 Cr LJ 1333: 1935 ALJ 1077: 158 Ind Cas 200.

——S. 403 — Finding that conspirancy was different from previous one—Prosecution against same accused — Whether barred.

Findings of fact that a particular conspiracy was a different conspiracy from the previous one, are not matters behind which the High Court can go and they must, therefore, accept the position that that was a different conspiracy at any time, in the sense of having an organization and objects different from those charged in the previous case. S. 403, Criminal P. C., does not, therefore, apply and a trial of the same accused for the subsequent conspiracy is not barred by s. 403. AIR (Vol22) 1935 Cal 316:36 Cr LJ 982:62 Cal 749: 156 Ind Cas 678 (DB)

——S. 403 — Essentials of autrefois acquit—Joint complaint — Composition with one — Effect of.

To set up the plea of autrefois acquit it is essential that there must have been a previous trial of the offence terminating in the order of acquittal. It must be established that the offences were substantially the same and grew out of same facts. Where the two indictments are essentially different and relate to separate and independent transactions affecting distinct individuals it cannot be held that acquittal with reference to complaint of the one is a bar to entertainment of the second complaint. It is not necessary that both complaints should be before the same person but before the presiding officer of the same Court. B and C instituted a joint complaint against H. Transactions out of which the complaints arose were different and independent, and separate complaints ought to have been presented. B and H compounded the case with the result that C's case was no longer subject of judicial inquiry. C filed a fresh complaint. H. contended that he had been acquitted of

all charges in the original complaint and no fresh complaint could be entertained under Section 403.

Held, that the effect of acquittal with reference to B's complaint as no bar to the entertainment of the complaint by C. No order for acquittal had been passed with reference to C's complaint and H was not ordered to be discharged on the same. AIR (Vol 17) 1930 All 92: 1930 Cr C 81: 1930 ALJ 85: 30 Cr LJ 1149:120 Ind Cas 117.

——**S. 403 — Composition.**

Composition has the effect of acquittal only as between the person who is entitled to compound on the one hand and the accused with whom the composition takes place on the other. Where the accused are not tried for the specific offences for which a charge is subsequently laid and there has been no composition with the person entitled to compound, the later prosecution can be proceeded with. 1930 MWN 692.

——**S. 403 — Withdrawal of two successive complaints as being under a wrong section and by a wrong person.**

A complaint under S. 173, Penal Code, was filed against the accused, but was withdrawn on the ground that it was under a wrong section, namely, S. 173 instead of S. 174, and the accused was acquitted under S. 248 Cr. P. Code. A second complaint filed on the same facts by the same man, a head constable, under S. 174, Penal Code, was also withdrawn on the ground that the head constable was not the proper complainant and a second time the accused was acquitted under S. 248, Cr. P. Code. A third complaint was filed by the Sub-Inspector on the same facts under S. 174, Penal Code, and the accused was convicted.

Held, that the conviction was proper and the trial was not barred by the previous acquittals. AIR (V 15) 1928 Bom 143 : 109 Ind Cas 481 : 52 Bom 257: 30 Bom LR 380: 29 Cr LJ 545: 10 AI Cr R 288. (DB).

——**S. 403 — Charge under S. 401, I.P.C. — Acquittal of — Subsequent charge under S. 413, I.P.C.**

Where the charge for an offence under S. 401, I. P. C. rested primarily on the approver's statement about the accused having been present at a meeting held for the purpose of forming the gang, and where it was because that statement was disbelieved that the prosecution failed and where the approver's statement was in fact part of the material on which the prosecution for the offence under S. 413, I.P.C. had been instituted, but that prosecution would be based entirely on the evidence as to the discovery of the stolen property in the accused's house, which it was held in the former trial, did not prove his membership of the gang,

Held, that the two trials were not based on the same facts and S. 403 (1) did not apply. AIR (V 12) 1925 Lah 537 : 88 Ind Cas 185 : 26 PLR 470 : 26 Cr. LJ 1097.

——**S. 403 — Proceedings dropped as not maintainable — Change in the law — Fresh proceedings.**

Petitioner deposited a sum of money along with a mortgage deed, under S. 83, T. P. Act praying for redemption of the mortgage. The deed was suspected to be forged and the opposite party applied to start proceedings under S. 476. The Court held that proceedings under S. 83, T.P. Act were not of a judicial character and therefore dropped the proceedings. After the amended Code came into force under which the proceedings in respect of which the offence is alleged to have been committed need not be of a judicial character, the public prosecutor again moved the Court for taking the same action against the same person.

Held, that the petitioner could be proceeded against. AIR (V 12) 1925 Pat 330 : 83 Ind Cas 730: 4 Pat 24 : 6 PLT 225 : 3 Pat LR Cr 51 : 26 Cr LJ 170 (DB).

——**Ss. 403, 435 and 436 — Fresh trial not barred —Application for commitment to Sessions or to Dt. Magistrate during pendency of trial before Sub-Magistrate — Rejection — Subsequent petition to Sessions Court under S. 436 after termination of proceeding — Penal Code, Ss. 147 and 304.**

Charges were framed against the accused under Ss. 147, 323 and 325, I.P.C., by a Sub-Magistrate. Before the trial was closed, the complainant applied to the Dt. Magistrate under S. 435, Cr P.C., to call for the records and direct a committal of the case to the Court of Sessions for trial for an offence under S. 304, I.P.C. The Dt. Magistrate rejected the application as incompetent. After the close of the trial before the Sub-Magistrate, a revision was preferred to the Sessions Judge under S. 436, Cr P. Code, who ordered the committal of the accused to the Sessions on charges under Ss. 147 and 304, I.P.C. The Sub-Magistrate acquitted the accused on the charge under S. 154, I.P.C.

Held, that the committal so far as it related to S. 147, contravened S. 403, Cr P. Code, as the accused had been acquitted on that charge. The order of the committal was valid as regards S. 304, I.P.C., and the order of the Dt. Magistrate refusing to entertain the revision under S. 435 did not operate as a bar to the Sessions Judge's taking action under S. 436, Cr. P. C. AIR (V 7) 1920 Mad 94 : 38 MLJ 194 : 10 LW 521 : 54 Ind Cas 491 (DB).

——**S. 403 — Cross cases of rioting — Conviction in one case on plea of guilty — If bars conviction in cross case.**

A conviction in one rioting case on a plea of guilty is no bar to a conviction in a cross case of rioting in connection with the same occurrence. AIR (V 5) 1918 Cal 650 : 19 Cr LJ 766 : 46 Ind Cas 606 (DB).

——**S. 403 — Autrefois acquit — Previous trial.**

To entitle an accused person to plead autrefois acquit there must have been a previous trial. Petitioner was charged under S. 426, I.P.C. In consequence of the absence of the complainant, an order of acquittal was passed under S. 247, Cr P. Code. Subsequently complainant presented a fresh complaint of the same offence. Held, that S. 403 was no bar to the trial by the Magistrate on the second complaint as there was no trial on the first complaint. AIR (V 5) 1918 Mad 212 : 19 Cr LJ 497 : 40 Mad 977 (foot note): (1917) 9 Cr LR 290 (DB).

——**Ss. 403 and 247 — Fresh trial not barred — Autrefois acquit — Acquittal — Default of prosecution.**

An order of acquittal under S. 247, Cr P. Code, in a summons case passed by the Magistrate on failure of the complainant to attend the Court is no bar to the institution of a fresh complaint for the same offence. An accused can plead autrefois acquit only when the case against him is explained to him and tried on the merits and a regular order of acquittal is passed. 34 M 253, Dissented from. AIR (V 5) 1918 Mad 212 : 40 Mad 977 : 19 Cr LJ 497 : 45 Ind Cas 257 (DB).

——**S. 403 — Acquittal of some no bar to trial of others.**

An acquittal of some of the accused is no bar in law to the trial of others who had run away but have been subsequently captured. (1910) 11 Cr LJ 541 (541) : 37 C 680 : 7 Ind Cas 932 (DB).

——**S. 403 (1) — No complaint — Order of acquittal — Whether bar to a new trial.**

A soldier from Burma (complainant) sent an intimation to the District Magistrate that he had authorised his brother to file a complaint against

the accused for enticing away his wife. When the case came on for hearing, it appeared that the brother had no such authority and the Magistrate acquitted the accused. The complainant then filed a complaint, personally.

Held, that the previous acquittal was no bar to the trial of the present complaint inasmuch as the finding of the Magistrate amounted to this, that there was no complaint before him. (1909) 6 ALJ 262 : 31 A 317 (318).

**——Ss. 403, 235 — Previous conviction for offence under S. 365 of the Indian Penal Code — Subsequent trial for abduction not barred.**

Where under a charge under S. 365 of the Indian Penal Code a conviction is bad, a subsequent trial for abduction is not barred by S. 403 of the Code of Criminal Procedure, the offence being one which falls under S. 235, sub-s. (1). (1906) 3 ALJ 2 (3) : 1906 AWN 32.

**——Ss. 403, 236, 237 — Previous acquittal of co-accused, if bar to trial — Additional facts ascertained subsequently — Penal Code, Ss. 380 and 411.**

On a charge of theft under S. 380, I. P. C., against three persons, A, B & C, two of them A and B were placed on their trial and acquitted by a competent court. Subsequently some of the stolen properties having been discovered in the house of the third accused C, C was put upon his trial for an offence under S. 411, I.P.C., and convicted.

Held: That the previous acquittal of A and B was no bar to the subsequent trial and conviction of C, as there were certain additional facts before the court ascertained subsequent to the acquittal which supported the charge under S. 411, I.P.C., (1906) 10 CWN 1031 (1033) (DB).

**——S. 403 (4) — Previous acquittal — Trial for another offence — Penal Code (Act XLV of 1860) Ss. 304, 323 — District Magistrate.**

The accused was placed before a Magistrate, charged with an offence under S. 304 of the Penal Code. The Magistrate finding that the offence was not made out, charged the accused with an offence under S. 323 of the Code & convicted and sentenced him accordingly. The District Magistrate upon an examination of the record and proceedings in the case directed the convicting Magistrate to commit the case to a Court of Session for trial for an offence under S. 301 of the Penal Code.

Held, that under S. 403 (4) of the Criminal Procedure Code, the previous conviction of the accused under S. 323 of the Penal Code was no bar to his trial for an offence under S. 304 of the Code which the Magistrate was not competent to try. (1903) 5 Bom LR 125 (126) (DB).

**——Ss. 403, 236, 237 — Charge under S. 342 — Bombay Act II of 1888 — Acquittal — Fresh charge under Ss. 308 and 309 of the same Act — Bar.**

The accused was prosecuted by the Bombay Municipality under S. 342 of the Bombay City Municipality Act for constructing two balconies to his house without the permission of the Municipality. He was acquitted. The Municipality then served a notice upon the accused under Ss. 308 and 309 of the Act, asking him to remove the two balconies, and also two others which were not new: and on the accused's failing to comply with the notice, the Municipality prosecuted him again. The question arose whether the previous acquittal of the accused precluded the Municipality from bringing the second charge against him.

Held, that there was no bar to the second prosecution as Ss. 403 (1), 236 and 237 of the Criminal Procedure Code had no application. The second offence could not have been committed until the notice to remove was served on the accused and his notice was not served upon the accused until the year following that in which he was acquitted under the former charge. (1902) 4 Bom LR 575 (577) (DB).

**(b) For distinct offences**

——S. 403 — Since in S. 403 there is a saving clause in respect of prosecutions which come within the purview of S. 26 General Clauses Act, the provisions of S. 403 barring fresh trial have no application to a case where in the earlier prosecution the case was split up into two and the accused had been tried only for criminal breach of trust while the other charge under S. 282-A, I.P.C., was reserved for a separate trial. AIR (V 31) 1944 Mad 369 : (1944) 1 MLJ 120 : 57 MLW 127 : 1944 MWN 195 : 46 Cr LJ 194 : 217 Ind Cas 138.

**——Ss. 403, 236, 237 — Independent offences — Conviction for one, if bars prosecution for other.**

Where the accused has committed two distinct and independent offences, one under S. 420, I.P.C. of cheating certain person and obtaining from him Govt. Promissory Notes on false representation and the other under S. 409, I.P.C., by embezzlement of the amount received by him on behalf of a bank from certain other person his conviction under S. 420, does not bar his trial and conviction under S. 409, I.P.C. AIR (V 29) 1942 Oudh 473 : 1942 OWN 485 : 43 Cr LJ 830 : 1942 AWR 295 : 18 Luck 408 : 202 Ind Cas 382.

**——S. 403 — Acquittal for particular overt act of cheating, is no bar to prosecution of accused on charge of conspiracy to commit series of acts of cheating — Penal Code, Ss. 420, 120-B.**

Overt acts may properly be looked at as evidence of the existence of a concerted intention and in many cases, it is only by means of overt acts that the existence of the consipiracy can be made out; but the criminality of the conspiracy is independent of the criminality of the overt act. An acquittal for the particular overt act of cheating R cannot be a bar to the prosecution of the accused on a charge of conspiracy to commit a series of acts of cheating or again on a charge that he, in pursuance of such a conspiracy, had successfully cheated S or had unsuccessfully attempted to cheat A. AIR (V 29) 1942 Pat 58 : 22 PLT 825 : 8 BR 54: 43 Cr LJ 44: 196 Ind Cas 604 (DB).

——S. 403 —Where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity, it is open to the Crown to prove that he actually took part in the dacoity, for the latter was not the offence of which he was acquitted. Even if he has been acquitted on a charge of dacoity it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of the dacoity. AIR (V 17) 1930 Oudh 455 : 7 OWN 862 : 1930 Cr C 1079 (DB).

**——S. 403—Series of acts—Different offences.**

Section 403 (2) limits or rather explains the common law rule as meaning that the acquittal or conviction for the offence constituted by acts A, B and C, will not bar a subsequent trial in respect of the offence constituted by the acts B, C and D. The offences are distinct and the evidence necessary in the first case is different from the evidence necessary in the second. This sub-section has no application to a case in which entire series of acts constituted both offences. AIR (V 17) 1930 Pat 26 117 Ind Cas 625 : 30 Cr LJ 806 : 11 PLT 722 : 1930 Cr C 2 : 9 Pat 585. (DB).

——S. 403 — Where the two offences committed are quite distinct and committed against distinct persons, S. 403 is no bar to prosecution for the second offence. AIR (V 16) 1929 All 940 : 120 Ind

Cas 121: 30 Cr LJ 1153: 1930 ALJ 218: 11 LRA Cr 25 : 1929 Cr C 668.

**——S. 403 — S. 19 (e), Arms Act and S. 224, I.P.C.**

The offence under S. 19 (e) Arms Act is distinct from offence under S. 324, I.P.C., and therefore a trial for an offence under S. 324, I. P. C. would not be a bar to the proceedings under S. 19 (e), Arms Act. AIR (V 16) 1929 Bom 283 : 119 Ind Cas 641 : 53 Bom 604 : 31 Bom LR 536 : 1929 Cr C 38 : 30 Cr LJ 1059. (DB).

**——S. 403— Motor Vehicles Act (VIII of 1914), S. 5—Prosecution under S. 388,, I.P.C.**

Where a driver of a motor lorry was once convicted of an offence under S. 5, Motor Vehicles Act (VIII of 1914) for reckless driving which had resulted in the lorry knocking against a chabutra and fracturing the bones of the leg of a person sitting on it,

Held, that the one act was the act of rash driving and even if the applicant's lorry had not knocked against the chabutra and had not injured the person, he would still have been liable for reckless driving. There was not only one act of reckless driving, but a subsequent act of knocking against a man during such rash driving and, therefore, his conviction for rash driving cannot protect him from prosecution for the consequences of such rash driving under S. 325, or S. 338 I.P.C., but he cannot be tried under S. 279. AIR (V 15) 1928 All 191 : 107 Ind Cas 687 : 26 ALJ 160 : 9 AI Cr R 99 : 9 LRA Cr 11 : 29 Cr LJ 271.

**———S. 403 — Cheating — False personation before Sub-Registrar.**

Where a person executed a mortgage and registered it and was subsequently tried and acquitted under Ss. 419-114, Penal Code.

Held, that his subsequent trial under S. 82 (c), Registration Act, was not barred as he committed two entirely distinct offences; one was cheating by personation when he executed the deed of mortgage; and the other an offence under the Registration Act, when he represented himself at the registration office to be another, and that the offence of personation at the registration office was a totally different and subsequent one to the offence of cheating. AIR (V 14) 1927 Rang 303 : 105 Ind Cas 236 : 6 Bur LJ 201 : 28 Cr LJ 908.

——S. 403 —Where the accused was convicted for theft as he was found removing gunny bags with opium inside.

Held, his conviction for theft does not bar his trial for being in possession of opium, under S. 9 of the Opium Act. AIR (V 13) 1926 All 405: 95 Ind Cas 287 : 48 All 496 : 24 ALJ 559 : 7 LRA Cr 95 : 27 Cr LJ 767.

**——Ss. 403 (1), (2) and 235 (1) — Fresh trial not barred — Trial for offence for which separate charge might have been framed at the former trial.**

The petitioners police constables were convicted of rioting in the course of which they took several persons in custody. Two of the petitioners were previously tried on a charge under S. 342, I.P.C. in respect of the arrest made by them and were acquitted.

Held, that the present trial of these two petitioners for rioting was not invalid under S. 403 (1). The case was covered by Sub-Sec. (2) of S. 403 which provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him under S. 235 (1), Cr. P. C. AIR (V 8) 1921 Cal 181: 24 CWN 763: 31 CLJ 476: 21 Cr LJ 614: 57 Ind Cas 278 (DB).

**——S 403 — Fresh trial not barred — Acquittal in trial under S. 147, I.P.C., — Subsequent trial under S. 186, I.P.C.—Bar.**

The acquittal of the accused in a case under S. 147, I.P.C. is no bar to his trial under S. 186, I.P.C. AIR (V 7) 1920 Pat 449 : 1 Pat LT 654.

**——S. 403 (i) and (2) —Fresh trial not barred — Autrefois acquit — Offences under Ss. 352, 504, I. P.C. —Process issued under S. 352 — Trial and acquittal — Fresh trial Under S. 504, I.P.C.**

A complaint was preferred under Ss. 352 and 504, I.P.C., Process was issued upon the accused directing him to appear and take his trial under S. 352 only. The Magistrate acquitted the petitioner of the offence under S. 352 but being of opinion that on the evidence adduced a prima facie case under S. 504, I.P.C. had been made out, ordered process to issue.

Held, that S. 403 (2) of the Cr P. Code was applicable to the case, and that the accused could be legally tried again for the offence punishable under S. 504, I.P.C. AIR (V 6) 1919 Cal 1063 : 20 Cr. LJ 43 : 48 Ind Cas 683. (DB).

**——S. 403 — Penal Code, Ss. 304, 323.**

Where an accused is acquitted of an offence under S. 323 of the Penal Code, and subsequently he is committed to the Sessions for trial under S. 304, there is no legal bar to the trial. AIR (V 1) 1914 All 191 : 36 All 4 : 11 ALJ 959: 15 Cr LJ 64: 22 Ind Cas 336 (DB).

**(c) On the same facts arising out of the same transaction**

**(i) General**

**——S. 403 (2) — Acquittal of accused of offence under S. 352, I.P. Code — If bars his subsequent trial for offences under Ss. 448 and 504, I.P. Code, on same facts.**

An acquittal of the accused of an offence under S. 352, I. P. Code, on the ground that the complainant was absent on the date of hearing under S. 247, Cr. P. Code, is no bar under S. 403, Cr. P. Code, to his subsequent trial on the same facts for offences under Ss. 448 and 504, I.P. Code. ILR (1949) 1 Cal 458 (DB).

**——S. 403 —Acquittal under S. 148, I.P. Code, for being member of unlawful assembly with common object of carrying stolen property — Subsequent trial and conviction under S. 412, I. P. C., for possession of property stolen at dacoity — Legality.**

The previous trial and acquittal of a person on a charge under S. 148, I.P. Code, of being a member of an unlawful assembly with the common object of carrying away stolen property, will not operate as a bar to his subsequent trial and conviction on a charge under S. 412, I.P. Code, of being in possession of stolen goods removed by dacoity, when the subsequent charge was not triable by the Magistrate who tried the prior charge; further the subsequent trial being in respect of a distinct offence under S. 412, I.P. Code, S. 403 (1) Cr P. Code does not apply and cannot be pleaded as a bar. The case is governed by S. 403 (2) and (4) and not S. 403 (1). AIR (V 34) 1947 Pat 67 : 25 Pat 378 : 13 BR 261 : 229 Ind Cas 5 : 48 Cr LJ 289 (DB).

**——S. 403 — Fresh trial — Question whether it is barred — Test.**

The question as to whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on the facts and circumstances of a particular case. The true test is not so much whether the acts are the same in both trials as whether the

acquittal or conviction from the first charge necessarily involves an acquittal or conviction on the second charge. The provisions contained in S. 403, Criminal P. C., are complete by themselves on the subject of the effect of previous acquittal or convictions and no question of exercise of inherent jurisdiction or the application of the rule of res judicata arises where there are specific provisions in the law.

Where the facts in a prosecution under S. 121-A, are not the same as in a previous trial though some are common but on the facts of the previous trials, a charge under S. 121, I.P.C., could not possibly have been framed or a trial held on that charge, and where the present charge not only includes the offences with which the accused were charged in the previous trial but goes beyond them the case is governed by Sub-S. (2) of S. 403 and not by Sub-S. (1). AIR (V 24) 1937 Cal 99: 38 Cr LJ 818: 169 Ind Cas 977 (SB).

**——S. 403 (2) — Complaint disclosing several offences on same facts — Trial for one offence and acquittal — Fresh complaint on either offences.**

Where a complaint disclosed several distinct offences on the same facts and the accused were summoned for one of the offences but were acquitted for default of appearance of the complainant;

Held, that a fresh trial in respect of a complaint for other offences disclosed by the same facts, was not barred. AIR (V 22) 1935 Cal 571 : 36 Cr LJ 1364 : 158 Ind Cas 384 (2) (DB).

**——S. 403 (2) —Complaint for theft and trespass—Charge for trespass only — Acquittal — Fresh prosecution for the theft on same facts.**

Complaint was made against the accused of various offences, particularly under Ss. 453 and 379, I.P.C., The Magistrate who heard the complaint framed a charge under S. 453 only and the accused was finally acquitted. A second complaint was thereupon made against the accused upon the same facts unler S. 379:

Held, that the Magistrate was at fault in not framing a charge under both sections and the second trial was not barred by S. 403 (2), Criminal P. C.

The Court has, however, the power in an appropriate case not to allow the accused to be prosecuted a second time for matters arising out of the same set of facts even though such a trial is not barred by S. 403 (2) AIR (V 19) 1932 Cal 291 : 35 CWN 1182 : 33 Cr LJ 439 : 137 Ind Cas 161 (DB).

**——S. 403 —Same transaction — More than one offence.**

As S. 236 does not contemplate a case in which the series of acts complained of may constitute more than one offence, therefore, S. 403 (1) has no application to a case where more than one offence has been committed by the same transaction. AIR (V 17) 1930 Pat 26 : 117 Ind Cas 625 : 30 Cr LJ 806 : 1930 Cr C 2 : 9 Pat 585 : 11 PLT 722 (DB).

**——S. 403 — Conviction for affray —Subsequent charge for hurt.**

Conviction of an accused for an offence under S. 160, Penal Code, on prosecution initiated by the police against both accused and the complainant in which both were sentenced to varying fines does not bar the subsequent prosecution of the accused for offences under Ss. 323 and 147, Penal Code on complaint laid by the complainant. For in the previous prosecution the charges under Ss. 323 and 147, could have been joined against the present accused under S. 235 (1). AIR (V 16) 1929 Bom 451 : 118 Ind Cas 693 1929 Cr C 510 : 31 Bom LR 922 : 30 Cr LJ 965. (DB).

**——S. 403 — Ss. 193 and 182, I.P.C.**

The accused filed a complaint before the District Magistrate charging certain police patels with ill-treatment. Subsequently she preferred a complaint to the Sub-divisional Magistrate charging a certain Sub-Inspector and a head constable with ill-treatment in the course of an enquiry. The Sub-divisional Magistrate charged her under S. 193, I.P.C. but she was acquitted under S. 494 (b), Cr P.C. Subsequently the District Magistrate made a complaint against her under S. 182, I.P.C.

Held, that the case is one where there can be said to have been a series of acts so connected together as to form the same transaction, within the meaning of sub-S. (1) S. 235; that in that series of acts more offences than one were committed by the same person, that the wording of sub-S. (1), S. 235, did cover the case and that the previous acquittal did not bar the subsequent prosecution. AIR (V 15) 1928 Bom 177 : 109 Ind Cas 346 : 30 Bom LR 342 : 10 AI Cr R 187 : 29 Cr LJ 522 (DB).

**——S. 403 — Application under S. 488, Cr. P. C.**

When a Magistrate to whom an application for maintenance is made, knows or has reason to believe that a similar application on the same facts has previously been adjudicated on he ought not to act on the application without considering the previous decision, but he is not wrong in law when he does so, and his proceedings are not necessarily bad and void, regardless of the merits.

When the previous application was never adjudicated upon being dismissed for default, the subsequent application is not barred. AIR (V 14) 1927 Rang 328 : 105 Ind Cas 240 : 5 Rang 697 : 6 Bur LJ 200 : 28 Cr LJ 912.

——S. 403 —Conviction for affray is no bar to subsequent conviction for causing hurt in the affray. AIR (V 12) 1925 All 299 : 86 Ind Cas 64 : 47 All 284 : 23 ALJ 8 : 26 Cr LJ 688 : 6 LRA Cr 41.

——S. 403 — Where a woman has been abducted and detained an acquittal on a charge of abduction is no bar to the trial of a charge of detention. AIR (V 11) 1924 Lah 330 : 74 Ind Cas 444 : 24 Cr LJ 780.

**——S. 403—Of offence under S. 352 I.P.C.—Charge under S. 384 I.P.C.**

It is open to the complaint after the disposal of the case under S. 352 I. P. C. which is the only offence which a Magistrate was investigating to move the officer empowered to take cognizance thereof to proceed with the trial of the charge under S. 384, I.P.C. AIR (V 10) 1923 Pat 228 : 83 Ind Cas 345 : 2 Pat 333 : 1923 PHCC 47 : 1 Pat LR Cr 109 : 25 Cr LJ 1385. (DB).

**——S. 403 — Test.**

The true test is not so much whether the facts are the same in both trials, as, whether the acquittal on the first charge necessarily involves an acquittal on the second charge. So where some constables were acquitted on a charge of having wrongfully confined certain persons.

Held, that this was no bar to their conviction for rioting although the offence of wrongful confinement had been committed in the course of the rioting. AIR (Vol 8) 1921 Cal 181: 57 Ind Cas 278: 21 Cr LJ 614:24 CWN 763:31 CLJ 476:48 Cal 78 (DB).

**——S. 403 — Autrefois acquit—Charge under S. 465 I. P. C.—Acquittal—Subsequent trial for offence under S. 467.**

A person tried and acquitted on a charge under S. 465, I. P. C. may on the same facts be committed to the Court of Session for trial for an offence under S. 467 on the allegation of the prosecution that the document said to have been forged is a

valuable security. AIR (Vol 6) 1919 Cal 464:19 Cr LJ 388.44 Ind Cas 740 (DB).

——**Ss. 403 (1) and 236—Fresh trial not barred—Autrefois acquit — Conviction — Subsequent trial on separate and distinct charge—Connected transactions.**

A conviction under S. 352, I. P. C., on the complaint of A, is no bar to the trial of the accused under Ss. 147 and 323 of the I.P.C., on the complaint of D. that the accused was assaulting A. when he interfered and tried to stop them and that thereupon the accused turned upon D. and beat him. To apply S. 403 (1) of the Cr. P. Code it is necessary to see whether under S. 235 of the Code any charge in the previous trial could have been framed for the offences for which the accused is sought to be tried at the second trial. S. 236 of the Code only applies when the act or a series of acts is of such a nature that it is doubtful which of the several offences the facts would constitute. Where the facts disclosed in the previous trial leave no manner of doubt as to the offences they constitute S. 236 has no application. AIR (Vol 5) 1918 Pat 165:19 Cr LJ 121:4 PLW 21:43 Ind Cas 409.

——**S. 403 — Trial for offences under Ss. 341 and 352, I. P. C.—Subsequent trial under S. 504,I.P.C.**

The trial of an accused for offences under Ss. 341 and 352 of the I.P.C. does not bar the trial of the accused for an offence under S. 504 of the I.P.C. in connection with the same transaction. (1916) 7 Cr LR 238 (DB) (Mad).

——**Ss. 403 and 236—Fresh trial not barred.**

Where an accused was charged under S. 471, I. P. C., with using a forged promissory note, knowing or having reason to believe it to be forged as a genuine document in a Civil Court, it appeared that the accused was tried previously for abetment of forgery and acquitted. It was held that the previous acquittal is no bar to a second trial under S. 403, Cr. P. Code since the case was not contemplated by S. 236 (2) but was covered by S. 235 (1). AIR (Vol 2) 1915 Bom 203:40 Bom 97:17 Bom LR 881: 16 Cr LJ 761:31 Ind Cas 361 (DB).

——**S. 403 — Acquittal of some co-accused — Whether bars the trial of others.**

Acquittal of some co-accused does not bar the trial of others for the same offences (1910) 37 C 680 : 11 CRLJ 541 : 7 Ind Cas 932 (DB).

——**S. 403 — Penal Code, Ss. 182 and 500.**

A person, acquitted on a charge under S. 182 on the ground that the person to whom information was given was not a public servant, can be tried under S. 500 for defamation on the same statement. (1910) 37 Cal 604 : 14 CWN 839 : 11 Cr LJ 325 : 12 CLJ 15 : 6 Ind Cas 352 (DB).

**(ii) Offences under other Acts**

——**S. 403 — Obstruction to latrine passage.**

Accused convicted under S. 341, I. P. C., and fined — Accused again convicted on same facts under by-law No. 59:

Held, that S. 403 (2), applied and that the second conviction was legal — That the fines in previous conviction should be considered in imposing sentence in second trial. AIR (V 31) 1944 Pat 328 : 10 Cut LT 55.

——**S. 403 (1) — Acquittal under Penal Code — Subsequent trial under Forest Act not barred.**

The acquittal of a person under Ss. 379, 411, I.P.C., does not bar his subsequent trial under Ss. 35, 36, Madras Forest Act. 1937 MWN 1247.

——**S. 403 (2) — Same act or acts constituting two offences — Conviction in one — Whether bars trial of the other — Madras Towns Nuisances Act (III of 1889), S. 3 (12).**

Where a person was convicted of causing hurt under S. 323, Penal Code, and in respect of the same conduct of being guilty of disorderly behaviour under S. 3 (12) of the Towns Nuisances Act:

Held, that there was no bar to the trial of the one offence owing to the conviction in respect of the other.

Under S. 403 (2), Criminal P. C., a person can be tried for any distinct offence for which a separate charge might have been made against him under S. 235, notwithstanding that he may have been convicted or acquitted of another offence committed in the same transaction. AIR (V 19) 1932 Mad 362 : 62 MLJ 197 : 35 LW 265 : 1932 MWN 105 : 33 Cr LJ 522 : 55 Mad 788 : 137 Ind Cas 754.

——**S. 403 — Directors of company — S. 91-B, Companies Act — S. 409, I.P.C.**

Two persons, who were the directors of a Bank, were prosecuted, tried for and convicted under S. 91-B, Companies Act. They were further prosecuted for criminal breach of trust. It was contended that under S. 403 a person could not be charged on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237.

Held, that the offence under S. 91-B, Companies Act, had nothing to do with the alleged offence of criminal breach of trust of the Bank's funds. No alternative charge was possible in the proceedings under S. 91-B, Companies Act and that the case was governed by S. 403 (2), Cr P. Code. AIR (V 17) 1930 Lah 57 : 118 Ind Cas 650 : 30 Cr LJ 954 : 1930 Cr. C 25.

——**S. 403— Calcutta Police Act, S. 68 and Merchant Shipping Act S. 103 (4).**

Where the accused an officer of a steamship, was convicted under S. 68 of the Calcutta Police Act on a charge of drinking and disorderly conduct creating a disturbance by assaulting the Captain of the vessel and sentenced to pay a fine, and the Captain under S. 103 (4) of the Merchants Shipping Act charging the accused with having assaulted him and he was convicted under the said section and sentenced.

Held, that the substantial charge under the Police Act being "assault", Cr. P. Code, S. 403 (1), 2nd part, is a bar to a second conviction upon the same facts under a different enactment, namely, the Merchants Shipping Act. AIR (V 14) 1927 Cal 224 : 31 CWN 195 : 99 Ind Cas 1033 : 28 Cr LJ 233 : 7 AI Cr R 386. (DB).

——**S. 403 — Bengal Food Adulteration Act, S. 21.**

Prosecution of an accused under S. 21 of Bengal Food Adulteration Act without any order or consent in writing of the Municipal Commissioners within the meaning of S. 15 of the Act, and his subsequent acquittal under S. 245, Cr. P. Code, is no bar to his subsequent trial on the same facts for the same offence. AIR (V 13) 1926 Cal 691 : 95 Ind Cas 79: 43 CLJ 110: 30 CWN 382 27 Cr LJ 751 (DB).

**9. Miscellaneous.**

——S. 403 — Bar under — Charge-sheet under S. 307, I. P. Code — Charge framed under S. 337 and conviction thereunder — Trial of the offence under S. 307 — Legality. AIR (Vol 36) 1949 Mad 430 : (1949) 1 MLJ 145.

——S. 403 — Applicability — Charges under Ss. 302 and 380, I. P. Code — Conviction for murder and acquittal under S. 380 — Acquittal by High Court of the charge under S. 302 — Conviction under S. 411 — Permissibility. AIR (Vol 34) 1947 Mad 114 : (1946) 2 MLJ 351.

**——S. 403 — Protection — If confined to cases falling under S. 237 or extends to cases under S. 238.**

The protection given under S. 403, Cr. P. Code, does not merely apply to cases falling under S. 237; but also to cases falling under S. 238, Cr. P. Code. AIR (Vol 33) 1946 Bom 38 : 223 Ind Cas 195 : 47 Cr LJ 378 : 47 Bom LR 998 (FB).

——S. 403 — Acquittal or discharge by Special Criminal Court constituted under Special Criminal Court Ordinance (1942) — If bar to fresh trial — Lawful Court. AIR (Vol 32) 1945 Mad 355 : 47 Cr LJ 126.

**——S. 403 — Test to decide whether subsequent trial falls under Part 2, S. 403 (1).**

The true test of deciding whether a subsequent trial comes under Part 2 of S. 403, Sub-S. (1), Criminal P. C., is to see whether the acquittal or conviction from the first charge necessarily involves an acquittal or conviction on the second charge. AIR (V 26) 1939 Cal 65 : 68 CLJ 206 : 40 Cr LJ 199: ILR (1939) 1 Cal 1: 179 Ind Cas 506 (FB).

**——S. 403 — Subsequent trial of another accused on same evidence, whether barred.**

Because an accused has been either acquitted or convicted, there is nothing in law to prevent another accused being subsequently tried and acquitted or convicted even if the decision in the second trial differs from that of the original trial on exactly the same evidence. It is probable that on exactly the same evidence, two equally competent Judges will arrive at the same conclusion, but it is the duty of a Court to decide a case on the evidence before it without being influenced by the fact that another Court has, on the same evidence on a previous occasion come to a certain conclusion. AIR (Vol 23) 1936 Pesh 152 : 37 Cr LJ 889 : 164 Ind Cas 145 (DB).

——S. 403 — An order refusing to proceed under S. 476, Criminal P. C., is not a judgment nor does it amount to an order of autrefois acquit and Magistrate can subsequently take action though he had first refused to do so. AIR (Vol 22) 1935 Pesh 1 : 36 Cr LJ 470 : 153 Ind Cas 947 (DB).

**——S. 403 — Refusal to file complaint under S. 476.**

The doctrine of autrefois acquit does not apply to a refusal by the Magistrate under S. 476 to file complaint against an accused. AIR (Vol 17) 1930 Sind 315 : 1930 Cr C 1147 (DB).

**——S. 403 — Uncommunicated order of stay.**

Where an additional District Magistrate took the case on his own file and ordered further proceedings to be stopped but the order was not communicated to the proper Court and where therefore the lower Court ordered acquittal under S. 247, Cr. P. Code,

Held, that S. 403, Cr. P. Code, was no bar for a retrial of the accused. AIR (Vol 16) 1929 Cal 657 : 1929 Cr C 327 (DB).

**——S. 403 — Offence falling within two definitions.**

A case under sub-S. (2), S. 235, is covered by the main provisions of S. 403. AIR (Vol 15) 1928 Bom 177 : 109 Ind Cas 346 : 30 Bom LR 342 : 10 AI Cr R 187 : 29 Cr LJ 522 (DB).

**——S. 403 — Cheating.**

In a charge of cheating the complainant must disclose all the evidence of deception at the first trial and he cannot institute a series of trials each based upon different evidence of deception. AIR (Vol 14) 1927 Mad 444 : 99 Ind Cas 1035 : 25 MLW 220 : 28 Cr LJ 235 : 7 AI Cr R 390.

**——S. 403 — Complaint under S. 195, Cr. P. C.**

Proceedings to which S. 195 refers are among the exceptions, and the operation of S. 403 in such cases must necessarily be complex and difficult; S. 403 itself does not refer to the identity of parties in the first and second trials as a necessary condition to the plea of autrefois acquit; it refers only to the identity of the charges, in which respect it may be contrasted with the doctrine of res judicata in Civil Procedure, and yet in the trial of the offences to which S. 195 refers, the personality of the complainant is a matter of primary importance; unless the proper complainant is before the Court, it is required to desist from taking cognizance of the complainant. AIR (Vol 14) 1927 Sind 10: 21 SLR 1: 27 Cr LJ 1105: 97 Ind Cas 417 (DB).

**——S. 403 — Ch. 31, (Ss. 404 to 431) — Limitation.**

The time spent in obtaining a copy of the diary orders in the case, which were filed with the appeal, should not be deducted while computing the period of limitation for filing an appeal. AIR (Vol 12) 1925 Rang 239 : 89 Ind Cas 459 : 26 Cr LJ 1371 : 4 Bur LJ 44 : 3 Rang 220 (DB).

**——S. 403 — Security proceedings — Offence under S. 401, I. P. C. — Trial — Proceedings under S. 110, Cr. P. C, if a bar.**

Evidence of previous convictions of theft and of being bound down under S. 110, Cr. P. C. is not admissible on a subsequent trial of the accused under S. 401, I. P. C. to prove either the commission of such offence or bad character. AIR (Vol 7; 1920 Cal 87 : 47 Cal 154 : 31 CLJ 192 : 21 Cr LJ 386 : 55 Ind Cas 994 (DB).

**——S. 403 — Release in a warrant case under S. 249.**

S. 249 is only intended to apply to summons cases instituted otherwise than upon complaint and not to warrant cases. If an order of release is passed in a warrant case under S. 249, the order is void and the case still being on the file a fresh case respecting the same offence cannot be started on a complaint by a private party. AIR (Vol 13) 1926 Pat 292 : 5 Pat 243 : 7 PLT 449 : 94 Ind Cas 890 : 27 Cr LJ 698 (DB).

**——Ss. 403 and 247 — Acquittal on date not fixed for hearing — Effect of — Further trial — Bar.**

An order of acquittal passed by a Magistrate under S. 247, Cr. P. C. on a date not fixed for the hearing is a nullity. The Magistrate can ignore this order and proceed with the case on the date originally fixed, without an order from a Superior Court to revive the proceedings. AIR (Vol 2) 1915 Cal 119 : 42 Cal 365 : 18 CWN 1180 : 16 Cr LJ 148 : 27 Ind Cas 212 (DB).

**——Ss. 403, 495 — Security proceedings — Withdrawal of — Institution of fresh proceedings — Proceedings under S. 107.**

Ss. 403 and 495, Cr. P. C. does not apply to security proceedings but applies only where the proceedings end in an acquittal or discharge of the accused. A proceeding under S. 107 does not terminate in either of the two ways. Neither an order of discharge nor of acquittal can be made in law when the accused has not been directed to

appear. (1913) 36 Mad 315 : 14 Cr LJ 559 : 21 Ind Cas 159 (DB).

——S. 403 — In Cl. 4 "competency" means the character and status of the tribunal. (1913) 36 Mad 308: 24 MLJ 463 : 13 MLT 360 : 14 Cr LJ 214 : 19 Ind Cas 310 (DB).

——S. 403 — Where an accused, put on his trial for an offence, shows an order of acquittal passed by a competent court apparently, the court cannot impeach such order unless it is set aside by a competent court. The accused can plead the acquittal under S. 403. (1911) 8 ALJ 1129 : 12 Cr LJ 575 : 12 Ind Cas 839.

**——S. 403 (1) — Comp'aint without authority — Whether bar to new trial.**

A soldier intimating falsely to a Magistrate, that he had authorised his brother to complain for him, is not barred from instituting a fresh comp'aint himself. (1909) 31 All 317 : 6 ALJ 262 : 9 Cr LJ 526 : 2 Ind Cas 219.

### 10. Principle.

**——S. 403 — Autrefois acquit — Plea not available — Principles when can be extended.**

Even where the plea of autrefois acquit is not technically available, the principle of it is available for the accused when the interests of justice require its extension in his favour. Circumstances that the jury have unanimously held the accused not guilty in the earlier trial under S. 409 and the accused has once been acquitted, that the accused has in fact paid the whole amount involved in the two trials; that he has already suffered one lengthy trial, and that it is undesirable that in the second trial there should be any risk of the jury's taking a view different from that taken by the jury in the first trial, are such that the above principle should be applied to the facts and the second trial of the accused should be prevented. AIR (Vol 32) 1945 Bom 413 : 47 Bom LR 138 : 47 Cr LJ 138 : 221 Ind Cas 266 (DB).

——S. 403 — Principle does not apply to cases where two charges do not fall within the scope of Ss. 236 and 237. 1938 MWN 586 : 48 MLW 145 (2).

——S. 403 — It is a fundamental principle that a person once acquitted of an offence cannot again be tried for that offence (S. 403, Criminal P. C.). But dismissal of a complaint or discharge of an accused in a warrant case is no bar to his being thereafter tried on the same facts. AIR (Vol 25) 1938 Pat 99 : 4 BR 332 : 16 Pat 650 : 19 PLT 21 : 39 Cr LJ 353 : 1938 PWN 41 : 173 Ind Cas 742 (DB).

**——S. 403 — Res judicata — When arises.**

Per Lakshmana Rao, J. —There is no rule of res judicata in criminal matters except when proceedings end in an acquittal or conviction. AIR (Vol 23) 1936 Mad 353 : 1936 MWN 281 : 43 LW 548 : 70 MLJ 635 : 37 Cr LJ 637 : 162 Ind Cas 592 (2) (FB).

**——S. 403 — Plea of autrefois acquit.**

Per Mockett, J. —Section 403, Criminal P. C. is very much wider than the rule of autrefois acquit in England and the plea of autrefois acquit can be taken at any stage in a trial. But the proper time for a plea is when the accused is called upon to plead.

The plea of autrefois acquit cannot be 'constructively' decided. AIR (V 23) 1936 Mad 353: 43 LW 548 : 1936 MWN 281 : 70 MLJ 635 : 37 Cr LJ 637 : 162 Ind Cas 592 (2) (FB).

**——S. 403 — Defence — Res judicata, if applies.**

Under the law it is perfectly open to an accused person to raise any plea of law or fact which may make for his acquittal. There is nothing like res judicata in a criminal trial as long as it does not terminate in either acquittal or conviction so as to attract the provisions of S. 403, Criminal P. C. There is nothing in law, authority or principle which would estop an accused person from showing that the act with which he is charged as penal did not constitute an offence and that on a right interpretation of the enactment under which he is sought to be penalised, it should be held that the Legislature never intended that anyone placed in his position should be criminally liable. To debar him from this defence would be nothing short of a prohibition from proving his innocence and would amount to clear denial of justice. Such a course is manifestly repugnant to the basic principle of all criminal jurisprudence. AIR (Vol 23) 1936 Nag 55 : 37 Cr LJ 474 (2) : 19 NLJ 84 : 161 Ind Cas 635 (DB).

**——S. 403 — Penal Code, Ss. 397, 307 — Charge under S. 397 — Acquittal — Fresh trial under S. 307 — Autrefois acquit.**

An accused person who has been acquitted of an offence under S. 397, I. P. C., cannot be tried again for an offence under S. 307, I. P. C., on the same facts, and the fact that the jury never addressed themselves to the alternative that they may find the accused guilty under S. 307, cannot affect the question.

Section 397 is a combination of several offences, namely, Ss. 392, 323, 324, 326 and 307, I. P. C. and a verdict of "not guilty" to a charge under that section covers every offence which was stated in it or which could have been charged therein on the same facts.

The principles on which the right to plead autrefois convict is based are in substance the same as in the case of the plea of autrefois acquit. AIR (Vol 21) 1934 Mad 311 : 66 MLJ 653 : 1934 MWN 41 : 39 LW 433 : 35 Cr LJ 783 : 57 M 554 : 148 Ind Cas 844 (DB).

**——S. 403 — Judgment of not guilty — Effect.**

It would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. AIR (Vol 21) 1934 Pat 505 : 36 Cr LJ 416 : 1 BR 227 : 153 Ind Cas 767.

——S. 403 — It is a fundamental common law rule that no one may be punished twice for the same offence and this has long been held to mean that he may not be punished twice for the same acts or omissions irrespective of the exact terms of the charge, and that the test of similarity is whether or not the evidence to obtain a legal conviction on the first charge was in substance the same as that necessary to sustain the second charge. The specific statement of this common law rule together with its limitations is contained in S. 403. AIR (Vol 17) 1930 Pat 26: 30 Cr LJ 806: 1930 Cr C 2: 9 Pat 585: 117 Ind Cas 625 : 11 PLT 722 (DB).

**——S. 403 — Test is whether the evidence is the same.**

**The real test to determine whether the charge under which the accused was previously charged & acquitted is different from the charge upon which he was subsequently tried is whether the evidence is the same in both cases.** AIR (Vol 15) 1928 Pat 577: 11 AI Cr R 29: 29 Cr LJ 760: 10 PLT 446: 110 Ind Cas 792.

**——S. 403 — Facts different.**

The principle of 'autre fois acquit' is not applicable, when, though the section is the same in both trials, the facts on which the prosecution rests, are wholly and completely different.

The previous acquittal of an accused under S. 498, I. P. C. is no bar to subsequent proceedings on a charge of subsequent detention, as this cannot be said to be a case of a person being tried for the same offence. (1928) 9 AI Cr R 315 : 29 PLR 52 : 29 Cr LJ 3 : 106 Ind Cas 339.

**——S. 403 — Village Court.**

Quaere:— Whether the dismissal by a Village Magistrate of a complaint for default of appearance tantamounts to an acquittal and whether the acquittal by a village Court not a recognized tribunal under the Cr. P. Code, will attract the application of the general principle of 'autrefois acquit' apart from the Code. AIR (Vol 14) 1927 Mad 695: 53 MLJ 102: 28 Cr LJ 507: 8 AI Cr R 178: 101 Ind Cas 891.

**11. Procedure.**

**——Ss. 403, 247 — Charge under S. 447, Penal Code — Accused acquitted under S. 247 — S. 403, held barred further trial — Proper procedure.**

The accused was charged under S. 447, I. P. C. At the third or fourth adjournment, the complainant was absent, and so the Magistrate acquitted the accused, under S. 247, Criminal P. C. The complainant had sent a telegram asking the Magistrate to adjourn the case which reached the Magistrate five minutes after the order of acquittal was pronounced. The successor of the Magistrate who acquitted the accused, thereupon permitted the complainant to file a fresh complaint and took cognisance of the case on the new complaint:

Held, that as the trial in a summons case commenced with the issue of notice to the accused, it was clear that the accused was both tried and acquitted, and therefore, S. 403, would operate as a bar to a further trial.

Held, further that the Magistrate, by allowing the case to be revived after his predecessor had acquitted the accused and closed the case was in effect revising or reviewing his predecessor's order. Subordinate Courts had no power of reviewing their own judgments. If they passed a wrong order and wished to set it right, they must apply to the District Magistrate to refer the matter to the High Court for correction. AIR (Vol 30) 1943 Mad 6: 55 MLW 525: 44 Cr LJ 176: (1942) 2 MLJ 221: 1922 MWN 601: 204 Ind Cas 273.

——S. 403 — On a previous complaint under Ss. 491, 498, Penal Code the Magistrate summoned the accused and after hearing the evidence of the complainant discharged him. After that the complainant made an application to the Magistrate to review his order of discharge. The Magistrate refused to review his judgment. After that the complainant filed another complaint on the same facts in the Court of the same Magistrate:

Held, that the application to review the discharge order was clearly against the provisions of S. 369, Criminal P. C.

Also, that although under S. 403, Criminal P. C. Explanation, the discharge of the accused is not acquittal for the purpose of that section, which would prevent the accused being again tried for the same offence, yet if the application for transfer of the case were granted and the case transferred to another Magistrate and that Magistrate convicts the accused, the situation would arise that the accused would have been discharged by one Magistrate and without that order of discharge being set aside, the accused would be convicted by another Magistrate on the same charge. The correct course for the complainant to adopt would be to make an application under S. 436, Criminal P. C., to the Sessions Judge or the District Magistrate, asking for the order of discharge to be set aside and further enquiry to be made. AIR (Vol 22) 1935 All 59: 36 Cr LJ 128: 1935 AWR 623: 152 Ind Cas 619.

——S. 403 — The defence of the accused that the trial was barred because of previous acquittal must be decided first before the start of the trial. 1935 MWN 811.

**——S. 403 — Order for re-trial — Charges on offences of which accused had been acquitted, if can be framed.**

Where the accused were tried under four charges and were convicted of two and acquitted of two charges and in the appeal against conviction, the case was sent back for re-trial whereupon the trial Judge framed charges for offences of which they had been acquitted and they were convicted of those charges and the convictions were confirmed in appeal:

Held, that a re-trial could be ordered only of the charges for which the accused had been convicted and that the trial Judge was not justified in framing charges and convicting them under the sections of which offences they had already been acquitted. AIR (Vol 20) 1933 All 941: 1933 ALJ 1446: 35 Cr LJ 668: 56 A 210: 148 Ind Cas 339 (DB).

**——S. 403 — Practice.**

Magistrate of co-ordinate jurisdiction should not entertain fresh complaint after discharge on same facts and evidence and if complainant is aggrieved by refusal of the first Magistrate to examine witnesses as to alleged admissions of guilt he must appeal to higher Court. AIR (Vol 16) 1929 Sind 242: 31 Cr LJ 687: 1929 Cr C 536: 124 Ind Cas 384.

**——S. 403 — Autrefois acquit — Decision — To investigation of facts.**

A Court ought not to decide that a charge in a pending trial before him is barred under S. 403 of the Cr. P. C. without an investigation of the facts put forward on behalf of the complainant. AIR (Vol 7) 1920 Cal 972: 23 CWN 543 (DB)

**——S. 403 — Autrefois acquit — Decision of — The plea on evidence.**

Whether there has been a previous acquittal as pleaded by the accused, has to be determined after hearing the evidence and ascertaining what the facts are in this case and what were the facts found in the previous case. AIR (V 6) 1919 Cal 57 : 23 CWN 599 : 20 Cr LJ 572 : 52 Ind Cas 60 (DB).

**——S. 403 — Fresh trial barred — Acquittal on charge of cheating — Falsification of evidence on the same record.**

So long as the acquittal under S. 420, I. P. C. stood, the accused could not be properly tried again, upon the record as it then stood, for an offence under S. 477 and if the Crown wished to proceed against him it must do so in a proper manner and by a separate proceeding, and not upon the original record. AIR (Vol 6) 1919 Pat 384: 20 Cr LJ 667: 52 Ind Cas 491.

——S. 403 — Fresh trial barred — Acquittal under (obiter).

If a prosecution is barred on account of previous trial, the accused shall not be tried according to S. 403. An order of acquittal on such a new trial is improper. (1909) 5 LBR 12: 9 Cr LJ 578: 2 Ind Cas 357.

### 12. Revision.

**——S. 403 — Ss. 345 (6) and 403 — Complaint of assault on complainant and his mother under S. 323, I. P. C. — Compromise binding only on the person who is party to it.**

A complaint of assault on the complainant and his mother was compromised after the hearing, and the accused acquitted under S. 345, Criminal P. C. Subsequently a week later, the mother filed a complaint on the same facts, before the same Magistrate. The trial Court holding the proceedings barred under S. 403, Criminal P. C.:

Held on revision — The acquittal under S. 345 (6) did not purport to acquit any accused of any offence whom the Court had no jurisdiction to acquit. There can only be a composition for an offence of causing hurt to the persons who actually were parties to the compromise. As the mother was not a party to the compromise, there was no composition with her, there can be no acquittal in respect of the hurt caused to her. So there was no bar to proceedings on her complaint. AIR (V 34) 1947 Cal 31 : 225 Ind Cas 221 (DB).

**——Ss. 403, 437 — Accused sent up under S. 302/34 convicted under S. 323 — Commitment to Sessions in revision.**

A conviction under S. 323, I. P. C., does not debar the Courts from ordering a trial of the accused under S. 302, I. P. C., an offence which is exclusively triable by a Court of Session. An order of the Magistrate to whom the accused are sent under S. 302/34, convicting the accused under S. 323 amounts to an order of discharge under S. 302/34, I. P. C., and the Sessions Judge can, in revision, pass an order for committing the accused to the Sessions Court. AIR (V 30) 1943 Pesh 89 : 45 Cr LJ 167 : 1943 Pesh L J 189 : 210 Ind Cas 10 (DB).

——S. 403 — Simple complaint of cheating — Complaint mentioning S. 489-A and S. 120, Penal Code but no evidence of conspiracy — Police investigation — Nothing in Police report about conspiracy — Petition for compromise — Compounding of the case, and accused acquitted under S. 345 (2) — Objection by Public Prosecutor on the ground of conspiracy.

Held, that there was no ground for interference in revision unless and until there was a fresh complaint or a Police report of facts amounting to conspiracy. AIR (V 29) 1942 Pat 58 : 8 BR 54 : 22 PLT 825 : 43 Cr LJ 44 : 196 Ind Cas 604 (DB).

——S. 403 — The word "trial" under S. 403, does not necessarily mean an acquittal because of the bar to further proceedings in the same way as an acquittal after trial on the merits. The mere fact that this is an acquittal not on the merits of the case, but on the initial stage of the case in the absence of the complainant, does not make any difference whatsoever for deciding whether there should be an interference in revision against the order of acquittal. AIR (V 27) 1940 Nag 357 : 1940 NLJ 399 : 41 Cr LJ 919 : 190 Ind Cas 467.

**——S. 403 (4) — Conviction under S. 211, Penal Code — Acquittal in revision — Subsequent trial under S. 182, Penal Code, sanction under S. 195, Criminal P. C., having been obtained, whether barred.**

The "competency" of the Court to try an offence" does not mean the status or character of the former Court to try the offence with which the accused is subsequently charged; but it also includes within its purview cases in which the Court, though otherwise qualified to try the case could not have done so because certain conditions precedent for the exercise of its jurisdiction had not been fulfilled.

Where it is subsequently sought to prosecute an accused on the same facts under S. 182, Penal Code, he having been once acquitted in the revision by the High Court from his conviction under S. 211, Penal Code, and the sanction for the subsequent trial is required by S. 195, Criminal P. C., is obtained, the bar of autrefois acquit does not apply. The case is governed by the exception laid down in sub-s. (4) of S. 403, Criminal P. C. AIR (V 25) 1938 Lah 625 : 40 PLR 501 : 39 Cr L J 960 : ILR (1939) Lah 373 : 177 Ind Cas 894 (DB).

**——Ss. 403, 439 — Ground that proceedings were barred under S. 403 (1) not raised in revision—High Court if can take notice suo motu.**

Where subsequent proceedings are barred under S. 403 (1) by acquittal of the accused in the prior proceedings but this ground is not taken by the accused in revision filed by him against his conviction in subsequent proceedings, the High Court can take notice of it suo motu. AIR (V 22) 1935 Nag 23.

**——Ss. 403, 437—Penal Code, Ss. 307, 323 — Charge-sheet under Ss. 307, 323 — Charge framed under S. 323 — Omission to mention charge under S. 307 — Acquittal under S. 323 — Revision — Commitment under S. 308, legality of — Order of discharge under S. 308, if implied — Jurisdiction.**

The accused was placed on trial before a Magistrate for offences under Ss. 307 and 323, I. P. C. Charge was framed under S. 323 but the Magistrate omitted to say anything about S. 307. The accused was acquitted. But the complainant applied to the Sessions Judge for revision of the order with the result that the Sessions Judge ordered that the accused should be committed to Sessions on a charge under S. 308:

Held, that there was a case before the Magistrate under S. 307 and although he had not passed any orders in regard to that part of the case, it must be held that an order of discharge was implied. The Sessions Judge, therefore, had jurisdiction under S. 437, Criminal P. C. to direct that the accused should be committed for trial. AIR (V 21) 1934 All 141 : 35 Cr LJ 865 : 1934 ALJ 478 : 4 A WR 1544 : 56 All 529 : 148 Ind Cas 999.

——S. 403 — Where, upon a revision petition to the Court of joint Magistrate, under S. 78 (8), Madras Village Courts Act, 1889, the conviction and fine passed against accused by Village Panchayat Court are set aside on ground that Panchayat Court had no legal existence at the time and hence had no jurisdiction, S. 403, Criminal P. C. is no bar to new trial on the same facts. AIR (V 21) 1934 Mad 716 : 1934 MWN 1022 : 36 Cr LJ 550 : 58 M 256 : 68 MLJ 534 : 41 LW 708 : 154 Ind Cas 602.

**——Ss. 403, 531 — Acquittal by Court without territorial jurisdiction — Fresh complaint before Court having jurisdiction — S. 531, applicability of.**

Two persons were brought to trial before the Sub-Divisional Magistrate of Vellore. It was con-

tended that he had no territorial jurisdiction to try the case, but he decided he had, and acquitted the accused. On revision, the High Court held that the Magistrate had no jurisdiction, and dismissed the revision petition. Fresh complaints were filed on the same facts before the Chief Presidency Magistrate, Madras. The accused pleaded that fresh trial was barred under S. 403, Criminal P. C.

Held, that in view of the provisions of S. 531, Criminal P. C. even the High Court could not have set aside the order of the Magistrate on the ground of mere want of territorial jurisdiction, and, therefore, the Presidency Magistrate could not ignore the order of acquittal passed by the Sub-Divisional Magistrate and the complaint to the Chief Presidency Magistrate were barred under S. 403, Criminal P. C. AIR (V 20) 1933 Mad 765: 65 MLJ 529: 34 Cr LJ 1080 : 1933 MWN 713 : 38 LW 562 : 56 M 996 : 145 Ind Cas 878 (FB).

**——S. 403 — Illegal conviction, subsequent prosecution.**

In a criminal case the accused were let off on revision on the ground that the trial was illegal. No mention, however, was made of one of the accused who had been convicted and sentenced under S. 562, Criminal P. C. In a subsequent prosecution of that accused, it was contended that the previous conviction was not a bar as it had been automatically set aside by the finding that the trial was illegal:

Held, that an illegal conviction stood on a different footing from a conviction by a Court without jurisdiction and the second prosecution was barred by S. 403, Criminal P. C. AIR (Vol 18) 1931 Lah 199: 32 Cr LJ 731: 131 Ind Cas 373.

**——S. 403 — Second revision.**

Fresh application for revision on the same grounds is not maintainable. 25 ALJ 1010: 8 AI Cr R 337: 8 LRA Cr 135: AIR (Vol 14) 1927 All 724.

**——Ss. 403 (4) and 439 — Revision.**

Ordinarily the High Court will not revise an order of acquittal but will do so where the order has been passed without examining the prosecution side, and on the mere denial of the accused of his guilt. UBR (1912) 148: 14 Cr LJ 177: 19 Ind Cas 177.

**——S. 403 — Fabrication of several documents at same time — Charged framed as to some — Second trial — Same offence — Revision — Criminal Procedure Code, Ss. 403, 439.**

Six documents were fabricated at one and the same time. The petitioner was charged with the fabrication of these documents, but the charge was at first framed only as to three. The petitioner was acquitted by the High Court. He was subsequently charged with the fabrication of the other three.

Held, that the petitioner was technically liable to be tried a second time and could not plead in bar his former trial.

Held, further, that the fabrication of all the documents being one single transaction, and having been treated at the former trial as such, no second trial should take place, notwithstanding that there was no legal bar. The power under S. 439 ought to be exercised with great care and regard to pending trials only in the most exceptional cases. (1905) 2 ALJ 673: 1905 AWN 238 (239) (DB).

### 13. Scope.

**——S. 403 — If a complete code upon the subject of autrefois acquit and autrefois convict.**

Quaere. Whether S. 403, Cr. P. Code, constitutes a complete Code in India upon the subject of autrefois acquit and autrefois convict or whether in a proper case the Common Law can be called in aid to supplement the provisions of the section. 76 IA 158: ILR (1949) Bom 496: 52 Bom LR 1: 1950 MWN 21: 50 Cr LJ 889: 51 PLR 405: 53 CWN 850: AIR (Vol 36) 1949 PC 264: 62 LW 677: 30 PLT 244: (1949) 2 MLJ 461.

**——S. 403 — Scope and object of — Second trial on same facts — Legality — Cases not falling under Ss. 236 and 237 — If excluded from operation of principle of autrefois acquit — First trial and acquittal under Ss. 147 and 323, I. P. Code — Second trial under S. 188.**

It is a principle of the administration of criminal law that no accused shall be tried twice on the same facts and on the same occurrence. The operation of S. 403 (1) is not confined to the circumstances provided for in that sub-section. The mischief aimed at by the section is the trying the accused over again on the same facts. The bar of autrefois acquit is not confined to cases falling within Ss. 236 and 237, Cr. P. Code. The intention of the Legislature in enacting S. 403, is that an accused shall not be vexed with more than one trial on the same facts. Where certain accused persons were tried on charges under Ss. 147 and 323, I. P. Code and acquitted by a competent magistrate, they cannot again be tried on a charge under S. 188, I. P. Code, on a complaint by a subdivisional magistrate. (1946) PWN 169: 228 Ind Cas 378: 13 BR 201: 48 Cr. LJ 93: AIR (Vol 34) 1947 Pat 290.

**——S. 403 (2) — Acquittal for one offence — Subsequent conviction for another on same facts — Legality.**

It is open to the prosecution to charge a person with one of the offences and subsequently to charge him with another although both of them formed part of one and the same transaction. AIR (Vol 32) 1945 Bom 65: 46 Bom LR 564: 46 Cr LJ 258: 217 Ind Cas 235 (DB).

**——S. 403 — Language of principles of S. 403 cannot be extended in favour of accused.**

The principles underlying the English Common Law pleas as autrefois convict and autrefois acquit have been embodied so far as India is concerned within the limits, however narrow they may be, of the language of S. 403, Criminal P. C., itself. The language of the section should not be stretched nor should the principles be extended in any way so as to give benefit to the accused, of the spirit underlying the provisions of the section, for, it would be bewildering and, indeed, might result in great injustice to the community at large. AIR (Vol 26) 1939 Cal 65: 68 CLJ 206: 40 Cr LJ 199: ILR (1939) 1 Cal 1: 179 Ind Cas 506 (FB).

**——S. 403 — Scope of — Conspiracy — Accused once tried on charge of conspiracy, fresh entry into conspiracy connected with previous conspiracy — If can be retried.**

What S. 403, Criminal P. C., lays down, if it is a conspiracy matter to be considered, is that a man cannot be tried again for that particular entry into the conspiracy for which he has already been tried. Section 403 does not say, that for any fresh entry into the conpiracy, he cannot be tried. When a person, who is tried and convicted or acquitted on a charge of conspiracy, subsequently enters into a conspiracy connected with the previous one, by a fresh agreement, such agreement amounts to a fresh participation in conspiracy and S. 403 is, therefore, no bar to the trial of such person with regard to such fresh entry. AIR (Vol 26) 1939 Cal 65: 68 CLJ 206: 40 Cr LJ 199 : ILR (1939) 1 Cal 1 : 179 Ind Cas 506 (FB).

**——S. 403 — Bar under S. 403 — When operates.**

Section 403 (1), Criminal P. C., will operate in cases covered by Ss. 236 and 237, but will not

operate in cases covered by S. 235, sub-s. (1). AIR (Vol 20) 1933 Bom 447: 35 Bom LR 985: 35 Cr LJ 112: 58 Bom 23: 146 Ind Cas 587 (DB).

——S. 403 — Accused not to be punished twice.

Where the circumstances leading to the accused's conviction have arisen out of one and the same transaction, he cannot be punished twice for the same offence. AIR (Vol 20) 1933 Nag 177: 34 Cr LJ 1260: 146 Ind Cas 208.

——S. 403 — Scope is wide.

The wording of S. 403 is very wide and the jurisdiction of the Court does not merely refer to the character and status of the Court to try the offence, but also refers to want of jurisdiction on other grounds as shown by illustrations (f) and (g) to the section. It also covers cases where the trial is held to be without jurisdiction for want of a sanction under S. 195. Where there was no trial of the accused on the merits as the conviction was set aside on the ground of want of jurisdiction in the Court to try the accused, S. 403 (1) does not operate as a bar to his second trial. (36 Mad 308, Dist. from.) 5 Pat 452: 7 PLT 383: 27 Cr LJ 849 : 95 Ind Cas 929 : AIR (V 13) 1926 Pat 302 (DB).

**——S. 403 — Scope of — Effect of S. 308 on — English law compared — Autrefois acquit — "Might have been charged".**

Where A was accused of (1) murder of B, (2) culpable homicide of, B and the jury unanimously found him not guilty on the 1st point but differed as to the second point, whereupon the Judge discharged the Jury and directed retrial and was urged in defence that as the accused was acquitted on the first point, he could not be tried on the other.

Held, that S. 403 applied only where the charge on the second point "might have been made", in the previous trial and not where as in this case the charge on the second point, was actually made, further that for the purpose of the section the accused was not being tried again but was being tried on the original indictment itself. S. 308 does not effect the construction of S. 403 of the Code. The construction of the section should not be with reference to the English law of criminal pleading. The section has nothing to do with pleading but is in terms of a limitation on the jurisdiction of the Court. A defence under that section may be set up at any time before verdict in any form. 18 CWN 723: 15 Cr LJ 460: 41 C 1072: 24 Ind Cas 340: AIR (Vol 1) 1914 Cal 901.

——S. 403 — Scope of — Ss. 211 and 182, I. P. C.

The section applies even if sanction was not obtained at a previous trial for the institution of proceedings under S. 211, I. P. C. (1913) 36 Mad 308: 24 MLJ 463: 13 MLT 360: 14 Cr LJ 214: 19 Ind Cas 310 (DB).

**——Ss. 403 and 494 — Scope — Fresh prosecution — Bar.**

S. 403 applies to an order of acquittal made under S 494 of the Code. It embodies the rule as to pleas of autrefois acquit and autrefois convict subject only to the exceptions. (1913) 9 NLR 26: 14 Cr LJ 135: 18 Ind Cas 887.

### 14. Tried — Meaning of.

**——Ss. 403, 308, 305, 237, 238 and 299 — Accused charged in High Court with murder only — Judge directing jury to return verdict on lesser offence — Jury holding accused not guilty of murder unanimous and not guilty of grievous hurt by divided verdict — Judge disagreeing with latter verdict but acquitting accused instead of discharging jury — S. 403 is not bar to re-trial of accused under S. 308 for grievous hurt.**

Although the accused in the High Court was only charged with murder the Judge in his charge to the jury directed them that if they found on the facts that the lesser offence of culpable homicide not amounting to murder or of grievous hurt was committed they could bring in a verdict on the lesser offence. The jury brought in a unanimous verdict of not guilty on the charge of murder and also on the charge of culpable homicide not amounting to murder, and they brought in a divided verdict of not guilty by six to three on the charge of grievous hurt. On this verdict the accused was acquitted on the charge of murder and culpable homicide not amounting to murder. With regard to the verdict on the charge of grievous hurt, the Judge disagreed with the jury. The Judge, instead of discharging the jury under S. 305 (3) acquitted the accused, under impression that re-trial of the accused under S. 308, would be barred by S. 403. The question was whether S. 403 operated as a bar to the re-trial of the accused by another jury under Ss. 305 and 308, on the charge of grievous hurt. It was contended that as the accused was charged only with murder and no specific charge was framed for grievous hurt the jury were not bound to return the verdict with regard to the offence of grievous hurt and, therefore, the acquittal on the charge of murder operated as a bar under S. 403, against a re-trial for the minor offence of grievous hurt which was included in the major offence of murder:

Held that (1) Section 328 enables the Court to convict an accused of the minor offence if he was charged with the major offence although no specific charge in regard to the former was framed against him and under S. 299, it was the function of the jury to find the facts but as to the law applicable to those facts they must take the direction of the Judge and return the verdict accordingly. Therefore, when the Judge in his charge to the jury directed them that on a certain finding of facts they should return a verdict on the minor offence the jury was bound to return the verdict on the minor offence namely of grievous hurt although the accused was not charged with the minor offence;

(2) that a retrial resulting from the disagreement by the Judge with the jury under S. 305 and as provided by S. 308 was not a new trial as contemplated by S. 403 and, therefore, the order of acquittal on the charge of murder did not give the accused protection under S. 403 of not being liable to be re-tried for the offence of grievous hurt;

(3) that the Judge having disagreed with the jury under S. 308, there must be a re-trial of the accused for the offence of grievous hurt. AIR (Vol 33) 1946 Bom 38: 47 Bom LR 998: 223 Ind Cas 195:

**(Reverses AIR (Vol 32) 1945 Bom 110: 46 Bom LR 818).**

**(Overrules AIR (Vol 18) 1931 Bom 309: 55 Bom 520).**

**——S. 403 — Court, whether includes jury — Acquittal by Court with jury in excess of legal number — Subsequent trial, bar of.**

The word 'Court' in S. 403 excludes the jury, Hence an acquittal by a Court of Session of an accused would bar his subsequent trial even though the jury consisted of members in excess of the legal number. AIR (Vol 32) 1945 Bom 183: 46 Bom LR 860: ILR (1945) Bom 196: 46 Cr LJ 520: 218 Ind Cas 499 (DB).

**——Ss. 403, 236 to 238 — Accused tried for stabbing deceased in abdomen — Wound resulting in death — Judge suggesting alternative verdicts of murder or grievous hurt — Jury giving verdict of**

**grievous hurt by 5 to 4 — Re-trial for grievous hurt — S. 403 (1), held applied.**

The actual acts which formed the subject-matter of the charge were very simple. They consisted simply of an attack made by the accused against the deceased and a wound which he inflicted with a stabbing instrument in the abdomen; which wound caused the death of the deceased. The accused was tried on the charge of murder. The Judge at the trial suggested to the jury that on the evidence, if they believed it, alternative verdicts were possible. He told them that if they held that the accused intended to kill the deceased, then his offence would be one of murder but that if he had no such intention, the offence would be causing grievous hurt with a dangerous weapon. The jury returned a verdict of guilty of causing grievous hurt by 5 to 4. The Judge ordered that the accused be kept in custody and be re-tried at the next Sessions and he added. 'Having regard to the jury's verdict, he should be tried only under S. 326, having been acquitted under S. 302.' The accused was accordingly put up for trial:

Held, that S. 236, Criminal P. C., and not S. 238, applied. The case was one in which, on certain concrete facts which had been spoken to by the witnesses, it was left to the jury to decide what the intention of the accused must be deemed to have been. In other words, it was doubtful from the "single act or series of acts" which constituted the offence, whether the offence was the offence of murder or of causing grievous hurt with a dangerous weapon. The language of S. 403 (1) must be deemed to apply to the case, however anomalous it might seem that the accused should be protected from further trial for an offence of which, according to the opinion of five out of nine jurymen, he was actually proved guilty. It was not open to the Judge to try the accused upon the charge and the accused must be acquitted. AIR (Vol 30) 1943 Mad 737: 56 MLW 499: 45 Cr LJ 518: (1943) 2 MLJ 297: 1943 MWN 578: 212 Ind Cas 97.

**——S. 403 — Charges under S. 465, Penal Code (Act XLV of 1860), and S. 52, Income-tax Act (XI of 1922) — Prosecution withdrawing charge under S. 465, Penal Code — Accused acquitted of that charge and being found not guilty under S. 52, Income-tax Act, acquitted also under S. 52, Income-tax Act — Complaint under S. 196, Penal Code.**

After the framing of the charges for offences under S. 465, I. P. C., and S. 52, Income Tax Act, against the accused the prosecution withdrew the charge under S. 465, I. P. C.. So the acused were acquitted of that charge and were found not guilty under S. 52, Income Tax Act and were acquitted under that charge also. The accused were sought under S. 196, I. P. C., to be put upon trial upon a complaint which consisted of the facts which were the foundation of the charge framed under S. 465, I. P. C.:

Held, that the accused were acquitted of the charge under S. 465, upon the withdrawal of the charge. They could not, therefore, be tried again on the same facts under S. 196, I. P. C., and the proceedings under S. 196, I. P. C., should be quashed. AIR (V 28) 1941 Pat 442 : 22 PLT 255 : 7 BR 965 : 42 Cr LJ 774 : 195 Ind Cas 698.

——S. 403 — An accused was tried and convicted on July 22, 1933 of attempted murder of one G and sentenced to imprisonment under S. 307, I. P. C. G died on July 25. The accused was re-tried under provisions S. 403 (3), Criminal P. C. and sentenced to death under S. 302, I.P.C.

Held, that the previous conviction was no bar to subsequent trial and conviction. AIR (Vol 22) 1935 Pesh. 18: 36 Cr LJ 813: 155 Ind Cas 287.

——S. 403 — Where the accused is charged and convicted first for falsification of accounts, there is nothing illegal in proceeding against him for the breach of trust in another trial. 1934 MWN 1094.

**——S. 403 — Fresh trial barred — Connected offence.**

If in a previous trial for offence under a different Act a person is convicted and the sentence enhanced in view of another offence under Penal Code for which no charge was framed, there cannot be subsequent trial for that offence inasmuch as the Court has taken account of the same previously though indirectly. AIR (Vol 17) 1930 Cal 60: 124 Ind Cas 69: 33 CWN 948: 1930 Cr C 12: 31 Cr LJ 613 (DB).

**——S. 403 — Conviction and acquittal not in force.**

Section 403 (1) forbids a retrial only where a person has been convicted or acquitted and such conviction or acquittal remains in force. When the conviction is set aside and is no longer in force and no acquittal also is in force, a retrial can be ordered. AIR (Vol 16) 1929 All 710: 121 Ind Cas 248: 31 Cr LJ 230: 10 LRA Cr 108: 1929 Cr C 294: 12 AI Cr R 118 (DB).

**——S. 403 — Breaches of trust, etc.**

If a person commits breach of trust of or misappropriates different sums of money he commits so many offences. But it is not desirable that he should be tried as many times when he could have been tried for all of them at one trial. AIR (Vol 16) 1929 Cal 457: 49 CLJ 378: 33 CWN 454: 57 Cal 17: 1929 Cr C 91 (DB).

**——S. 403 — Acquittal under S. 247.**

The meaning of the word "tried" in S. 403 (1) does not necessarily import a decision of a case on merits, but only refers to the nature of the proceedings that were had; or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial. Therefore, an acquittal under S. 247 would bar a further trial under S. 403 (1). AIR (Vol 16) 1929 Cal 189: 49 CLJ 119: 33 CWN 260: 116 Ind Cas 174: 30 Cr LJ 585: 12 AI Cr R 463 (DB).

**——S. 403 — Acquittal under S. 247.**

The word "trial" in S. 403 does not necessarily import a decision of any case on the merits. A trial commences, if not from the moment an accused is served with summons, certainly from the moment he appears in Court on the case being called. An acquittal under S. 247 is a bar to further prosecution. AIR (Vol 14) 1927 Nag 388: 28 Cr LJ 183: 99 Ind Cas 855.

**——S. 403 — Condition — Trial and acquittal.**

A verdict of acquittal is immune from challenge; but it is only when an accused has been "tried" and acquitted of an offence that the immunity arises. AIR (Vol 13) 1926 Cal 691: 43 CLJ 110: 30 CWN 382 : 27 Cr LJ 751 : 95 Ind Cas 79 (DB).

——S. 403 — Trial and acquittal of an accused under Penal Code, S. 325 with 147 does not bar his subsequent trial on the same facts under Penal Code, S. 302. (1926) 94 Ind Cas 359 : 7 LRA Cr 115 : 27 Cr LJ 615 (DB).

**——S. 403 — Trial and acquittal for mischief on certain facts precludes fresh charge for rioting on merely the same facts.**

Where an accused was alleged to have gone with a number of others to a palmyra tope and it was alleged that some of the members in that assembly climbed up the trees and cut the spathes of the palmyra trees and threw down the pots attached to the spathes in which toddy was being

collected and the accused was once charged with mischief under S. 427 of the Penal Code and acquitted on the ground that he was not present at the scene of occurrence.

Held, he could not subsequently be charged with rioting under S. 147 of the Penal Code on the allegation that he along with the same body of people as on the former occasion went to the tope and that some of them destroyed the spathes in pursuance of the common object, viz., of committing mischief by destroying the spathes and breaking the pots because the two transactions were so closely overlapping that it was open to the prosecution to have framed an alternative charge of mischief and rioting under S. 236. Section 403 is not a section easy of construction but the general principle underlying it is to be borne in mind namely that a man should not be put upon his trial twice over on the same facts as it is a great hardship for a man to stand more than one trial for any one offence. AIR (Vol 11) 1924 Mad 478: 76 Ind Cas 708: 19 MLW 31: 33 MLT 269: 1924 MWN 153: 25 Cr LJ 244.

——S. 403 — **Fresh trial barred — Autrefois acquit — Previous trial on charges under Ss. 380 and 411, I. P. C. — Subsequent trial under S. 54 A of the Calcutta Police Act.**

S. 403, Cr. P. C., bars the trial of an accused a second time on the same facts of an offence cognate to or involved in the offences with which he was previously charged. The petitioner found in possession of a quantity of jute was tried on charges under Ss. 380, 411, I.P.C. and convicted by the Magistrate, but acquitted by the High Court. He was again placed on his trial under S. 54 A of the Calcutta Police Act in respect of the same act.

Held, that the subsequent proceedings were barred by S. 403, Cr. P. Code. AIR (Vol 5) 1918 Cal 406: 45 Cal 727: 22 CWN 199: 27 CLJ 434: 19 Cr LJ 198: 43 Ind Cas 614 (DB).

——S. 403 — **Fresh trial barred.**

A person was tried and convicted for misappropriation of money during a certain period and was again put on trial in respect of other sums misappropriated during the same period. Held the fresh trial was barred as the charge in the first case may be taken to have included all items misappropriated. AIR (Vol 4) 1917 Mad 524: 17 Cr LJ 30: 32 Ind Cas 158 (DB).

——S. 403 (4) — **Fresh trial not barred — Autrefois acquit — Same facts — Different offence.**

Acquittal by a Dt. Magistrate of offences under Ss. 325, 326, 141, I.P.C. is no bar to retrial on the ground that the offence admitted was murder. 7 PR 1912 Cr: 39 PWR 1912, Cr: 243 PLR 1912: 13 Cr LJ 742: 17 Ind Cas 54 (DB).

——S. 403 — **Fresh trial barred — Acquittal under S. 498, I.P.C. — Retrial under S. 363, I.P.C.**

Were a person acquitted under S. 498, I. P. C., is retried under S. 363, he cannot so long as the order of acquittal remained in force be deemed to have committed that offence, but the accused's innocence of enticing away a married woman would not prove his innocence of kidnapping her child. 56 PLR 1911: 58 PWR 1911 Cr: 12 Cr LJ 94: 9 Ind Cas 511.

——S. 403 — "Trial" in S. 403 does not necessarily imply decision on the merits. (1911) 34 M 253: 9 MLT 93: 12 Cr LJ 41: 9 Ind Cas 253.

——S. 404.

——S. 404 — **Appeal — Right of — It is governed by particular statute by which offender is tried.**

Per Iqbal Ahmad, C. J. — The commission of an offence does not give a right of appeal to the offender. The date of the commission of the offence is, therefore, wholly irrelevant to the determination of the question whether an offender has or has not a right of appeal. The right of appeal is the creation of a statute and it must, therefore, be governed by the statute in conformity with which a particular offender is tried. AIR (Vol 30) 1943 All 26: 1942 AWR HC 392 (1): 1942 ALJ 686: 44 Cr LJ 216: ILR (1943) All 238: 205 Ind Cas 113 (FB).

——S. 404 — **Substantive right such as right of appeal — When accrues.**

Per Grille, C. J. — When a civil action has begun a litigant in that action is entitled to substantive rights such as the right of appeal as existed at the time the action was brought, and those rights cannot be altered to his detriment during the pendency of the litigation which includes an appeal to the highest tribunal available; neither can there be alteration in his favour, when finality has once been reached, by any subsequent legislation. This is also true in respect of criminal cases when once a case has been brought before the Criminal Courts. AIR (Vol 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 NLJ 16: 44 Cr LJ 237: 205 Ind Cas 161 (DB).

——S. 404 — **Right of appeal and trial by jury are substantive rights.**

Per Niyogi and Digby, JJ. — A right of appeal and a right of trial by jury are substantive rights and not mere matters of procedure. AIR (Vol 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 NLJ 16: 44 Cr LJ 237: 205 Ind Cas 161 (DB).

——S. 404 — **Right of appeal is not natural but created by statute.**

A right of appeal is not a natural right; it is created by statute. Consequently it is inaccurate to say that the accused have been robbed of their right of appeal by the Magistrate by imposing a fine below Rs. 50. AIR (Vol 28) 1941 Lah 414: 43 Cr LJ 170: 197 Ind Cas 446.

——S. 404 — All that S. 404 indicates is that the appeals are to be against judgments and orders; but that section has nothing to do with the forum of the appeal, the determination of which must depend on the interpretation of the words used in Ss. 406, 407, 408, 410 and 411. AIR (Vol 25) 1938 All 102: 1937 AWR 1147: ILR (1938) All 157: 1937 ALJ 1152: 39 Cr LJ 345: 173 Ind Cas 663 (DB).

——S. 404 — **Jury — Material for successful challenge not made for excusable reasons — Adverse verdict, if should be set aside.**

There is nothing in the decision of the Board in Ras Behari Lal v. King-Emperor, 60 I. A. 354 to warrant the wide proposition that in every case in which there was material for a successful challenge and it was not made for excusable reasons, an adverse verdict should be set aside. Such a proposition is ill-founded and is contrary to the well-settled principles laid down by the Board with regard to its intervention in criminal matters. AIR (Vol 24) 1937 PC 108: 38 Cr LJ 503: 1937 MWN 385: 1937 PWN 969: 46 MLW 125: 42 CWN 1: 168 Ind Cas 67.

——Ss. 404, 411 — **Sentence of whipping by Presidency Magistrate.**

There is no appeal to the High Court from a sentence of whipping passed by a Presidency Magistrate, in view of Ss. 404 and 411, Criminal P. C. AIR (Vol 24) 1937 Bom 336: 39 Bom LR 470: 38 Cr LJ 985: 170 Ind Cas 757.

——S. 404 — **Appeal — Right of — Law governing.**

The right of appeal in criminal matters is a statutory one, and is primarily governed by S. 404 which forms the commencement of Chap. XXXI, Criminal P. C. AIR (Vol 24) 1937 Cal 413: 38

Cr LJ 876 : ILR (1937) 1 Cal 123 : 170 Ind Cas 26 (DB).

**——Ss. 404, 408, 410 — Court to which appeal lies — How to be determined — Ss. 408 and 410 — Scope.**

The Court to which an appeal lies from the judgment of the Judge is determined by the status of the Judge on the day he pronounces judgment. Sections 408 and 410, Criminal P. C., are to be read subject to the provisions of S. 404. AIR (Vol 24) 1937 Sind 22: 30 SLR 456: 38 Cr LJ 350: 167 Ind Cas 75 (DB).

**——S. 404 — Jury — Misdirection, if sufficient ground for interference.**

For their Lordships to interfere misdirection as much, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future.

In the case of misdirection, as in any other case of an alleged failure in the proper trial of a criminal case, the Board will give advice to His Majesty to intervene only if there is shown to be such a violation of the principles of justice that grave and substantial injustice has been done. The Board does not act as a general Court of Appeal and even if English Law were shown to be applicable in all its details, a failure to state the law in the summing up to the jury or to insist more clearly on the onus of proof lying upon the prosecution would not establish that there had been a serious miscarriage of justice. Apart from the circumstance that a summing up in the dominions or abroad is often imperfectly reported (if it is reported at all), admissions by the prosecuting counsel or other incidents in the course of the trial may have sufficiently brought home to the minds of a jury some factor in the case or some principle such as that of the onus of proof which might appear to have been omitted from the summing up of the Judge. AIR (Vol 23) 1936 PC 160: 37 Cr LJ 679: 44 MLW 108: (1936) MWN 832: 162 Ind Cas 470.

**——S. 404 — Leave to appeal to Privy Council from sentence of death — Letters Patent (Calcutta, Madras and Bombay), Cl. 41.**

The Criminal P. C. does not provide for an application for leave to appeal to the Privy Council from a sentence of death being entertained by any High Court but such an application can only be entertained by Chartered High Courts under Cl. 41 of the Letters Patent. AIR (V 20) 1933 Nag 216 : 34 Cr LJ 934 (2) : 29 NLR 340 : 145 Ind Cas 246 (DB).

**——S. 404 — Forum — Several accused convicted — Forum of appeal — Depends upon individual sentence.**

For the purpose of deciding the tribunal before which the appeal lies, each accused must be deemed to have been convicted in a separate case of his own; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence. AIR (V 10) 1923 Mad 95 : 43 MLJ 561 : 16 MLW 764 : 24 Cr LJ 89 : 71 Ind Cas 217 (DB).

**——S. 404 — Interlocutory order.**

Interlocutory order on question whether Magistrate has jurisdiction — Neither revision nor appeal lies — There is no provision in the Code for an interlocutory appeal or revision against a Magistrate's decision that he has jurisdiction in a case. AIR (V 13) 1926 Oudh 280 : 3 OWN 104 : 27 Cr LJ 191 : 1 Luck 48 : 13 OLJ 662 : 91 Ind Cas 1007.

**——S. 404 — Privy Council is not a Court of Criminal appeal.**

The King in Council is not a Court of Criminal Appeal and the power in the Sovereign to entertain appeals of this character is only to be exercised when there has been such a gross denial of the principles of natural justice as has been defined in numerous cases. AIR (V 9) 1922 PC 162 (1) : 26 CWN 57 : 30 MLT (PC) 180 : 1 Pat LR Cr 31 : 23 Cr LJ 743 (1) : 14 LW 558 : 69 Ind Cas 631.

**——S. 404 — Ch. 31 (Ss. 404 to 431) — Scope.**

Every section in Chap. 31 which can assist the procedure of hearing and disposing of appeals according to the principle of the Code should be incorporated in S. 250 (3). AIR (V 8) 1921 Mad 281 : 41 MLJ 172 : 13 MLW 689 : 1921 MWN 387 : 22 Cr LJ 583 : 62 Ind Cas 823.

**——S. 405.**

**——Ss. 405 and 408 — Breach of trust by partner — Criminal liability.**

A matter which is prima facie a civil dispute should not be entertained by the Criminal Court unless the prosecution is able to prove clearly and beyond doubt that the accused acted dishonestly and with a view to enrich himself cladestinely at the expense of those with whom he was working and to whom he was bound by a fiduciary relationship. AIR (V 7) 1920 Mad 150 : 11 LW 144 : 21 Cr LJ 309 : (1920) MWN 346 : 55 Ind Cas 469 (DB).

**——S. 406.**

**——S. 406, Proviso, 110 — Person proceeded against under S. 110 and sentenced for three years by Magistrate — Appeal does not lie to District Magistrate.**

Where a Magistrate sentences a person proceeded against under S. 110, Criminal P. C., for a period of three years, an appeal does not lie to the District Magistrate. AIR (V 22) 1935 Pesh 55 : 36 Cr LJ 936 : 156 Ind Cas 284 (1).

**——S. 406 — In the case of districts in respect of which a notification has been issued by the Local Government under the proviso to S. 406, Criminal P. C., appeals under that section from orders made by Additional District Magistrate under S. 118, Criminal P. C., lie to the District Magistrate and not to the Sessions Judge.** AIR (V 19) 1932 Lah 463 (1) : 32 Cr LJ 849 : 32 PLR 453 : 13 Lah 254 : 132 Ind Cas 206.

**——S. 406 — Re-trial.**

In the case of an appeal under S. 406 from the order under S. 107, the appeal is not one from conviction and therefore, apart from the provisions of S. 423, appellate Court can order re-trial. AIR (V 13) 1926 All 403 : 48 All 501 : 27 Cr LJ 945 : 24 ALJ 566 : 7 LRA Cr 121 : 96 Ind Cas 497 (DB).

**——S. 406 — Forum.**

An appeal lies to the District Magistrate from an order for security for good behaviour passed by an Additional District Magistrate. AIR (V 8) 1921 Cal 347 : 48 Cal 874 : 25 CWN 383 : 66 Ind Cas 69 (DB).

**——Ss. 406, 125, 106 and 107 — Security for keeping the peace — Cancellation of bond — Power of District Magistrate.**

Section 406 allows an appeal to the District Magistrate against an order to find security for good behaviour but in the case of an order to keep the peace, the District Magistrate's powers are limited to the cancellation of the bonds under S. 125. The section means that the Distrct Magistrate cannot

revise the original order of Subordinate Magistrate passed under S. 106 or S. 107. The section contemplates cancellation of bond for reasons arising subsequent to its execution not for the reason that the District Magistrate thinks that execution should not have been ordered. AIR (V 7) 1920 Nag 138 : 21 Cr LJ 591 : 57 Ind Cas 111.

——Ss. 406, 107 and 118 — Appeal — When allowed.

There is no right of appeal under S. 406 in proceedings under Ss. 107 and 118. AIR (V 3) 1916 All 338 : 14 ALJ 268 : 17 Cr LJ 165 : 33 Ind Cas 645.

——S. 406-A.

——Ss. 406-A, 122 and 123 — Power to reject sureties — Powers of Sessions Judge in appeal.

On a careful examination of the provisions contained in Ss. 122, 123 and 406-A, Criminal P. C., it appears that the power to reject sureties is given to the Magistrate and that there is a right of appeal from an order passed by the Magistrate refusing to accept or rejecting a surety under S. 122 to the Sessions Judge. The clear implication of these provisions of the law taken together is that the Magistrate is vested with the authority either to accept or reject sureties demandable under S. 110 of the Code, and it is not open to the Sessions Judge exercising jurisdiction under S. 123 of the Code, to accept or reject the sureties offered.

The course open to the Sessions Judge under the law as it stands is to send the proceedings back to the Magistrate, with his decisions on the merits of the case, for taking action under S. 122, Criminal P. C. AIR (V 21) 1934 Cal 482 : 35 Cr LJ 952 : 61 Cal 588 : 149 Ind Cas 460 (DB).

——S. 407.

——S. 407 — Judgment, if part of trial.

The judgment is a part of the trial, and the forum of the appeal is to be determined by the status of the Court at the time of the conviction. AIR (V 30) 1943 Bom 94 : 45 Bom LR 74 : 44 Cr LJ 481 : 206 Ind Cas 75 (DB).

——Ss. 407, 413 — Trial by Second Class Magistrate — Case pending for judgment — Magistrate invested with first class powers — Subsequent sentence of fine of Rs. 20.

The judgment is no part of the trial and the trial does not extend to the date of the delivery of judgment. Trial of a case must be taken to be complete on a date on which nothing remains to be done but to deliver judgment.

The general right of appeal conferred on a person convicted on a trial by a Magistrate of the Second Class which is conferred by S. 407, Criminal P. C., is taken away in certain cases by S. 413. Hence there is no appeal from a sentence of fine of Rs. 20 passed by a Magistrate who began the trial when he had second class powers only but was invested with first class powers after the trial had concluded but before the passing of the judgment and sentence. AIR (V 29) 1942 Pat 107 : 43 Cr LJ 7 : 22 PLT 963 : 8 BR 150 : 197 Ind Cas 87.

——S. 407 — Trial by Magistrate with second class powers — Magistrate vested with first class power before delivering judgment — Forum of appeal.

Where the entire evidence in a case as well as the arguments of both the parties were heard by a Magistrate while he had second class powers but he was vested with first class powers before giving judgment:

Held, that an appeal from his judgment would lie to the Distr' Magistrate under S. 407, Criminal P. C., and not to the Sessions Judge. AIR (V 19) 1932 Cal 460 : 36 CWN 302 : 33 Cr LJ 516 : 137 Ind Cas 854.

——S. 407 — Change in powers.

Where a second class Magistrate takes cognizance of a case and he is subsequently invested with first class powers, and the greater part of the trial takes place before him, as a first class Magistrate, an appeal from conviction by such Magistrate does not lie to District Magistrate but the case falls under S. 408. AIR (V 14) 1927 Bom 366 : 29 Bom LR 482 : 29 Cr LJ 474 : 8 AI Cr R 70 : 101 Ind Cas 602 (DB).

——S. 407 — In a case where the accused are convicted on a trial held by a Magistrate who started with second class powers, but at the time when he concluded the trial was possessed of first class powers the appeal lies to the Sessions Judge. AIR (V 14) 1927 Lah 398 : 8 Lah 203 : 28 PLR 489 : 28 Cr LJ 781 : 104 Ind Cas 109.

——S. 407 — Part of case tried as second class Magistrate and part as first class — Appeal lies to Sessions Judge.

It is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal. Where the Magistrate was vested with first class powers some time before the hearing of the arguments in the case, i.e., part of the trial was held by him as a second class Magistrate and part as a first class Magistrate.

Held, that the proper tribunal for hearing the appeal was the Sessions Judge and not the District Magistrate. AIR (V 12) 1925 Pat 472 : 6 PLT 554 : 3 Pat LR Cr 100 : 26 Cr Cr LJ 914 : 1925 PHCC 120 : 86 Ind Cas 978 (DB).

——S. 407 — "On a trial" — Conviction under the Cattle Trespass Act, S. 22 — Appeal.

A person against whom an order has been passed under S. 22 of the Cattle Trespass Act is competent to appeal, as one "convicted on a trial". (1901) 29 M 517 (518) : 5 Cr LJ 86 (DB).

——S. 407 (1) and (2) — Section 407 (1) makes an appeal ordinarily lie to the District Magistrate; for he is to hear all appeals from second or third class Magistrate if they were not transferred under S. 407 (2). But S. 407 (2) cannot properly apply to an appeal under S. 486 (1). AIR (V 29) 1942 Mad 181 : (1941) 2 MLJ 852 : 54 MLW 633 : 43 Cr LJ 397 : 1941 MWN 1073 (1) : ILR (1942) Mad 587 : 198 Ind Cas 549.

——S. 407 (1) — Where the appeal to the District Magistrate is under S. 476-B and not under S. 407 (1), the District Magistrate has no power to send the appeal to the Sub Divisional Magistrate for disposal. AIR (V 30) 1943 Mad 50 : 55 LW 591 : (1942) 2 MLJ 381 : 1942 MWN 594 : 44 Cr LJ 177 : ILR (1943) Mad 303 : 204 Ind Cas 289.

——S. 407 (2) — Appeal — Power of District Magistrate to transfer.

Section 407 deals with appeal from convictions only and therefore a District Magistrate cannot transfer to a First Class Magistrate subordinate to him, an appeal from an order sanctioning prosecution. (1912) 34 All 244 : 9 ALJ 260 : 13 Cr LJ 273 : 14 Ind Cas 657.

——S. 407, Cl. (2) — Withdrawal of appeal — Part heard appeal — Withdrawal — Omission to examine witnesses summoned by Court from which the appeal was withdrawn.

It is competent to a District Magistrate to withdraw part-heard appeals from the file of a First Class Magistrate subordinate to him under S. 407, Criminal P. C. The Court to which an appeal is transferred for disposal is not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was

withdrawn. (1907) 18 MLJ 89 : 31 M 277 (279) : 7 Cr LJ 329.

**——Ss. 407 (2), 195 (d) (7) — Appeals under S. 195 to Joint Magistrate — Power to District Magistrate to authorize Joint Magistrate to hear such appeals.**

The Court of a Joint Magistrate is not a Court to which appeals "ordinarily lie" from the judgment of Sub-Magistrates within the meaning of Cl. 7 of S. 195, Criminal P. C.

A District Magistrate is not competent to authorize a Joint Magistrate to hear applications for revoking or granting a sanction given or refused by the Sub-Magistrate. (1903) 27 M 124 (126, 127) : 2 Weir 461.

**——S. 408.**

1. Scope and applicabi'ity.
2. Right of appeal and forum.
3. Concurrent sentences.
4. Several accused — Proviso (b).
5. Change in powers.
6. Conviction under S. 124-A, Penal Code — Proviso (c).

**1. Scope and applicabi'ity.**

**——Ss. 408, 414 — Conviction under S. 562 — Appeal, if can be preferred without waiting for passing of sentence — Applicability of S. 414.**

Section 408, Criminal P. C., gives a right of appeal immediately a conviction is recorded under S. 562, without waiting for the passing of the subsequent sentence (if any). Section 414 has no application to such a case and a right of appeal conferred by S. 408 is not taken away by S. 414. AIR (Vol 27) 1940 Rang 223: 41 Cr LJ 877: 1940 Rang LR 381: 190 Ind Cas 226.

——S. 408 — Section 408 is to be read subject to the provisions of S. 404. AIR (Vol 24) 1937 Sind 22: 38 Cr LJ 350: 30 SLR 456: 167 Ind Cas 75 (DB).

**——S. 408 — Applicability.**

Courts of Session in British Baluchistan have the same powers over European British subjects and other persons as are held by Courts of Session in British India. A Court of Session, therefore, in British Baluchistan can hear such appeals as the Code of Cr. Procedure prescribes. AIR (Vol 16) 1929 Lah 187: 30 Cr LJ 918: 118 Ind Cas 438 (DB).

**——S. 408 (b) — "Sentence of imprisonment for a term exceeding four years" — Meaning of.**

The phrase "sentence of imprisonment for a term exceeding 4 years" in S. 408(b) has reference to the substantive sentences of imprisonment apart from any sentence of fine or imprisonment in default of payment of fine. AIR (Vol 5) 1918 Lah 384: 19 PR 1918 Cr: 33 PWR 1918 Cr: 19 Cr LJ 742: 46 Ind Cas 518.

**——Ss. 408, 413 and 415 — Scope.**

S. 408 of the Cr. P. C. lays down a general rule that any person convicted on a trial by a First Class Magistrate may appeal to the Court of Session; to this general rule S. 413 is an exception while S. 415 is an explanatory one intended to remove any doubts that might arise in the cases considered therein. (1911) 33 A 510: 8 ALJ 524: 12 Cr LJ 389: 11 Ind Cas 253.

**——S. 408 — European British Subject — Waiver of right to be tried by special procedure — Effect on right of appeal to High Court — Cr. P. C., Ss. 408, 446 — Applicability.**

Where the accused who was a European British subject, after being explained the privileges of a European British Subject waives his right to be tried as such, the result of the waiver is to render the provisions of Ss. 408 & 446 inapplicable to his case so that he could lose his right of appeal to the High Court. AIR (Vol 5) 1918 Pat 59: 2 Pat LW 79: 11 Cr LJ 986: (1919) Pat HCC 255: 42 Ind Cas 602.

**——Ss. 408, 435 — "Situate" — Appellate forum — Magistrate having jurisdiction over the whole District.**

Two Sessions divisions in one District:— Where a district contained two Sessions divisions, and a Magistrate was authorized to try offences committed to any portion of the district and his head-quarters was the head-quarters of one of the Sessions divisions, appeals from the Magistrate's judgments lie to the Sessions Court within whose jurisdiction the head-quarters of the Magistrate is situate, irrespective of the place where the offence was committed. The word "situate" means fixed or located, and when applied to a Court, refers to the place where the Court ordinarily sits. The word "situate" in S. 439, Criminal Procedure Code, refers to the head-quarters of the Magistrate trying the case. (1903) 16 MLJ 444: 30 M 136 (137): 1 MLT 402 (DB).

**2. Right of appeal and forum.**

**——S. 408 (b) — Accused sentenced by Assistant Sessions Judge under S. 376, Penal Code, to four years rigorous imprisonment and whipping — Trial by jury — Jury unanimous — Appeal, where lies.**

The accused was tried by the Assistant Sessions Judge of Lucknow under S. 376 of the I. P. C. The trial was held with the aid of jurors. The jurors unanimously found the accused guilty. The Assistant Sessions Judge accepted the unanimous verdict and sentenced the accused to four years' rigorous imprisonment and whipping. The accused appealed against his conviction and sentence to the High Court:

Held, that under S. 408(b), Criminal P. C., appeal should have been filed in the Court of the Sessions Judge. The mere fact that the accused has been sentenced to whipping does not alter the position. The phrase "sentence of imprisonment for a term exceeding four years" in the aforesaid clause has a reference to the substantive sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of payment of fine. AIR (Vol 21) 1934 Oudh 433 (1): 35 Cr LJ 1288(2): 11 OWN 1133: 151 Ind Cas 289.

——S. 408 — Section 408 empowers any person convicted at a trial held by an Assistant Sessions Judge to appeal to the Court of Session where the sentence of imprisonment is less than four years. If, therefore, in a case the sentence passed by the Assistant Sessions Judge is only three years, an appeal will lie to the Sessions Judge whose powers to dispose of appeal must be found within four corners of S. 423, which is not confined only to a High Court. AIR (Vol 30) 1943 Oudh 322: 1943 AWR (CC) 52: 1943 OWN 207: 44 Cr LJ 604: 207 Ind Cas 427.

**——S. 408 — Second Class Magistrate submitting case to First Class Magistrate — Latter sentencing accused on evidence on record.**

Where a case is submitted to a First Class Magistrate by a Second Class Magistrate under S. 349, Criminal P. C., and the former sentences the accused to fine below Rs. 50, the case comes within the express words of S. 408, and an appeal, if it could be claimed at all, would be under this section and not

under S. 407. AIR (Vol 24) 1937 Cal 394: 41 CWN 833: 38 Cr LJ 990: ILR (1937) 2 Cal 469: 170 Ind Cas 920 (DB).

——Ss. 408, 413 — Right of appeal — Two separate sentences of Rs. 40 fine.

The provisions of S. 413, Criminal P. C., which restrict the right of appeal conferred by S. 408 must be strictly construed. Where a Magistrate passes two separate sentences of fine of Rs. 40 on the accused the aggregate of the two sentences may be taken into account so as to save the right of appeal. AIR (Vol 18) 1931 Cal 642: 35 CWN 752: 33 Cr LJ 90: 59 Cal 19: 134 Ind Cas 1196.

——S. 408 — When appeal lies.

Where two sentences of fine exceeding in the aggregate fifty rupees are passed by a Magistrate, an appeal lies to the Court of Session under S. 408. AIR (Vol 13) 1926 Bom 416: 27 Cr LJ 926: 28 Bom LR 668: 96 Ind Cas 270 (DB).

——S. 408 — An appeal lies under S. 408, Cr. P. Code, from an order passed under S. 562(1). AIR (Vol 13) 1926 Bom 382: 28 Bom LR 671: 27 Cr LJ 873: 96 Ind Cas 121 (DB).

——S. 408 — Order of compensation under the Cattle Trespass Act is appealable.

An order awarding compensation and repayment of fines under S. 22 of the Cattle Trespass Act (1 of 1871), is appealable under S. 408 of the Cr. P. Code, the compensation so awarded not being a fine, the restrictive provisions of S. 413, Cr. P. Code, are not applicable. AIR (Vol 9) 1922 Bom 191: 46 Bom 58: 23 Bom LR 836: 22 Cr LJ 624: 63 Ind Cas 160 (DB).

——S. 408 and Ordinance III of 1914, S. 3.

Under S. 408, Cr. P. Code, when a person was charged with the infringement of an order under S. 3 of the Ordinance III of 1914 and a regular trial was heard by the District Magistrate by virtue of S. 5, Cr. P. C., an appeal lies to the Sessions Judge. AIR (V 3) 1916 Lah 207 : 10 PR 1916 Cr : 15 PWR 1916 Cr : 17 Cr LJ 225 : 152 PLR 1916 : 34 Ind Cas 641.

——S. 408 — Appeal — Forum.

Sentences of Magistrates are appealable to the Court of Session. (1913) 14 Cr LJ 195: 19 Ind Cas 195 (DB).

——Ss. 408, 439 (5) and 562 — Appeal and revision — When lies.

An appeal lies against an order of conviction without sentence under Ss. 562 and 408 and no revision can be entertained where an appeal lies. (1909) 5 LBR 129: 11 Cr LJ 152: 4 Ind Cas 1027.

### 3. Concurrent sentences.

——S. 403 — Separate sentences to run consecutively — Appeal to High Court, maintainable.

Where the accused was convicted and sentenced under Ss. 366 and 376, I. P. C., and it appeared that the sentence for each offence was less than four years but the aggregate of the two exceeded that term, Held, that the sentences should be treated as a simple sentence because of S. 35 (3) and that an appeal was maintainable under S. 408(b). 1930 ALJ 1206.

——S. 403 — Total term of imprisonment not exceeding four years — Other concurrent sentence of lesser period need not be considered.

Where the total term of imprisonment, to which an appellant has been sentenced, either by an Assistant Sessions Judge or by a S. 30 Magistrate does not exceed four years the appeal undoubtedly lies to the Court of the Sessions Judge; (15 CWN 734 and 17 CWN 72, not Foll.)

The fact that other concurrent sentence of a lesser period has been passed against the appellant under provisions of the Penal Code, does not preclude the Sessions Court from dealing with the appeal.

Further, appellate Court in such a matter is only concerned with the actual substantive sentence imposed so far as the question of where the appeal lies is concerned, and the fact that the Magistrate, in determining the length of the sentence took into account the length of time the appellant had been under trial, will not affect the question. AIR (Vol 14) 1927 Nag 255: 8 AI Cr R 295: 10 NLJ 135: 28 Cr LJ 672: 103 Ind Cas 208.

——S. 408 — Appeal — High Court or Sessions Court.

If an Assistant Sessions Judge sentences an accused to an imprisonment for a period not exceeding four years under each of two sections of the Penal Code, the sentences to run concurrently, an appeal lies to the Sessions Court and not the High Court. AIR (Vol 3) 1916 Cal 464: 23 CLJ 595: 17 Cr LJ 266: 34 Ind Cas 986 (DB).

——S. 408 — Sentence exceeding four years — Concurrent sentences — Appeal — Jurisdiction.

The words 'aggregate sentences in S. 35 relates to a case of consecutive sentences and not to concurrent ones. Therefore an appeal from a conviction by an Assistant Sessions Judge sentencing the accused under Ss. 304 and 307 I. P. C. to four years on each count the sentences to run concurrently, lies to the Dt. Judge. (1913) 11 ALJ 111: 14 Cr LJ 119: 35 All 154: 18 Ind Cas 679.

——S. 408 (b) — Concurrent sentences — Appeal — Forum.

Where there were two sentences one of 4 years and the other for 7 days which were to run concurrently, an appeal lies to the Sessions Court and not to the High Court. (1909) 11 Bom LR 544: 10 Cr LJ 250: 3 Ind Cas 171 (171) (DB).

### 4. Several accused — Proviso (b).

——S. 408 — Trial of two accused by Assistant Sessions Judge — Sentences of 5 years and 7 years — Appeal lies to High Court and not to Sessions Judge. 1931 MWN 1068 (DB).

——S. 408 — Some accused sentenced to less and some to more than four years at one trial — Appeals of all accused lie to High Court.

When one accused has been sentenced to more than four years, all other accused persons convicted at the same trial, have to appeal to the High Court even though they themselves have received smaller sentences and this is so even if the accused, who has got more than four years, does not choose to appeal. AIR (Vol 13) 1926 All 160: 24 ALJ 151: 7 LRA Cr 8: 7 LRA Cr 17: 27 Cr LJ 175: 91 Ind Cas 959.

——Ss. 408 and 413 — Appeal — Joint trial of several accused.

Where several accused were jointly tried and some of them were given appealable sentences and the accused whose sentences were appealable preferred an appeal, the accused with non-appealable sentences are not entitled to have their case examined as if an appeal lay in their case also. AIR (Vol 6) 1919 Mad 1163: 7 LW 571: 19 Cr LJ 623: 24 MLT 182: 45 Ind Cas 527 (DB)..

**——Ss. 408 and 413 — Joint trial — Appealable — Non-appealable sentences — Appellate Court, if can deal with — Appellate sentence.**

Per Atkinson, J.— If two or more persons are tried jointly and some are convicted and awarded non-appealable sentences and others are convicted and awarded appealable sentences and such persons as have been convicted and awarded appealable sentences appeal, the law does not warrant under such appeal the right to re-open the trial as an appeal in favour of those persons who have been convicted and awarded non-appealable sentences. Per Jwala Prasad, J.— The accused who have been given non-appealable sentences have the right of appeal with others. AIR (Vol 6) 1919 Pat 556: 4 Pat LJ 435: 20 Cr LJ 545: 51 Ind Cas 833 (DB).

**——S. 408 (b) and 30 — Sentence exceeding 4 years.**

An appeal against an order of First Class Magistrate with powers under S. 30 sentencing one accused to 2 years and the rest for 5 years lies not to the Dt. Judge but to the Chief Court. AIR (Vol 3) 1916 Lah 441: 5 PR 1916 Cr: 122 PLR 1916: 17 Cr LJ 299: 56 PWR 1915 Cr: 35 Ind Cas 171.

**——S. 408 — Joint trial of several accused — Accused awarded appealable sentence — Appeal of others — Competency.**

Where on a joint trial of two or more persons, an appealable sentence is passed upon one of them, all the convicted persons have the same right of appeal even though their sentences are of a kind for which an appeal is barred under the Cr. P. Code, S. 413 if they had been tried severally. Dissenting from 5 Bom HCR Cr 24; 7 Bom HCR Cr 30. AIR (V 3) 1916 Lah 302 : 17 Cr LJ 173 : 16 PR 1916, Cr : 21 PWR 1916 Cr: 33 Ind Cas 653 (DB).

**——Ss. 408 and 413 — Appeal — Several persons sentenced at one trial.**

Where two persons are tried together before a First Class Magistrate and one is sentenced to imprisonment exceeding one month and the other to a fine not exceeding Rs. 50, both can appeal to the Court of Session under S. 408. AIR (Vol 3) 1916 Lah 193: 30 PR 1915 Cr: 17 Cr LJ 27: 45 PWR 1915 Cr: 32 Ind Cas 155.

**——S. 408 (b) — Assistant Sessions Judge — Different sentences — Appeal to High Court.**

Where an Assistant Sessions Judge sentences one of several accused to more than 4 years' rigorous imprisonment, and others to lesser terms, the appeals of all, lies to the High Court even though the accused who is sentenced to more than 4 years, does not appeal. AIR (Vol 2) 1915 All 356: 37 All 471: 13 ALJ 719: 16 Cr LJ 606: 30 Ind Cas 158.

**——S. 408 (b) — Appeal — Assistant Sessions Judge — Forum.**

At a trial some persons were convicted by an Assistant Sessions Judge and sentenced to over 4 years' imprisonment, and others to less than 4 years' imprisonment. Held, the appeal of the latter also lay to the High Court. AIR (Vol 2) 1915 All 20: 13 ALJ 272: 16 Cr LJ 353: 28 Ind Cas 737.

**——Ss. 408 and 413 — Different sentences on several persons convicted at one trial — Right of appeal.**

Where different sentences were passed on several persons convicted at one trial in some cases appealable, in other not appealable, no right of appeal arises in the latter cases, simply because there is one consolidated appeal by all convicted persons. AIR (Vol 1) 1914 Mad 433: 16 MLT 33: 23 Ind Cas 739: 15 Cr LJ 371 (DB).

**——S. 408 — Sentence for more than 4 years.**

An appeal against a sentence exceeding 4 years by the Dt. Magistrate lies to the High Court and not to the Sessions Judge, though some of the accused in the same trial have been sentenced to imprisonment for a period less than 4 years. 161 PLR 1911: 12 Cr LJ 236: 53 PWR 1911, Cr: 10 Ind Cas 278 (DB).

**——S. 408 (b) — "In any case" — Appeal from the sentence of Assistant Sessions Judge — Appeal by persons sentenced to less than 4 years while another accused in the case has been sentenced to more than 4 years.**

Whenever an Assistant Sessions Judge sentences any of the accused in a case to more than 4 years' imprisonment, the appeal always lies to the High Court, whether it be by the person who is sentenced to 4 years or by one who is sentenced to less than 4 years in the same case; and the Sessions Judge has no jurisdiction to entertain an appeal from persons sentenced to less than 4 years. (1907) 17 MLJ 248 (249) (DB).

5. Change in powers.

**——Ss. 408, 407 — Second Class Magistrate during pendency of trial invested with first class powers—Appeal.**

Where a Magistrate has begun a trial as a Second Class Magistrate, but is subsequently invested with first class powers and after this, one witness for defence is cross-examined by him, an appeal from his judgment lies not to the District Magistrate but to the Sessions Judge. AIR (V 30) 1943 Bom 94: 45 Bom LR 74: 44 Cr LJ 481: 206 Ind Cas 75 (DB).

**——Ss. 408, 404 — Trial and arguments before Assistant Sessions Judge — Before delivery of judgment, Judge made Additional Sessions Judge — Appeal, where lies.**

The word "trial" in the Criminal P. C. of 1898, as amended by Act 18 of 1923, has been used in a restricted sense and does not include judgment in the case. The "conclusion of the trial" of a case takes place before the judgment is delivered, and the judgment, therefore, is no part of the trial and is outside the scope of a trial as contemplated by the Code of 1898.

Where, therefore, trial was held before an Assistant Sessions Judge and after the conclusion of the argument but before the delivery of the judgment he got an order that he was made an Additional Sessions Judge from the date he commenced the trial of the case and subsequently delivered the judgment convicting the accused:

Held, that the appeal from the conviction lay to the Sessions Judge and not to the High Court. That the order making him Additional Sessions Judge though retrospective in terms, could, in view of the provisions of S. 39, take effect only from the date on which the order was communicated him.

All that S. 404 indicates is that the appeals are to be against judgments and orders but that section has nothing to do with the forum of the appeal which is provided for by Ss. 406, 407, 408, 410 and 411 of the Code, and the determination of the forum of appeal must depend on the interpretation of the words used in those sections. AIR (V 25) 1938 All 102 : 1937 ALJ 1152 : ILR (1938) All 157 : 39 Cr LJ 345 : 1937 AWR 1147 : 173 Ind Cas 663 (DB).

——S. 408 — The moment a Second Class Magistrate is invested with the powers of a First Class Magistrate he becomes a First Class Magistrate and any convictions by him in cases which were taken up by him as a Second Class Magistrate would

be only convictions as a First Class Magistrate and an appeal would lie to the Court of Session. AIR (V 15) 1928 Mad 55: 52 MLJ 733: 51 Mad 257: 1 M Cr C 100: 106 Ind Cas 583: 29 Cr LJ 71: 1927 MWN 669: 26 MLW 685: 39 MLT 497 (DB).

——S. 403 — Where a Magistrate who begins as a Second Class Magistrate and completes the case as a First Class Magistrate, passes a higher sentence in the latter capacity, the course of appeal is to the Sessions Judge and not to the District Magistrate. 4 L. B. R. 239, Not Foll. AIR (V 14) 1927 Lah 138: 28 Cr LJ 50 : 99 Ind Cas 82.

——S. 408 — **Conviction by Asst. Sessions Judge — Asst. Sessions Judge posted as Sessions Judge before filing of the appeal — Practice — Stay of trial.**

An appeal from a conviction and sentence of an Assistant Sessions Judge, where the sentence is less than four years' rigorous imprisonment lies to the Sessions Judge. The mere fact that before the appeal is filed, the Assistant Sessions Judge is promoted to the position of Officiating Sessions Judge, does not entitle the accused to appeal to the High Court. The appeal should be filed in the Sessions Court and the Officiating Judge should either send it to the High Court for disposal or postpone the hearing of it until the return of the Sessions Judge. AIR (V 5) 1918 Pat 240 : 3 Pat LJ 192 : 5 PLW 24 : 19 Cr LJ 442 : 44 Ind Cas 970 (DB).

### 6. Conviction under S. 124-A, Penal Code — Proviso (C).

**——S. 408 (c) — Appeal to Sessions Judge against conviction under S. 124-A, I. P. C., wrongly admitted and sentence reduced — Appeal to High Court, beyond limitation — Time, whether can be extended under Limitation Act, S. 5.**

An accused was convicted for an offence under S. 124-A, I. P. C. An appeal was filed to the Sessions Judge, who overlooking the provisions of S. 408, Criminal P. C., admitted the appeal and reduced the sentence. The accused again appealed to the High Court, but beyond the period of limitation:

Held, that the order of the Sessions Judge was made without jurisdiction, as an appeal in such cases lay only to the High Court under S. 408, Criminal P. C.:

Held, also, that there was sufficient cause for extension of time under S. 5, Limitation Act. AIR (V 24) 1937 All 466 : 1937 : ALJ 365 : 38 Cr L J 972 : 1937 AWR 401 : 170 Ind Cas 874 (DB).

**——S. 409.**

——S. 409 — The effect of Ss. 9, 193 (2) and 409, Criminal P. C., is that an Additional Sessions Judge can hear all the appeals which lie to the Sessions Judge and the Sessions Judge has power to transfer any appeal he likes to the Court of the Additional Sessions Judge. AIR (V 29) 1942 Oudh 50 : 1941 OWN 1130 : 43 Cr LJ 50 : 1941 AWRCC 313 : 196 Ind Cas 664.

**——S. 409, proviso — Transfer of case by High Court from one Sessions Judge to another—Latter's power to transfer it to Additional Sessions Judge.**

Where the High Court transfers a case from the Court of one Sessions Judge to the Court of another Sessions Judge, unless the contrary is directly expressed, the Sessions Judge to whom the transfer is made has power and jurisdiction to transfer the case to an Additional Sessions Judge. The proviso to S. 409, Criminal P. C., is not restricted to appeals arising within the jurisdiction of the Court of Session. AIR (V 21) 1934 Pat 114 : 15 PLT 318 : 35 Cr LJ 1167 : 150 Ind Cas 927 (2) (DB).

**——Ss. 409 and 9 — Additional Sessions Judge — Appeal.**

Under S. 409 read with S. 9 of the Code an Additional Sessions Judge has jurisdiction to hear appeals to the Sessions Court from the sentence of a Magistrate. (913) 14 Cr LJ 195 : 19 Ind Cas 195 (Cal) (DB).

**——S. 410.**

——S. 410 — Trial by Judge of Sind Chief Court exercising Sessions jurisdiction — Appeal and revision lie to Chief Court. AIR (V 31) 1944 Sind 65: 45 Cr LJ 505 : ILR (1944) Kar 239 : 212 Ind Cas 79 (DB).

**——S. 410 — Sessions trial — Accused convicted and sentenced by Judge of Judicial Commissioner's Court sitting in its Sessions jurisdiction — Appeal.**

An appeal lies to the Judicial Commissioner's Court against convictions and sentences passed by a judge of the Judicial Commissioner's Court sitting in its Sessions Court jurisdiction with a jury, only on a point of law. AIR (V 26) 1939 Sind 209: 41 Cr LJ 28 : ILR 1940 Kar 249 : 184 Ind Cas 474 (DB).

——S. 410 — Section 410 is to be read subject to the provisions of S. 404. AIR (V 24) 1937 Sind 22: 38 Cr LJ 350 : 30 SLR 456 : 167 Ind Cas 75 (DB).

**——S. 410 — Grounds for interference — Conviction based on inadmissible evidence.**

Where it appeared that the conviction was based partly on inadmissible evidence and that the motive for the occurrence had been exaggerated,

Held, that the jury could well have been misled by the procedure and that the High Court should interfere in appeal and order re-trial. AIR (V 18) 1931 Cal 65 (2) : 52 CLJ 423 : 1931 Cr C 63 (DB).

**——S. 410 — Question of fact.**

It is a question of fact whether a statement made to a police officer in the course of an investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. AIR (V 17) 1930 Cal 130 : 1930 Cr C 130 : 125 Ind Cas 111 : 31 Cr LJ 771 (DB).

**——Ss. 410, 269 (3) — "Same trial" meaning—Single trial for offences some of which are triable by Jury — Appeal.**

"Same trial" in S. 269 (3) are used in distributive sense and do not take away the right of appeal given by S. 410.

Per Napier, J.— "Trial" has two meanings. Where a person is tried by a Jury and there is also another charge tried by the Judge, the right of appeal from the judgment of the Sessions Judge is retained in spite of the words "same trial." AIR (V 5) 1918 Mad 821 : 18 Cr LJ 346 : 38 Ind Cas 730 (DB).

**——S. 410 — European Br. Subject—Appeal against conviction by Court of Session — High Court, meaning of, in reference to proceedings against European Br. subjects.**

The "High Court" in reference to proceedings against European Br. subjects in Oudh, means the High Court of Judicature for the North-Western Provinces. The appellant, whose claim to be dealt with as a European Br. subject was admitted by the committing Magistrate as well as the Court of Session, was convicted under Ss. 417 and 474, I. P. C. He filed an appeal against his conviction in the Court of the Judicial Commissioner of Oudh.

Held, that under S. 410, Cr. P. C. the appeal lay to the High Court. (1910) 13 OC 335 : 11 Cr LJ 723 : 8 Ind Cas 873.

**——S. 411.**

——S. 411 — There is no appeal to the High Court from a sentence of whipping passed by a Presidency Magistrate, in view of Ss. 404 and 411. AIR (V 24) 1937 Bom 336 : 38 Cr LJ 985 : 39 Bom LR 470 : 170 Ind Cas 757.

**——S. 411 — Sentence of six months' rigorous imprisonment passed by Presidency Magistrate.**

No appeal lies as provided by S. 411 from a sentence of six months' rigorous imprisonment passed by a Presidency Magistrate. Neither S. 407 nor

**S. 408 has any application to an order made by a Presidency Magistrate. Appeals in such cases are prescribed by S. 411. AIR (V 24) 1937 Cal 413 : ILR (1937) 1 Cal 123 : 38 Cr LJ 876 : 170 Ind Cas 26 (DB).**

**——Ss. 411, 562 — Appeal.**

An order passed by a Presidency Magistrate under S. 562, Criminal P. C., is not appealable. AIR (V 19) 1932 Cal 488 (1) : 36 CWN 459 : 33 Cr LJ 639: 38 Ind Cas 627 (2) (DB).

**——S. 411 — Currency notes — Possession after 18 months — Presumption.**

Where 18 months after a theft of currency notes, a few of them were found in the possession of the accused and no other suspicious circumstances were found against him; there is no presumption of guilty knowledge on his part in the absence of an explanation. The fact that he has given a false explanation of his possession was not sufficient to warrant, his conviction for dishonest retention of stolen property. (1912) 11 MLT 186 : (1912) MWN 362 : 13 Cr LJ 475 : 15 Ind Cas 315.

**——S. 411 — Concurrent sentences of 6 months' imprisonment each by Presidency Magistrate.**

If two concurrent sentences of 6 months' imprisonment are passed by a Presidency Magistrate, no appeal under S. 411 is competent. (1910) 17 CLJ 392 : 13 Cr LJ 787 : 17 Ind Cas 531 (DB).

**——S. 411 — Appeal — Presidency Magistrate — Sentence — Revision.**

There is no appeal against the conviction by a Presidency Magistrate when the sentence is only one day's simple imprisonment and a fine of Rs. 150. But there can be a revision if some point of law is involved, when the High Court could convert it into a revision. (1909) 10 Cr LJ 255 : 3 Ind Cas 285 (Bom) (DB).

**——S. 411-A.**

——S. 411-A — Question whether appellate Court hearing an appeal under S. 411-A is entitled to go into the validity or otherwise of the order of the trial Judge granting leave to appeal — Question if fit for appeal to Special Court. AIR (V 38) 1951 Mad 212 : (1950) 2 MLJ 245.

**——S. 411-A — Scope — Appeal for enhancement of sentence — If competent.**

The right of appeal given by S. 411-A, Cr. P. Code, is given only to a person who is convicted at a trial and is not given to the prosecution. An appeal against the sentence dealt with by S. 411-A (1) (c) is clearly an appeal by the person convicted, for the opening words of S. 411-A (1) as to who may appeal, govern all the clauses which are set out under sub-S. (1). As the Code now stands, there cannot possibly be any appeal or application for revision for enhancement of a sentence passed at a sessions trial held by a High Court, however inadequate such sentence may be. AIR (V 36) 1949 Cal 301 : 50 Cr LJ 548 (DB).

**——S. 411-A — Constitutional validity — Government of India Act, 1935 — Sch. VII, List III, entries 2 and 15 — Scope.**

Act XXVI of 1943 introducing S. 411-A in the Cr. P. Code, is a valid enactment of the Central Legislature and the appeals (against convictions and acquittals on trials held by a High Court in the exercise of its Original Criminal Jurisdiction, notwithstanding anything contained in the Letters Patent of any High Court and without prejudice to the provisions of S. 449 of the Cr. P. Code), provided for by S. 411-A of the Cr. P. Code are maintainable.

A right of appeal may be a valuable and substantial right and in practice almost equivalent to a substantive law. Nevertheless, in form it may belong to the category of procedure.

It is reasonable to presume that the framers of the Constitution Act intended to convey by the words "Criminal Procedure" in entry No. 2 of List III Concurrent Legislative List, in Sch. VII of the Government of India Act, 1935, all that was commonly being treated as part of criminal procedure the legislative enactments of the Indian Legislatures before the date of the Constitution Act.

Entry 15 of List III gives ample power to the Central Legislature to pass legislation with respect to the jurisdiction and powers of Courts, if the provision relating to appeals falls within the words in entry 2 "Criminal Procedure". Even assuming that the subject-matter of Act XXVI of 1943, does not fall within the words "Criminal Procedure" in entry No. 2 of the Concurrent List, it will fall within the words "all matters included in the Code of Criminal Procedure at the date of the passing of this Act" in the same entry. It is reasonable to presume that the matter of providing appeals in criminal cases generally is a matter included in the Code of Criminal Procedure.

The fact that further jurisdiction was superadded to the jurisdiction already possessed by the High Court does not amount to the constitution of a new Court so as to bring the subject-matter of Act XXVI of 1943, within entry I in List II in respect of which only the Provincial Legislature had power to legislate.

Legislative authority in respect of criminal procedure would include the power to provide for and affect the right of appeal in these matters. Even if there is any overlapping then under S. 100 (2) of the Constitution Act, 1935, the Concurrent List would prevail in so far as a particular subject can be said to fall within entries both in List II and List III.

The resolution of the Governor of the Province (who had assumed to himself all the powers vested in the Provincial Legislatures under a proclamation issued under S. 93 of the Constitution Act) approving the bill which was ultimately passed as Act XXVI of 1943 can be treated as the Resolution such as is referred to in S. 103 of the Government of India Act. ILR (1949) Mad 739: AIR (Vol 36) 1949 Mad 481: 62 LW 917: 50 Cr LJ 684: 1949 MWN 93: (1949) 1 MLJ 258 (FB).

**——S. 411-A — Leave to appeal on the facts — Discretion of Judge hearing application — Principles for exercising — Grant of leave — Effect — Scope of appeal.**

A Judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially. The Judge is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the Court.

Leave once having been granted, however, the matter is at large and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases. The consideration applicable to appeals under S. 411-A, Cr. P. Code, are the following (1) the views of the jury implicit in their verdict as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial: (3) the right of the accused to the benefit of any doubt; and (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

The test that was hitherto applied, namely, whether the verdict of the jury is perverse or unreasonable in order to entitle the Court to interfere with it has now been definitely discarded, and the test

to be applied is whether the verdict is upon the evidence right or wrong. 49 Cr LJ 17: AIR (Vol 35) 1948 Mad 88: 1947 MWN 597: (1947) 2 MLJ 128 (DB).

——S. 411-A — Appeal on a matter of fact — **Principles governing the granting of leave — Powers of the Court of Appeal in disposing the appeal — Verdict of jury, if can be upheld merely on the ground that it is not perverse or unreasonable — Danger of construing an Indian Act by reference to an English Act — Difference between Indian and English law in regard to the power of Courts of Appeal in dealing with verdicts of juries.**

An appeal under S. 411-A of the Cr. P. Code on a matter of fact can only be brought on a certificate of the trial Judge or with the leave of the Court of Appeal. A Judge hearing an application for leave to appeal on facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially. He is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the High Court. Leave once having been granted, however, the matter is at large and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases. In exercising the power conferred by the Code and before reaching its conclusion upon fact, the High Court should always give proper weight and consideration to such matter as, the views of the jury implicit in their verdict as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit, of any doubt and the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. If, attaching due weight to these matters, the Court hearing an appeal on the facts under S. 411-A, Cr. P. Code, comes to the conclusion that the verdict of the jury was wrong, it is bound to allow the appeal and reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not perverse or unreasonable. So to do would be to deprive the appellant of the right of appeal which the statute gives him.

It is always dangerous to construe an Indian Act by reference to an English Act, however, closely the language of the two Acts may approximate, and this is particularly true of facts dealing with such a matter as trial by jury in which the attitude of the Legislature in the two countries has been dissimilar in many respects.

The elision in S. 411-A of S. 418 and S. 423 (2), which would have prevented an appeal on facts, and the omission of any limitations on the powers of the Court similar to those contained in S. 4 (1) of the English Criminal Appeal Act of 1907, make it clear that the Indian Legislature was not minded to impose on the powers of the Court of Appeal in India any fetter similar to that imposed on the English Courts of Criminal Appeal in dealing with the verdicts of juries. 74 IA 132: ILR (1948) Mad 70: 50 Bom LR 382: 231 Ind Cas 345: 1947 ALW 555: 1947 OWN 611:48 Cr LJ 765: 1947 MWN 330: 60 LW 351: 1947 ALJ 351: 51 CWN 732: 1947 AWR (PC) 49: 1947 OA (PC) 49: AIR (Vol 34) 1947 PC 113: (1947) 1 MLJ 404.

**——S. 411-A — Applicability — Criminal contempt of Court — Conviction and sentence by single Judge of High Court in original criminal trial — Appeal — Competency — Inherent powers.**

No appeal lies to the High Court either under S. 411-A, Cr. P. Code, or under the inherent jurisdiction of the High Court, from a sentence passed by a single Judge of the High Court, exercising original criminal jurisdiction, for criminal contempt of Court. 230 Ind Cas 408: 48 Cr LJ 628: 48 Bom LR 752: AIR (Vol 34) 1947 Bom 184 (DB).

**——S. 411-A — Powers of High Court — Verdict of jury — Interference — Test.**

Though the power of interference with verdicts of jury given to the High Court under S. 411-A, Cr. P. Code, is very wide, it does not necessarily follow that the High Court is bound to follow it indiscriminately in every case; in practice the High Court will not exceed the powers which it ordinarily exercises in dealing with cases referred to it under S. 307, though both in appeals under S. 411-A and in references under S. 307, the powers which it is entitled to use if it thinks fit are very much wider. ILR (1946) Bom 1019: 226 Ind Cas 287: 47 Cr LJ 884: 48 Bom LR 382: AIR (Vol 33) 1946 Bom 465 (SB).

**——S. 411-A — Leave to appeal — Judge not agreeing with divided verdict of jury but accepting same — Certificate of appeal — If can be granted.**

Where the verdict of the jury is not unanimous and the Judge does not agree with it, it is not open to the Judge to accept the verdict and then grant a certificate under S. 411-A to appeal on facts. Where he accepts a verdict which is not unanimous, it should be left to the appellate Court to say whether there should be an appeal or not. ILR (1946) Bom 1019: 226 Ind Cas 287: 47 Cr LJ 884: 48 Bom LR 382: AIR (Vol 33) 1946 Bom 465 (SB).

**——S. 411-A — Acquittal — Appeal from — Verdict of jury — Interference by High Court — Grounds of.**

The High Court must always be reluctant to interfere with a verdict of the jury, especially when it is a unanimous verdict. The Court must be satisfied that it is a perverse verdict, and the line of demarcation between a perverse verdict and an erroneous appreciation of evidence must be clearly and sharply drawn. The Court has to be satisfied that no reasonable body of men could have arrived at the verdict at which the jury arrived. It is not sufficient that on reading the evidence the High Court might have come to a conclusion different from the one that the jury arrived at. The High Court must be satisfied that the only possible view on the evidence is that the jury was manifestly perverse in the decision at which they arrived. 223 Ind Cas 195: 47 Cr LJ 378: 47 Bom LR 998: AIR (Vol 33) 1946 Bom 38 (FB).

**——Ss. 411-A and 305 — Certificate to appeal on facts — Jury trial before High Court — Verdict of jury wrong in Judge's opinion but accepted being unanimous — Judge may give certificate — Verdict of jury not unanimous — Judge accepting verdict cannot grant certificate — Whether there should be appeal in such case should be left to appellate Court.**

When in a case tried before a High Court the jury are unanimous in their opinion, if the Judge thinks that the verdict of the jury is wrong, but has got to be accepted by him as it is unanimous the Judge may give a certificate to enable an appeal on facts. But when the jury are not unanimous and at least six of them are of one opinion and the Judge thinks that the verdict of the majority is not acceptable to him he is bound to discharge the jury under S. 305 (3); it is not open to him to accept the verdict and then grant a certificate under S. 411-A to appeal on facts. It should be left to the appellate Court to say whether there should be an appeal or not. AIR (Vol 33) 1946 Bom 465 (SB).

**——S. 411-A — If High Court can interpose with verdict of jury.**

According to S. 411-A, Criminal P. C., once the leave of the appellate Court or the certificate of the Judge who tried the case has been obtained the Court of appeal has all the powers that it has when it tries an ordinary appeal on facts. The limitations imposed upon the Court of appeal in the case of jury trials in the mofussil under S. 418 and S. 423 do not apply to such an appeal. There is nothing in the statute, which places that limitation upon the powers of the Court of Appeal. Courts of appeal are not only to consider whether the verdict of the jury is unreasonable or perverse, but there must be an original approach to the case by them. ILR (1945) Bom 724 (FB).

**——S. 411-A — Leave of certificate under S. 411-A, when should not be granted.**

Per Lokur J. — Under S. 411-A, leave of certificate should be granted only when it is thought that had the verdict been given by a mofussil jury, it would have been a fit case for a successful reference to the High Court under S. 307 of the Code, and not merely because on the evidence, it is possible to take a view different from that taken by the jury. AIR (Vol 32) 1945 Bom 277: 47 Bom LR 363: 46 Cr LJ 635: 220 Ind Cas 1 (FB).

**——Ss. 411-A, 307 — Verdict based on appreciation of oral evidence — Witnesses unanimously disbelieved — Interference.**

The power of interference under S. 411-A, though very wide, should not be exercised indiscriminately in every case. Where a verdict is based mostly on appreciation of oral evidence, the Appellate Court should be slow to interfere when the jury has unanimously disbelieved the witnesses whose testimony is not beyond criticism. AIR (Vol 32) 1945 Bom 277: 47 Bom LR 363: 46 Cr LJ 635: 220 Ind Cas 1 (FB).

**——Ss. 411-A, 307 — Sessions trial by High Court — Verdict unanimous — Judge granting certificate of appeal — Powers of Appellate Court under S. 411-A.**

The general considerations on which the Appellate Court has to act under S. 411A are practically the same as those under S. 307. Although under S. 307, the High Court has power to go into facts in trials by jury in the mofussil, it is the settled practice to give due weight to the verdict of the jury and to limit its interference to cases where it appears to be manifestly wrong or unreasonable. In the case of verdicts of juries in the High Court itself where jurors are expected to be more intelligent and experienced in the ways of the world and have also the benefit of the summing up of the case by a Judge of the High Court, this practice should be followed with greater reason. Simply because such extraordinary power has been given to the High Court for the first time by Act XXVI of 1943, it does not necessarily follow that the Legislature intended that it should be exercised in every case in disregard of the well-recognised principles applying to all trials by jury. Even after the amended law, the jury remains the sole arbiter of facts of the trial and the Judge is still bound by the unanimous verdict of the jury. So, the Appeal Court ought to give due weight to its verdict. Where the presiding Judge gives a certificate of appeal, due regard must, of course, be given to his implied opinion that the verdict is wrong. But even then the test for interference remains the same as in a case under S. 307 where the Judge disagrees with the verdict and submits the case to the High Court for the ends of justice. The new powers with which the High Courts are vested are to be exercised with the double object of preventing failure of justice in trials by jury and at the same time, preventing such trials themselves from being reduced to a mockery. AIR (Vol 32) 1945 Bom 277: 47 Bom LR 363: 46 Cr LJ 635: 220 Ind Cas 1 (FB).

**——S. 411-A — S. 411-A has no retrospective operation.**

The alteration made by the provisions of S. 411A introduced into the Code by the amending Act XXVI of 1943, is not one of procedure only. It has given a direct right of appeal to the High Court on points of law which did not exist before except in a very restricted form, and it has given a right of appeal on grounds involving matters of fact only which did not exist at all. This new right of appeal which has been conferred cannot be regarded as a mere matter of procedure; S. 411A has therefore no retrospective operation. AIR (Vol 31) 1944 Bom 252: 46 Bom LR 470: 215 Ind Cas 59: ILR (1945) Bom 17: 46 Cr LJ 328 (DB).

(Following the view in AIR 1929 Mad 381 (SB), it was held that decision in AIR 1928 Bom 371, that the 1928 Amendment to Letters Patent (Bom) cl. 15, in the matter of appeal was retrospective, must be held to have been overruled by the P. C. ruling in (1905) AC 369: 74 LJ PC 77: 21 TLR 513).

**——S. 411-A (1) (b) — Appeal on matter of fact — Powers of Court — Limits — Interference with verdict — Principles — Verdict of guilty on the uncorroborated and retracted evidence of approver — Legality — Interference with on appeal — When justified.**

In an appeal under S. 411-A (1) (b) of the Cr. P. Code on a matter involving a question of fact the Court has power to set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case, it is convinced that the verdict is unreasonable. The omission in the Cr. P. Code of a provision corresponding to sub-S. (1) of S. 4 of the English Criminal Appeal Act (1907) does not affect the powers of an Indian High Court when hearing an appeal under S. 411-A (1) (b) either by way of extending or limiting them. S. 133 of the Evidence Act states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Under the English common law the same rule applies, but both in England and in India it has become a rule of practice and it is now virtually a rule of law, that corroboration is required. But all that is necessary is that the Judge should warn the jury of the danger of convicting if the only evidence is that of an accomplice. Where the jury had been properly directed and there was material on which their decision could with reason be based the Court of appeal will not interfere with the verdict. The fact that the trial Judge agreed with the majority verdict of the jury is a matter which the appellate Court is entitled to take into consideration when considering the reasonableness of those findings. ILR (1946) Mad 389: 225 Ind Cas 593: 59 LW 22: 1946 MWN 49: 47 Cr LJ 785: AIR (Vol 33) 1946 Mad 271: (1946) 1 MLJ 42 (DB).

**——S. 411-A (1) and (2) — Power of appellate Court under — Matters to be considered by High Court in appeal, explained — Court has full power to set aside verdict of jury if it is unreasonable.**

There is no provision in the Criminal Procedure Code corresponding to sub-s. (1) of S. 4 of the English Act, namely, Criminal Appeal Act, 1907, (7 Edw. VII, Ch. 23), which empowers the appellate Court to allow the appeal on the ground, inter alia, that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence. But the omission does not affect the powers of the

Indian High Court when hearing an appeal under S. 411-A (1) (b), Criminal P. C., either by way of extending or limiting them. The considerations which apply in an appeal from acquittal under S. 423 must also apply in an appeal under S. 411-A (1) (b) on a matter involving a question of fact. Thus, in an appeal under S. 411-A (1) (b), Criminal P. C., the Court has full power to set aside the verdict of the jury if on a consideration of the facts and all circumstances of the case, it is convinced that the verdict is unreasonable.

But in exercising this power and before reaching the conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

The High Court cannot, however, in an appeal under S. 411-A enhance the sentence. AIR (Vol 33) 1946 Mad 271: 59 MLW 22: (1946) 1 MLJ 42: 1936 MWN 49 (DB).

**——S. 412.**

——Ss. 412 and 423 — Plea of guilty in improper trial before second class Magistrate — Powers of Appellate Court in appeal. AIR (V 35) 1948 Mad 492: (1948) 1 MLJ 444.

**——S. 412 — Plea of guilty obtained by trickery.**

No doubt under S. 412, Criminal P. C., persons who plead guilty can only appeal on the ground of sentence. But they are entitled to satisfy the Court that there was in fact no plea of guilty. A plea obtained by trickery is not a plea of guilty within the meaning of the Code, precluding the accused from asking for any relief except the reduction of the sentences and the setting aside of the order of confiscation. AIR (Vol 31) 1944 Cal 120: ILR (1943) 1 Cal 540: 45 Cr LJ 517: 212 Ind Cas 102.

**——S. 412 — Plea of guilty — Conviction can still be challenged in revision.**

An accused person, who pleads guilty before a Magistrate and is convicted, can contend, under S. 412, Criminal P. C., in his application for revision, that his conviction is illegal. AIR (Vol 30) 1943 Bom 209: 45 Bom LR 303: 44 Cr LJ 668: 208 Ind Cas 11 (DB).

**——S. 412 — Appeal lies even on merits.**

Section 412, Criminal P. C., does not say that there should be no appeal generally when the conviction on the accused's own plea had been had in the Court of the Magistrate of the Second Class, and an appeal lies even on merits. AIR (Vol 30) 1943 Pat 380: 10 BR 179: 45 Cr LJ 166: 9 Cut LT 19: 209 Ind Cas 639.

**——Ss. 412, 255(2) — Conviction must be on plea of accused and not on evidence.**

In order to make S. 412, Criminal P. C., applicable, the accused must have been convicted on his plea of guilty in exercise of the discretion of the Magistrate under S. 255 (2) of the Code and not on the evidence in the case. AIR (Vol 30) 1943 Pat 313: 10 BR 60 : 44 Cr LJ 801 : 208 Ind Cas 639.

**——S. 412 — Powers of High Court in revision.**

Where in a particular case the powers of an Appellate Court are restricted by S. 412 the powers of the High Court in revision are not similarly restricted. The powers of the High Court in dealing with the revision application are as ample as if an appeal on the merits had been entertainable by the Sessions Judge and had been dismissed. AIR (Vol 30) 1943 Pat 313: 10 BR 60: 44 Cr LJ 801: 208 Ind Cas 639.

——S. 412 — Accused pleading guilty — He can appeal both against conviction and sentence when notice for enhancement under S. 439(6) has been served upon him. AIR (Vol 22) 1935 Rang 49: 12 Rang 616: 36 Cr LJ 336: 153 Ind Cas 390 (DB).

——S. 412 — Once Judge has exercised his discretion under S. 271 (2) no considerations can be adduced to show that the discretion was not properly exercised so as to affect the provisions of S. 412 by which appeal is restricted to question of sentence only. AIR (V 21) 1934 Pat 330 : 16 PLT 256 : 35 Cr LJ 1322 : 151 Ind Cas 393 (DB).

**——S. 412 — Plea of guilty based on erroneous conception of legal right — Right of appeal, whether barred.**

Where an accused person pleads guilty on a charge under S. 380, I. P. C., but the said plea is founded upon an erroneous conception of the accused's right in the property, S. 412, Criminal P. C., is inapplicable to the case and cannot shut out his right of appeal. AIR (Vol 18) 1931 All 265: 32 Cr LJ 576: 1931 ALJ 201: 53 All 437: 130 Ind Cas 693.

**——Ss. 412, 422 — Criminal appeal — Admission on question of sentence only.**

Except in the cases provided for in S. 412, Criminal P. C., an appeal cannot be admitted on the limited ground of sentence only; if it is admitted at all, the whole appeal must be heard. AIR (Vol 18) 1931 Pat 351 (1): 12 PLT 539:: 32 Cr LJ 1017: 133 Ind Cas 163.

**——Ss. 412, 415-A — Several accused — One bound over on plea of guilty — Others sentenced — Right of appeal of former.**

Where an accused person is convicted on his own plea of guilty and instead of being sentenced is bound over under S. 562, Criminal P. C., he cannot prefer an appeal though his co-accused are convicted on their own plea of guilty and appealable sentences are passed against them. Section 412 is not controlled by S. 415-A. AIR (V 18) 1931 Sind 151 : 25 SLR 337 : 32 Cr LJ 1142 : 134 Ind Cas 379 (DB).

**——S. 412 — Applicability to revision by High Court.**

The High Court in revision is not bound by S. 412 but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether the plea was based on a proper conception of the facts. AIR (Vol 17) 1930 Rang 349: 1930 Cr C 1177.

**——S. 412 — Legality of conviction.**

Conviction of accused on the plea of guilty does not bar an appeal on the point of legality of the conviction. AIR (Vol 14) 1927 Bom 67: 28 Bom LR 1023: 27 Cr LJ 1148: 97 Ind Cas 668 (DB).

**——S. 412 — Limitation.**

The time spent in obtaining a copy of the diary orders in the case, which were filed with the appeal, should not be deducted while computing the period of limitation for filing an appeal. AIR (Vol 12) 1925 Rang 239: 4 Bur LJ 44: 3 Rang 220: 26 Cr LJ 1371: 89 Ind Cas 459.

——S. 412 — Plea of guilty — When can be acted upon — Mistake of law — Omission to record plea — Retrial.

A plea of guilty based on a mistake of law shall not be accepted. The Magistrate must try the accused on the merits.

Per Newbould, J. — The principle of S. 412, Criminal P. C. should be applied in cases in which the Appellate Court is applied to, for revision. When a person has pleaded guilty and had been convicted on such plea, he waives his right to question the legality of the conviction. If the Court holds in revision that a plea of guilty should not have been recorded, a trial should be ordered by an Appellate Court. AIR (Vol 7) 1920 Cal 522: 31 CLJ 122: 21 Cr LJ 547: 56 Ind Cas 851 (DB).

——S. 413.

1. Scope and applicability.
2. Appeal, when lies.
3. No appael lies.
4. "Case", meaning of.
5. Order under S. 562.

1. Scope and applicability.

——S. 413 — Scope — Construction — Appeal from order passed under First Offenders Probation Act.

Section 413 takes away the right of appeal only in cases where a sentence of imprisonment or a sentence of fine has been passed. It cannot be extended to include cases where an order has been passed under the First Offenders Probation Act.

The statutory deprivation of a general right of appeal must always be construed strictly. AIR (Vol 32) 1945 Oudh 59: 1944 OWN 478: 1944 AWR CC 290 (2).

——S. 413 — Section 413 has taken away in certain cases, the general right of appeal conferred on a person convicted on a trial by a Magistrate of the second class which is conferred by S. 407. AIR (Vol 29) 1942 Pat 107: 43 Cr LJ 7: 8 BR 150: 22 PLT 963: 197 Ind Cas 87.

——S. 413 — S. 413, applicability of.

In construing the provisions of S. 43, Criminal P. C., it is no doubt permissible to refer to the words used in S. 408, but the language of S. 413 is so clear, expressed as it is in general terms, that it would be wholly wrong to try and limit it by reference to the wording of S. 408. AIR (Vol 24) 1937 Cal 394: 41 CWN 833: 38 Cr LJ 990: ILR (1937) 2 Cal 469: 170 Ind Cas 920 (DB).

——S. 413 — Test to see if case comes within S. 413.

What has to be seen, in considering whether a case is hit by S. 413, is whether the sentence in question was one not exceeding the limit prescribed, and whether it was a sentence passed by a Court of the class mentioned therein. If these conditions are satisfied, S. 413 would apply, whether the sentence was passed under S. 349 or S. 380 or otherwise. AIR (Vol 24) 1937 Cal 394: 41 CWN 833: 38 Cr LJ 990: ILR (1937) 2 Cal 469: 170 Ind Cas 920 (DB).

——S. 413 — It does not make any difference whether the Judge who actually presided or exercised jurisdiction is a Sessions Judge, an Additional Sessions Judge or an Assistant Sessions Judge, so far as S. 413, Cr. P. C., is concerned. 1934 MWN 1091.

——S. 413 — Section 413 which restricts the right of appeal conferred by S. 408, must be strictly construed. AIR (Vol 18) 1931 Cal 642: 35 CWN 752: 33 Cr LJ 90: 59 Cal 19: 134 Ind Cas 1196.

2. Appeal, when lies.

——Ss. 413 and 408 — Scope and applicability — Sentence of fine of less than Rs. 50 under each of different sections of the Penal Code — Total fine imposed on each accused more than Rs. 50 — Right of appeal.

S. 413 of the Cr. P. Code is really in the nature of a limitation on the general right of appeal given to a convicted person under S. 408 of the Code. It would be therefore necessary to see, in each case, whether the Magistrate has passed a sentence of fine not exceeding Rs. 50 only.

Accused 1 and 3 were sentenced to fine of Rs. 40 each in respect of each of the offences under Ss. 148 and 324 of the I. P. Code, while accused 2, 4, 5 and 6, were sentenced to pay a fine of Rs. 30 each under each of the Ss. 147 and 323, I. P. Code. An appeal filed by the 6 accused to the Sessions Judge was held to be not maintainable on an application of S. 413 of the Cr. P. Code. In revision,

Held, that taking the individual accused it cannot be said that any of the accused has been sentenced to a fine not exceeding Rs. 50, because the first and 3rd accused were sentenced to a total fine of Rs. 80 each, while the rest of the accused were each sentenced to a total fine of Rs. 60. The case therefore clearly falls outside S. 413, Cr. P. Code, with the result that under S. 408 of the Cr. P. Code, the accused would have a right of appeal to the Court of Session. AIR (Vol 35) 1948 Mad 251: 60 LW 727: 1947 MWN 667 (2): (1947) 2 MLJ 383: 49 Cr LJ 461.

——Ss. 413, 414 — Cattle Trespass Act (1 of 1871), S. 24 — Penal Code, S. 447 — Conviction for criminal trespass and forcibly rescuing cattle — Combination of sentence — Appeal.

Where a person was convicted under S. 447, I. P. C., and S. 24, Cattle Trespass Act, and fined Rs. 50 for the former offence and Rs. 20 for the latter, by a Magistrate in the exercise of summary powers:

Held, that there was a combination of two punishments of the nature referred to in S. 414, Criminal P. C., and the order was appealable. AIR (Vol 19) 1932 Oudh 27: 8 OWN 1373: 33 Cr LJ 278: 7 Luck 501: 136 Ind Cas 248.

——S. 413 — An order awarding compensation and repayment of fines under S. 22 of the Cattle Trespass Act (I of 1871) is appealable under S. 408 of the Cr. P. Code, the compensation so awarded not being a fine, the restrictive provisions of S. 413. Cr. P. Code are not applicable. AIR (Vol 9) 1922 Bom 191: 46 Bom 58: 23 Bom LR 836: 22 Cr LJ 624: 63 Ind Cas 160 (DB).

——S. 413 — When dealing with the appeal of accused persons who have received an appealable sentence a Sessions Judge is competent to deal with appeals made by the co-accused who have received non-appealable sentences. AIR (Vol 7) 1920 Pat 802: 3 UP LR (Pat) 44: 22 Cr LJ 297: 60 Ind Cas 793.

——S. 413 — Appeal — joint trial — Right of appeal by one on whom non-appealable sentence is passed.

S. 413 of the Cr. P. Code, is open to the interpretation that the legislature intended that the right of appeal exercisable by a person who has received an appealable sentence includes a right of appeal also by any other person convicted at the same trial, though that particular person may have received a sentence which alone would not be appealable. Hence where

four persons were convicted at the same trial under S. 379 of the I. P. C. three of them receiving a sentence of two months each and the fourth a sentence of one month, and the former appealed to the Sessions Judge who quashed the conviction.

Held, that the fourth person also had a right of appeal, though his sentence by itself was not appealable. AIR (Vol 3) 1916 All 236: 38 All 395: 14 ALJ 518: 17 Cr LJ 513: 36 Ind Cas 481.

——Ss. 413 and 408 — Appeal — Several persons sentenced at one trial.

Where two persons are tried together before a First Class Magistrate and one is sentenced to imprisonment exceeding one month and the other to fine not exceeding Rs. 50 both can appeal to the Court of Session under S. 408. AIR (Vol 3) 1916 Lah 193: 45 PWR 1915 Cr: 30 PR 1915 Cr: 17 Cr LJ 27: 32 Ind Cas 155.

——S. 413 — Appeal — Joint trial — Appealable sentence against one accused.

Where, at a joint trial of two or more persons by a First Class Magistrate, an appealable sentence is passed against any one of them, the other accused also have got a right of appeal. (1912) 15 OC 386: 14 Cr LJ 170: 19 Ind Cas 170 (DB).

——S. 413 — Non-appealable sentence by Magistrate, if can be enhanced to make it appealable — Appellate Court, duty of.

Where an appeal is preferred to a Sessions Judge against the sentence of a Magistrate, the Judge is bound to hear the whole appeal on the merits. A non-appealable sentence may be enhanced, so as to make it appealable at the request of the accused. A sentence exceeding one month is appealable irrespective as to whether the sentence is legal or illegal. (1911) 13 Bom LR 550: 12 Cr LJ 431: 11 Ind Cas 615 (DB).

——S. 413 — Appeal — Jurisdiction — Magistrate passing non-appealable sentence — Subsequent enhancement to make it appealable.

A Sessions Judge has jurisdiction to entertain an appeal in a case where a Magistrate after first passing a non-appealable sentence enhances it to make it appealable, not having jurisdiction to do so, this alteration of the sentence being a mistake which the Sessions Judge ought to correct. (1911) 35 Bom 418: 13 Bom LR 503: 12 Cr LJ 402: 11 Ind Cas 586 (DB).

——Ss. 413 and 35 — Aggregate sentence of one month — One month's imprisonment on each charge to run concurrently — Appeal whether lies.

An appeal lies to the Sessions Judge against a conviction and sentence by a First Class Magistrate of one month's rigorous imprisonment on each of two charges, the sentences to run concurrently. (1911) 15 CWN 734: 15 CLJ 82: 12 Cr LJ 391: 11 Ind Cas 255 (DB).

3. No appeal lies.

——S. 413 — Right of appeal — Test — Aggregate fine not exceeding Rs. 50 — Appeal — Competency — Cr. P. Code, S. 35(2).

Having regard to the terms of S. 35 (2), Cr. P. Code, as amended in 1923, the test under S. 413, Cr. P. Code as to whether the right of appeal is barred is in the case of sentences of imprisonment, the aggregate of the sentences of imprisonment imposed and, in the case of sentences of fine, the aggregate of the sentences of fine imposed. When the total of fines does not exceed Rs. 50, no appeal will lie. 59 Cal 19, diss. AIR (Vol 38) 1951 Cal 454: (DB).

——S. 413 — Applicability — Trial of accused on charge under S. 427, I. P. Code, by Magistrate of second class, commenced and concluded — Magistrate invested with first class powers later — Sentence of fine of Rs. 50 after such investment — Appeal — Competency.

The trial of the accused on a charge under S. 427, I. P. Code, began on 16-8-1948, before a Magistrate who then had second class powers. Arguments in the case were concluded on 19-5-1949 and the case was postponed for judgment till 31-5-1949. On 31-5-1949 the Magistrate was invested with first class powers and judgment was delivered by him on 7-6-1949, convicting the accused and imposing a fine of Rs. 50.

Held, that since the Magistrate was a first class magistrate when he delivered the sentence imposing a fine of Rs. 50, an appeal was barred under S. 413, Cr. P. C. AIR 1925 Pat 472, Not foll. AIR (V 38) 1951 Pat 406.

——S. 413 — Magistrate while passing sentence of fine of Rs. 40 having powers of First Class Magistrate.

In S. 413 there are no words about holding of the trial when the Magistrate while passing the sentence of fine of Rs. 40 was a Magistrate of the First Class. No appeal lies at all. AIR (Vol 30) 1943 Bom 94: 45 Bom LR 74: 44 Cr LJ 481: 206 Ind Cas 75 (DB).

——S. 413 — Trial before Second Class Magistrate — At conclusion of evidence but before passing sentence, Magistrate invested with first class powers — Sentence passed subsequently, if one passed by First Class Magistrate — Sentence which Second Class Magistrate had no power to pass, if can be passed.

Where a Second Class Magistrate before whom a trial had commenced has been invested with first class powers after the evidence in the case has been concluded but before passing of the sentence, a sentence passed by him is a sentence passed by the First Class Magistrate and if the sentence is a fine below Rs. 50, no appeal would lie.

A Magistrate, who had heard a case while he was a Magistrate having second class powers and who was vested with first class powers before passing judgment can pass a sentence which a Magistrate of the second class had not the power to pass. AIR (Vol 27) 1940 Cal 540: 44 CWN 677: ILR (1940) 1 Cal 519: 42 Cr LJ 87: 191 Ind Cas 154 (DB).

——S. 413 — Complaint lodged under S. 78, Punjab Municipal Act (III of 1911) — One of the accused acquitted — Rest fined Rs. 10 each — Appeal.

A complaint was lodged by the Municipal Committee, through its Octroi Superintendent, against four persons under S. 78 of the Punjab Municipal Act. One out of them had been acquitted; the remaining three sentenced to pay a fine of Rs. 10 each. Appeal was filed against the order:

Held, the appeal was untenable, being barred by S. 413, Criminal P. C. 39 PLR 636: 39 Cr LJ 199: (1947) 172 Ind Cas 846

——S. 418 — Appeal — More than one sentence of fine on accused — Criterion for determining right of appeal — Aggregate fine less than Rs. 50 — Appeal.

Where two sentences of fine are passed, it is the aggregate which is to be looked into for the purpose of determining the right of appeal. An appeal is barred under S. 413, Criminal P. C., where even if more than one sentence of fine be passed by a First Class Magistrate the aggregate of the fine imposed is less than Rs. 50. AIR (Vol 19) 1932 Cal 551: 36 CWN 407: 33 Cr LJ 704 (2): 59 Cal 1131: 138 Ind Cas 720.

**——S. 413 — Joint trial.**

If a person, who is given a sentence which is ordinarily non-appealable, is tried jointly with a person who is given a larger sentence, the former does not thereby obtain a right of appeal which he would otherwise not have. AIR (Vol 10) 1923 All 609: 24 Cr LJ 679: 73 Ind Cas 775.

**——S. 413 — Concurrent sentences.**

An appeal does not lie to the Sessions Court when a Magistrate of the first class has convicted an accused person of more offences than one & has sentenced him for each offence to imprisonment for one month directing at the same time that the sentences should run concurrently. (Case law referred.) AIR (Vol 8) 1921 Cal 152: 25 CWN 613: 66 Ind Cas 65 (DB).

**——Ss. 413, 407 and 410 — Some accused sentenced to non-appealable sentences while other accused sentenced to appealable sentences in a joint trial — Right of appeal.**

The words "notwithstanding anything hereinbefore contained" in S. 413, Cr. P. Code, are very important words, and they set aside any right of appeal which might be held to have been created by Ss. 407 to 410, Cr. P. C. Therefore no appeal lies against a non-appealable sentence passed against an accused, even though his co-accused is given an appealable sentence. 36 Ind Cas 481; 19 Ind Cas 170, Diss. AIR (Vol 4) 1917 All 410: 39 All 293: 15 ALJ 136: 18 Cr LJ 546: 39 Ind Cas 690.

**——Ss. 413, 435 and 438 — Right of appeal.**

Section 413 clearly lays down that there is no appeal in cases of court passing a light sentence only, but not that a convicted person cannot appeal against a judgment in which no other sentence than one not exceeding one month, is passed. Where one or more persons are sentenced to imprisonment not exceeding one month along with other persons sentenced to heavier terms the latter alone can appeal, and in such cases the injustice resulting may be removed by reference or revision to the High Court, under Ss. 438 and 435. AIR(Vol 4) 1917 Sind 34: 10 SLR 156: 18 Cr LJ 72: 37 Ind Cas 56 (DB).

**——S. 413 — Rs. 50 fine by First Class Magistrate.**

No appeal lies from a sentence of Rs. 50 passed by First Class Magistrate. (1911) 9 MLT 322: 12 Cr LJ 63: 9 Ind Cas 340.

**4. "Case", meaning of.**

**——S. 413 — Joint trial — Appealable and non-appealable sentences — Right of appeal — Case, meaning of — Acquittal of some accused by appellate court — Effect of.**

Only person on whom appealable sentences have been passed have a right of appeal and not others, against whom non-appealable sentences have been passed, though they might all have been tried in a joint trial. 38 All 395 and 17 Mad LJ 248, Diss.

Where several accused were tried jointly the adjudication against each of them is a "case", within S. 413, Cr. P. C. and the moment sentences are passed the case is split up into a number of cases. Though some of the accused tried along with others are acquitted in appeal, other may not have the benefit of the finding of the Appellate Court. 31 MLJ 837: 40 Mad 591: 18 Cr LJ 454: 39 Ind Cas 294: AIR (Vol 5) 1918 Mad 918 (DB).

**——S. 413 'Cases' — Meaning.**

The word 'cases' is explained. AIR (Vol 3) 1916 Lah 302: 17 Cr LJ 173: 16 PR 1916 Cr: 21 PWR 1916 Cr: 33 Ind Cas 653 (DB).

**5. Order under S. 562.**

——Ss. 413 and 415-A — Where four persons were convicted of breaking into a shop at night and committing theft under Ss. 457 and 380, I. P. C., the first and second accused who were boys were convicted and released under S. 562 (1), Criminal P. C., the last accused was also released under S. 562 (1), the third accused who was an adult was fined, and and the accused Nos. 2 to 4 preferred an appeal to the Sessions Judge:

Held, that an appeal lay to the Sessions Judge from the orders passed under S. 562, and also therefore, by force of S. 415-A, from the sentence imposed under S. 547, I. P. C. AIR (Vol 22) 1935 Mad 157: 1934 MWN 1318: 41 MLW 22: 36 Cr LJ 589: 58 Mad 517: 69 MLJ 101: 154 Ind Cas 879 (DB).

**——S. 414.**

**——S. 414 — Scope — Sentence of Rs. 100 fine in summary trial under S. 260, Cr. P. C., for offence under Madras Rationing Order — If appeal lies.**

In S. 414, Cr. P. Code, the words "in which a Magistrate empowered to act" indicate that the section applies not only to cases in which the Magistrate has not power to act under S. 260 of the Code for the offences mentioned in that section but also where he is otherwise empowered to act under that section. The words "empowered to act" refer not merely to implied power contained in S. 260, but also refer to express powers conferred on the Magistrate by other provisions in other enactments, like Central Act XXV of 1946, empowering summary trial of offences under that Act.

Accordingly, under S. 414 of the Cr. P. Code, no appeal lies against a sentence of fine hundred rupees in a case where the accused is tried summarily under S. 260 of the Code for an offence under the Madras Rationing Order. AIR (V 36) 1949 Mad 647 : 50 Cr LJ 931 : 1949 MWN 280 : (1949) 2 MLJ 16.

**——S. 414 — Applicability of the bar laid down in — Fine of Rs. 100 and order of forfeiture of property — Appealability.**

The bar laid down in S. 414, Cr. P. Code, must be applied only to a case which comes clearly within its four corners, that is, to a case where a Magistrate empowered to act under S. 260 passes a sentence of fine not exceeding two hundred rupees only. Hence where a sentence is passed of a fine of Rs. 100 and an order for forfeiture of certain property, the case fails outside the ambit of S. 414 and the accused will have a right of appeal. AIR (V 34) 1947 A 366: 1948 ALJ 144: ILR (1947) All 492 : 1947 AWR (HC) 278 : 1947 ALW 451 : 1947 A Cr C 169.

——S. 414 — Where the case is tried summarily under S. 4, U. P. Prevention of Adulteration Act, and the accused is sentenced to pay a fine of Rs. 200, no appeal lies by reason of S. 414, Criminal P.C. AIR (V 27) 1940 All 517 : 1940 AWR 482 : 1940 ALJ 653 : 42 Cr LJ 243 : ILR (1940) All 643 : 192 Ind Cas 83 (DB).

——S. 414 — Section 408 gives a right of appeal immediately a conviction is recorded under S. 562, without waiting for the passing of the subsequent sentence. Section 414 has no application to such a case and the right of appeal is not taken away by S. 414. AIR (V 27) 1940 Rang 223 : 1940 Rang LR 381 : 41 Cr LJ 877 : 190 Ind Cas 226.

——S. 414 — **S. 414, if applies when more than one sentence is imposed.**

Section 414 applies not only to a case where one sentence only is imposed. The singular includes the plural and reading S. 414 with S. 415, it is clear that what is meant is not two punishments similar in kind but a combination of two punishments of different kinds. AIR (V 23) 1936 Sind 40 : 37 Cr LJ 455 161 Ind Cas 267 (DB).

——**Ss. 414,439 — Powers of Appellate Court in appeal against acquittal — Trial Judge, verdict of—Value of — Powers of interference.**

So far as the provisions of the Criminal P. C. are concerned, the powers of the Appellate Court are exactly the same in the case of an order of acquittal as in the case of an order of conviction. The duty of the Appellate Court is to review the entire evidence, to make up its mind upon that evidence and to reverse the decision of the lower Court if it be satisfied upon consideration of the evidence that the decision is unjustified. The presumption of innocence with which the accused starts continues right through until he is held to be guilty by the final Court of Appeal. If he is acquitted by the Court of first instance, the presumption of innocence, of course, remains. The presumption of innocence is absolute. It is not strengthened by an acquittal nor weakened by a conviction in the trial Court. The Appellate Court approaches a consideration of the evidence uninfluenced by the decision of the trial Court which is evidence neither for nor against the accused. It proceeds upon the principle that the accused is presumed to be innocent by the law and it is for the Crown to prove its case. The onus of proof is neither increased nor lightened by an order of conviction or acquittal.

Where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of the Judge trying the case should not be lightly disregarded. There is no authority for any further qualification of the power of the Appellate Court.

It is true where the question in issue depends very largely upon the credibility of the witnesses in the trial Court, then the opinion of the trial Judge, who saw them in the witness-box and observed their demeanour, as to which witnesses are reliable and which are not reliable is an opinion which must carry very great weight with the Appellate Court. Beyond that, however, there is no restriction or qualification under the Criminal P. C. of the power of the Appellate Court to interfere with the verdict of the trial Judge be that verdict one of acquittal or of conviction. AIR (V 21) 1934 All 842 : 35 Cr LJ 1229 : 1934 ALJ 839 : 3 AWR 783 : 151 Ind Cas 114 (DB).

—**Ss. 414, 439 (5) — Motor Vehicles Act (7 (VII) of 1914), S. 14 — Conviction under — Fine and suspension — Appeal not filed — Revision.**

Where a taxi-driver was convicted and fined Rs. 60 and suspended for one year :

Held, that the order of suspension of license was a part of the sentence and it was open to him to appeal therefrom; but that no revision could be entertained at the instance of the accused if he did not appeal against the conviction. AIR (V 20) 1933 Rang 329 : 35 Cr LJ 116 : 146 Ind Cas 545 (2).

——**Ss. 414, 439 (5) — Motor Vehicles Act (7 (VII) of 1914), S. 14 — Conviction under — Fine and suspension — Appeal not filed — Revision.**

——**Case before Magistrate not empowered to try summarily — Transfer and summary trial by District Magistrate — Public servants — Summary trial, propriety of.**

Where the accused was summoned on a charge under S. 323, Penal Code, by Magistrate of the Second Class who could not try the case summarily but the Additional District Magistrate transferred the case to his own file and tried it summarily without informing the accused that he was going to try the case summarily and convicted the accused :

Held, that the case should not have been tried in summary manner, but should have been heard as an ordinary complaint case by a Magistrate having jurisdiction to try it.

Summary procedure, though legal, is inappropriate in cases in which Government servants, no matter what their rank, are concerned as accused persons. AIR (V 19) 1932 Lah 188 : 33 Cr LJ 108 : 33 PLR 177 : 135 Ind Cas 220.

——S. 414 — Sentence to pay fine of Rs. 50 for conviction under S. 447, Penal Code, and Rs. 20 for conviction under S. 24, Cattle Trespass Act, passed by a magistrate in the exercise of summary powers — Appeal :

Held, that there was a combination of two punishments of the nature referred to in S. 414, Cr. P. C. and the order was appealable. AIR (V 19) 1932 Oudh 27 : 8 OWN 1373 : 33 Cr LJ 278 : 7 Luck 501 : 136 Ind Cas 248.

——**S. 414 — Re-trial — Case of simple theft tried summarily — Appeal.**

Where the accused a railway watchman is sentenced on summary trial to one month's rigorous imprisonment for theft of a silver-topped stick from a Railway carriage, the charge is a simple charge of theft of the kind suitable for summary trial and retrial cannot be ordered even though the accused may be liable to be dismissed as a result of conviction. AIR (V 16) 1929 Pat 716 : 118 Ind Cas 312 : 30 Cr LJ 869 : 1929 Cr C 588.

——**S. 414 — Forum.**

Appeal lies to the Sessions Judge from the order of a Magistrate under S. 562. AIR (V 11) 1924 All 765 : 82 Ind Cas 172 : 46 All 828 : 22 ALJ 751 : 5 LRA Cr 131 : 25 Cr LJ 1244

—— **S. 415.**

—— **S. 415 — Scope and effect of — Right of appeal under — Conditions.**

S. 415, Cr. P. Code, is by way of explanation to Ss. 413 and 414. In effect it lays down that where a case falls under S. 413 or S. 414 an appeal would still lie if the punishment mentioned in those sections is combined with "any other punishment," which expression means any other sentence. S. 415 would allow an appeal only if one of the punishments mentioned in Ss. 413 and 414 is combined with any other kind of punishment. Where there are more than one sentence of imprisonment totalling more than one month or where there are more than one sentence of fine exceeding Rs. 50 an appeal would lie. Where there is no sentence of imprisonment not exceeding one month and in addition there is also a sentence of fine not exceeding Rs. 50 or a sentence, say of whipping, an appeal would lie even though the sentence of imprisonment did not exceed one month and the sentence of fine did not exceed Rs. 50. AIR (Vol 36) 1949 A 216: 50 Cr LJ 325: 1948 ALW 388: 1948 OWN 390.

**—— S. 415 — Appeal — Competency — Sentence of fine and also forfeiture under R. 81 (4) of the Defence of India Rules.**

When forfeiture under the provisions of R. 81 (4) of the Defence of India Rules is added to a sentence of fine on a conviction, an appeal would lie under S. 415 of the Cr. P. Code even though the sentence of fine itself may not be appealable. AIR (Vol 35) 1948 A 107: ILR (1947) All 846 : 1947 AWR (HC) 385: 1948 ALW 9: 1947 ALJ 586: 49 Cr LJ 50 (1).

**—— S. 415 — Appealability — Conviction on two counts under S. 379, I. P. Code and separate sentences of fine of Rs 25 on each count.**

Where there is a conviction on two counts under S. 379, I. P. Code, and the accused is sentenced separately to Rs. 25 on each count, no appeal lies under S. 415 of the Cr. P. Code against the order of the Magistrate. AIR (Vol 34) 1947 A 169: ILR (1947) All 399: 231 Ind Cas 82: 1947 OWN 24: 1947 ACr C 26: 48 Cr LJ 672: 1947 ALJ 3: 1947 AWR (HC) 4: 1947 ALW 49 (DB).

**—— S. 415 — Three fines under three different sections of Penal Code imposed — No appeal lies unless cumulative fine amounts to more than Rs. 50.**

In cases where an accused is sentenced to three different fines for three different offences under three different sections of the Penal Code, no appeal lies unless the cumulative fine amounts to more than Rs. 50. AIR (Vol 30) 1943 All 18: 1942 ALJ 607: 44 Cr LJ 189: 1942 AWRHC 322: ILR (1942) All 947: 204 Ind Cas 310.

**——S. 415 — Punishments referred to in S. 415 must be of different kinds.**

The punishments referred to in S. 415, Criminal P. C., include only punishments of different kinds and not punishments of the same kind. AIR (Vol 30) 1943 Pat 122: 21 Pat 753: 44 Cr LJ 401: 9 BR 234: 205 Ind Cas 440 (DB).

**—— S. 415 — Two non-appealable sentences of fine — Aggregate less than Rs 50 — No appeal.**

In view of the history of Ss. 413 and 414, Criminal P. C., as they originally stood before the amendment made in them in 1923, the phrase "any two or more of the punishments therein mentioned" in S. 415, referred to two or more of the punishments of different kinds. Section 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate of fine does not exceed Rs. 50. AIR (Vol 29) 1942 All 336: 1942 ALJ 275: 43 Cr LJ 716: ILR (1942) All 665: 1942 AWRHC 125: 200 Ind Cas 768.

**—— Ss. 415, 439 — "Any two or more of the punishments," meaning of.**

Section 415, Criminal P. C., refers to two or more punishments of different kinds. It has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50.

An accused who was convicted of rioting only & was sentenced to pay a fine of Rs. 20 filed an appeal under S. 415-A. He alleged that as two other accused who were convicted at the same trial and sentenced to pay two fines, Rs. 20 for rioting and Rs. 25 for an offence under S. 355, Penal Code, had a right of appeal under S. 415-A, he had also the right of appeal :

Held, that none of the accused had any right of appeal as there was no combination of punishments in one sentence within the meaning of S. 415. AIR (Vol 27) 1940 Mad 111: 50 LW 614: 1939 MWN 1039: ILR (1939) Mad 1035: 41 Cr LJ 403: (1939) 2 MLJ 878: 187 Ind Cas 103 (DB).

**—— S. 415 — Conviction in which aggregate combined sentences do not exceed Rs. 50 — Appeal to Sessions Judge.**

There can be no appeal to a Sessions Judge from a conviction by Sub-Divisional Magistrate in which the aggregate combined sentences do not exceed Rs. 50. The combination of punishments which is contemplated by S. 415, Criminal P. C. as the section now stands after the amendment of 1923, refers to a combination of the punishments of imprisonment and fine, but this section can have no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. AIR (Vol 26) 1939 Cal 274: 43 CWN 360: ILR (1939) 1 Cal 325: 40 Cr LJ 652: 182 Ind Cas 258.

**—— S. 415 — Combination of punishments — Sentences, whether should be of different kinds.**

Two or more punishments of the same kind (e.g. fine only) can constitute a combination of two punishments within the meaning of S. 415, Criminal P. C. and the presence of the words, "or S. 414" and "or more" in S. 415 clearly leads to the conclusion that the punishments referred to in that section include not only punishments of different kinds but also punishments of the same kind. AIR (Vol 24) 1937 Oudh 524: 1937 OWN 1088: 38 Cr LJ 1062: 13 Luck 618: 171 Ind Cas 337 (DB).

**—— S. 415 — Sentences of fines only, under Ss. 147 and 379, Penal Code — Whether can be combination of punishments — Revision or appeal, which lies.**

The six applicants were convicted by a Special Magistrate under Ss. 147 and 379 in respect of an occurrence and two of them were also convicted on another charge under S. 379, Penal Code, which offence was said to have been committed two days after the occurrence. On the charges relating to the previous incident, all the six were sentenced to a fine of Rs. 8 each under both the sections and on the separate charge under S. 379 the two accused were sentenced to pay a fine of Rs. 2 each:

Held, that the sentence of fine of Rs. 8 each was combination of two punishments; one imposed under S. 147 and the other under S. 379, I. P. C., but if a separate sentence of fine had been imposed under each of the sections, it would nevertheless have been a combination of punishments within the meaning of S. 415, and consequently, no revision against the conviction was maintainable but the remedy was by way of an appeal. AIR (Vol 24) 1937 Oudh 524: 1937 OWN 1088: 38 Cr LJ 1062: 13 Luck 618: 171 Ind Cas 337 (DB).

——S. 415 — The word 'sentence' has not been defined anywhere, and it may be taken to mean whatever has been declared in a simple trial that an accused person shall suffer for the offence which he has committed and hence the word 'combined' in S. 415 applies to two similar punishments of fine. 1936 MWN 213 (214).

**—— S. 415 — 'Therein' meaning of.**

The word "therein" in S. 415, Criminal P. C., refers to Ss. 413 and 414 and S. 415 is intended to apply to cases in which two or more of the punishments mentioned in S. 413 or S. 414, have been combined. AIR (Vol 19) 1932 Oudh 27 : 8 OWN 1373: 33 Cr LJ 278: 7 Luck 501: 136 Ind Cas 248.

**—— S. 415 — Combination of sentence — Appeal.**

An appeal lies to the Sessions Judge against a sentence of a First Class Magistrate of 1 day's imprisonment and a fine of Rs. 50, there being

a combination of sentences as required by S. 415 C. P. C. (1911) 33 All 510: 8ALJ 524: 12 Cr LJ 389: 11 Ind Cas 253.

——S. 415-A.

—— S. 415-A — Gives general right of appeal.

Section 415-A, Criminal P. C., gives a general and not a limited right of appeal. AIR (Vol 27) 1940 Rang 223: 1940 Rang LR 381: 41 Cr LJ 877. 190 Ind Cas 226.

—— S. 415-A — Section 415-A does not control S. 412. AIR (Vol 18) 1931 Sind 151: 25 SLR 337: 32 Cr LJ 1142: 134 Ind Cas 379 (DB).

——S. 417.

See also Ss. 423 & 439.

1. Appreciation of evidence.
2. Burden of proof.

See also N. 13 & 14.

3. Competency of appeal.
4. Grounds for.

See also N. 10 & 12.

5. Limitation.
6. Powers of Appellate Court.

See also N. 10.

7. Procedure.
8. Revision.
9. Scope and applicability.
10. Interference by High Court in appeal.

See also N. 3 & 4.

11. Interlocutory order.
12. Right to appeal.
13. Right of accused.
14. Benefit of doubt.

1. Appreciation of evidence.

**——S. 417 — High Court inclined to view that evidence disclosed afforded reasonable grounds for view of trial Court — Interference.**

Where in an appeal from acquittal, the High Court, after considering the evidence, is inclined to the view that there are facts or circumstances disclosed by the evidence which may not unreasonably be accepted as grounds for the conclusion arrived at by the trial Judge, the High Court will not interfere. AIR (Vol 24) 1937 Rang 7: 38 Cr LJ 295: 166 Ind Cas 645 (DB).

—— S. 417 — It must be only in very exceptional circumstances that a Court dealing with an appeal against an acquittal should reverse that finding by accepting oral evidence which the trial Court after enjoying the advantage of hearing the witnesses has disbelieved. AIR (Vol 16) 1929 Mad 846: 122 Ind Cas 648: 31 Cr LJ 449: 57 MLJ 548: 30 MLW 791: 1929 MWN 785: 2 MCr C 307 : 1929 Cr C 614.

**——S. 417 — Evidence.**

As to appreciation of evidence there is no difference between an appeal from conviction and an appeal from acquittal. The Code makes no distinction between an appeal from an acquittal and an appeal from a conviction. In an appeal from an acquittal if the Court thinks the lower Court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict. The power of appeal under S. 417 is one that should be exercised sparingly by Government. But the discretion to exercise the right to appeal appertains to Government and is not subject to the control of the Court. AIR (Vol 11) 1924 Bom 335: 26 Bom LR 113: 25 Cr LJ 786: 81 Ind Cas 306. (DB)

2. Burden of proof.

See also N 13 & 14.

**—— S. 417 — Appeal against acquittal — Principles — Double presumption in favour of accused.**

In an appeal by the Government from an acquittal, the accused starts with a double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case and until they do so, beyond all reasonable doubt, the accused must be presumed to be innocent; and secondly, that the accused having succeeded in securing an acquittal, the superior Court will not interfere until the Crown shows conclusively that the inference of guilt is irresistible. AIR (Vol 36) 1949 HP 15: 15 Cr LJ 160.

**—— S. 417— Reasonable doubt as to guilt of accused — It is for prosecution to prove guilt and not for accused to prove innocence.**

In an appeal against a conviction, it is only necessary to satisfy the Appellate Court that there is a reasonable doubt as to the guilt of the accused to induce the Appellate Court to interfere but when there is a reasonable doubt as to the guilt of the accused, the Appellate Court will not interfere with an acquittal. Nor will the Court in this or any other proceedings forget that the burden of proof lies upon the prosecution. It is for the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence. The High Court will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion merely because upon the evidence, the Judge might have come to the conclusion that the accused was guilty. The Court will not interfere unless it is quite clear that the Judge or the Magistrate whose judgment of acquittal is appealed against, is wrong and the Court must, in every case, assuming that Government have appointed competent Judges and competent Magistrates, give careful consideration and due weight to the findings of the lower Courts. It is not intended that S. 417, Criminal P. C., should be used in every case where Government thinks there should be a conviction. It is not a power lightly to be used. It should be used only when there can be no reasonable doubt upon the records to the guilt of the accused. AIR (Vol 25) 1938 Sind 80: 39 Cr LJ 504: 32 SLR 689: 174 Ind Cas 835 (DB).

**—— S. 417 — Crown should prove that judgment of Sessions Judge is wrong.**

In an appeal against an order of acquittal, it is for the Crown to show that the judgment of the Sessions Judge is wrong. (1935) 157 Ind Cas 691: 36 Cr LJ 1243: 37 PLR 632 (DB).

**—— S. 417 — Degree of probability — Acquittal based on extraneous and irrelevant considerations.**

In an appeal against an acquittal by the Court of Session, the Crown must satisfy the Court that the guilt of the accused is proved beyond any reasonable doubt, and, when it has done that, it naturally follows that it has succeeded in proving to the satisfaction of the Appellate Court, that the grounds given by the Court of Session in acquitting the accused are unreasonable and unsound. As to what constitutes proof of the guilt of an accused person in any given case, that depends upon the bundle of facts which serve either immediately to convince the mind of the truth of the prosecution story and of the charge against the accused. As absolute certainty amounting to demonstration of guilt is seldom to be had, the Court is obliged to act on degrees of probability which fall very short of it. It has to be judged aright whether in each particular case, the degree of probability is so high as to justify one in regarding it as a certainty and in acting accordingly. In holding a certain fact or thing as proved, all that a Judge look for is such a high degree of probability that a prudent man, in any other transaction where the consequences of a mistake were equally important, would act on the

assumption that the thing was true. AIR (Vol 20) 1933 Oudh 340: 10 OWN 585:: 34 Cr LJ 538: 143 Ind Cas 129 (DB).

**——S. 417 — Interference.**

Section 417, Criminal P. C., does not make any distinction between a Government appeal and a convict's appeal against his conviction. Yet the High Courts in India have always insisted that the Public Prosecutor must make out strong and cogent grounds to justify interference with a judgment of acquittal and that the High Courts will interfere only if it is proved without any doubt not only that the accused person is guilty but that he has been acquitted on unreasonable grounds. AIR (V 19) 1932 Oudh 317 : 9 OWN 3 : 33 Cr LJ 920: 7 Luck 511: 139 Ind Cas 751 (DB).

**——S. 417— Presumption in favour of innocence of accused.**

The rules and the limitations affecting appeals from acquittals are on a par with those relating to appeals from convictions. An appeal from the verdict of the jury stands upon a different basis. In an appeal from an order of acquittal, there is always a presumption in favour of the innocence of the accused. The presumption very materially affects the question of onus, which, except within a limited range of cases, lies upon the Crown, and where the finding of the subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding reached by the Court below, was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again, where the case is somewhere on the border line or very near it and it was possible for the Court, upon a balance of probabilities, to hold a person guilty or not guilty, the reversal of the order of acquittal is not only undesirable and inexpedient but is calculated to cause a miscarriage of justice. Where, however, the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, the High Court is bound to step in as much in the interest of the administration of justce as of the public generally. AIR (Vol 18) 1931 All 439 (DB).

**——S. 417 — Appeal against acquittal — Crown must show conclusively that inference of guilt is irresistible.**

In an appeal by Government against an acquittal the accused starts with a double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case and that until they do so, beyond all reasonable doubt, the accused must be presumed to be innocent; and secondly, that the accused having succeeded in securing an acquittal, the superior Court will not interfere until the Crown shows conclusively that the inference of guilt is irresistible. AIR (V 15) 1928 Pat 146 : 6 Pat 768 : 107 Ind Cas 835 : 9 AI Cr R 385 : 29 Cr LJ 301 (DB).

**——S. 417 — Appeal by Government — Acquittal on the ground of giving benefit of doubt — Onus is heavy to succeed in appeal.**

An appeal by Government must be considered on its merits just as any other appeal always must be. The onus is on the appellant and this onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge. AIR (Vol 12) 1925 All 315: 86 Ind Cas 52: 26 Cr LJ 676: 47 All 306: 23 ALJ 25: 6 LRA Cr 68 (DB).

**——S. 417 — Appeal from acquittal — Forgery — Will, scribe of, antedating it — Penal Code, S. 465.**

Where a competent Court has acquitted a person after due deliberation, its decision should be given its due weight. It is not sufficient to show that the Court could have interfered otherwise from the facts before it, but it must be shown that the inferences were wrong. It is not enough that the Appellate Court, sitting as a Court of Original Jurisdiction might have drawn different inference. The bare fact that a will, found to have been forged was written and antedated by the accused does not, in the absence of any thing showing his complicity in the fabrication of the will, raise a presumption to that effect. AIR (Vol 3) 1916 Oudh 112 : 3 OLJ 477: 17 Cr LJ 540: 36 Ind Cas 588 (DB).

3. Competency of appeal.

**——S. 417 — Wrong concession by Public Prosecutor, if bars appeal based on that concession being allowed.**

A concession wrongly made by the Public Prosecutor in the trial Court cannot stand in the way of an appeal against an acquittal based on that concession being allowed . AIR (Vol 34) 1947 Mad 239: (1946) 1 MLJ 444.

——S. 417 — Appeal against acquittal — Wrong concession in trial Court by public prosecutor resulting in acquittal — If a bar to interference in appeal. AIR (V 34) 1947 Mad 239 : (1946) 1 MLJ 444.

**——S. 417 — Order of acquittal passed by Special Magistrate under Bengal Act XII of 1932 — Appeal — Competency of.**

No appeal lies by the Local Government under S. 417, Criminal P. C., against an order of acquittal passed by a Special Magistrate appointed under the provisions of Bengal Act XII of 1932. AIR (Vol 20) 1933 Cal 776 (1): 34 Cr LJ 1070: 60 Cal 1482: 38 CWN 107: 145 Ind Cas 773 (1) (DB).

**——S. 417 — Trial Court acting perversely — Unreasonable and distorted conclusions drawn from evidence — Miscarriage of justice.**

Where it appears that the trial Court has acted perversely, and has drawn unreasonable and distorted conclusions from the evidence and that it would be a serious miscarriage of justice to allow a murder committed in the middle of a village in broad daylight in the presence of several people, to go unpunished, and the Crown has produced a strong case to prove it, the appeal against acquittal must be allowed. AIR (V 20) 1933 Rang 387: 35 Cr LJ 786: 148 Ind Cas 806 (DB).

**——S. 417 — Acquittal of major offence and conviction for minor offence — Appeal by Government after disposal of appeal by accused.**

Held, by the Full Bench (Niyogi A. J. C., dissenting): — An appeal under S. 417, Criminal P. C., can be preferred by the Government although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. An appeal under S. 417 should, however, be preferred by the Government with all reasonable expedition possible. Where in the opinion of the Standing Counsel, it is likely that Government will appeal against the acquittal, the appeal against the conviction should be postponed in order that both appeals may be heard together, but there should be no postponement if there is only a possibility that the Local Government may desire to appeal.

Per Niyogi, A. J. C. — An appeal under S. 417, from an order acquitting the accused of a major offence is competent only if it is filed before the

High Court pronounces its judgment in appeal from the conviction for the minor offence.

If the convict has appealed and the finding and sentence have been reversed with or without an order for re-trial, the appeal of the Local Government must fail. The reversal of the finding and sentence is final and no order can be passed inconsistent with that reversal. If the convict's appeal has been dismissed, any of the orders allowed by S. 423, Criminal P. C., can be passed on the appeal by the Local Government.

Per Subhedar, A. J. C. — An appeal against acquittal, filed after the dismissal of the appeal, against conviction by a Judge of this Court, should invariably be heard by a Bench of Judges who did not hear the previous appeal, and that an application for revision for enhancement of sentence arising out of a case finally disposed of by a Judge of this Court, be also heard by another Judge. AIR (Vol 19) 1932 Nag 121: 28 NLR 233 : 33 Cr LJ 849: 140 Ind Cas 49 (FB).

**——Ss. 417, 430, 439 — Order of acquittal on graver offence and conviction on lesser one — Appeal by accused on conviction — Dismissal of appeal — Local Government, if can appeal against acquittal after dismissal.**

No appeal under S. 417, Criminal P. C., can be preferred by the Local Government against an order of acquittal when an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. The proper course would be for the Standing Counsel, when an appeal has been preferred by an accused person, in such a case, to ask that proceedings be stayed to enable the Local Government to prefer an appeal under S. 417, if so advised.

In a case where there has been an acquittal on a graver charge, but a conviction on a lesser charge, both Local Government and the accused person have a right to appeal; the Local Government having a right of appeal under S. 417, Criminal P. C., and the accused person a right of appeal against conviction. Ordinarily, the two appeals should be heard together, but if the appeal of accused person is heard and decided by a High Court before the Local Government has appealed under S. 417, the appeal by the Local Government is barred and cannot be entertained by the High Court, there having been a pronouncement by the High Court, which is final under S. 430.

But although there can be no appeal against the acquittal after the appeal against the conviction has been heard and decided, there can be an application for enhancement of the sentence under S. 439 of the Code. AIR (Vol 19) 1932 Nag 73 : 33 Cr LJ 728 : 139 Ind Cas 63 (DB).

**——S. 417 — Distinction between appeal against acquittal and one against conviction.**

Although an appeal from an acquittal stands on the same footing as one from a conviction, sound principles of criminal jurisprudence require that the indications of error in a judgment of acquittal ought to be more clear or more palpable in order to justify its being set aside.

Where the Magistrate has failed to apply his mind to the salient features of the case and has acquitted the accused on ground which are irrelevant or unsupported by any evidence and the judgment is clearly wrong and perverse, an appeal from an acquittal must be accepted. AIR (Vol 19) 1932 Lah 12: 32 Cr LJ 1130: 32 PLR 877: 134 Ind Cas 112 (DB).

——S. 417 — Appeal against acquittal is allowable only if judgment in lower Court is manifestly wrong. 1931 MWN 729: (DB).

——S. 417 — The Criminal P. C. makes no distinction between an appeal against an acquittal and an appeal against a conviction, and the provisions of Ss. 417 and 418, read together, make it plain that in an appeal from an acquittal, if the High Court thinks the Subordinate Court has taken an erroneous view of the evidence it is bound to act on this opinion and convict the accused. As a rule of practice, however, the High Court should not accept an appeal from an acquittal unless, in its opinion, it is established beyond all reasonable doubt by the evidence on the record that the accused is guilty of the offence with which he was charged, and in considering the evidence due weight ought to be given to the findings of the lower Court and its opinion concerning the effect of the evidence and the credibility of the witnesses. AIR (Vol 18) 1931 Rang 86: 8 Rang 671: 32 Cr LJ 929: 132 Ind Cas 547.

**——S. 417 — Acquittal — What is.**

Where an accused being charged under S. 302 is convicted under S. 302/109 his conviction under S. 302-109 can be regarded as an acquittal on the charge under S. 302 and an appeal from such acquittal is competent. AIR (Vol 17) 1930 Lah 338: 127 Ind Cas 855: 12 Lah LJ 33: 1930 Cr C 386 (DB).

——S. 417 — Charge of conviction from Penal Code, S. 353, to one under S. 352 does not amount to acquittal under S. 353 and no appeal lies. AIR (Vol 15) 1928 Lah 230: 29 Cr LJ 905: 111 Ind Cas 665 (DB).

**——S. 147 — Accused acquitted of more serious offence and convicted of less serious one — Government can appeal.**

The legislature cannot have intended to deprive the Local Government of its right to appeal in cases where an accused person has been acquitted of a very serious charge, merely because at the same trial he was convicted of some other charge, possibly receiving a merely nominal sentence. AIR (Vol 12) 1925 Oudh 723: 89 Ind Cas 452: 12 OLJ 421: 2 OWN 550: 26 Cr LJ 1364 (DB).

**——S. 417 — Appeal from acquittal when lies.**

Before the Appellate Court will interfere with an acquittal, the guilt of the accused must be very clear and indubitable. AIR (Vol 5) 1918 Lah 286: 30 PWR 1918, Cr: 19 Cr LJ 710: 46 Ind cas 294 (DB).

**——S. 417 — Acquittal.**

The High Court will not interfere with the order of acquittal when appeal is based on doubtful weighing of facts. AIR (Vol 3) 1916 Lah 380: 17 Cr LJ 97 : 7 PWR 1916, Cr : 32 Ind Cas 833 (DB).

**——S. 417 — Appeal against acquittal — Direction by Local Government — To whom and how to be given.**

Under S. 417 of the Code the direction by the Local Govt. to present an appeal to the High Court against an order of acquittal must be given to a Public Prosecutor; it may be given in a letter whereby the Public Prosecutor is appointed as such. An appeal presented by a person who is not a Public Prosecutor or appointed as such for the purpose, on the direction of a Local Government is not a proper one and is incompetent nor the mere fact that a person has been directed to present an appeal against an order of acquittal involve his appointment as Public Prosecutor for the purpose of the case. AIR (Vol 1) 1914 Cal 560: 41 Cal 425: 18 CLJ 519: 18 CWN 279: 15 Cr LJ 46: 22 Ind Cas 190 (DB).

**4. Grounds for.**

See also N. 10 & 12.

**——Ss. 417, 423 — Appeal from order of acquittal based on facts.**

In an appeal from an order of acquittal based on facts, the High Court will interfere where the acquittal has resulted from a total misunderstanding and misappreciation on the part of the Magistrate of the evidence on record relating to the charge. AIR (Vol 29) 1942 Sind 33: ILR (1941) Kar 532: 43 Cr LJ 458: 199 Ind Cas 78.

**——S. 417 — Obvious error in decision resulting in injustice.**

Per Ram Lall, J. — (In order of reference). If a Judge or the Executive Government find that an obvious error in a decision has been committed, whether the question involved is of greater or lesser public importance, a case of injustice is established and one in which it is the duty of Government to make an appeal. A case, however petty it may appear to an Administrator, is often a matter of great importance to the party affected by the decision and it is the duty of the Executive Government to view the matter from this angle when considering the question of an appeal under S. 417, Criminal P. C. AIR (V 26) 1939 Lah 406 : 41 PLR 1 & 37 : 40 Cr LJ 942: 184 Ind Cas 358 (DB).

**——S. 417 — Cases should be carefully considered in all aspects before appeal is filed.**

It is not proper in an appeal against an acquittal for Government to attempt to snatch a conviction by making out another case against the accused. An appeal against an acquittal is a serious matter. The liberty of a person once acquitted is again to be put in jeopardy, and the cases, in which an appeal against an acquittal is to be made, should be carefully considered in all their aspects before the appeal is filed, and Government should be bound in argument and should consider themselves bound in argument to the ground raised in the memorandum of appeal. AIR (Vol 25) 1938 Sind 108: 39 Cr LJ 630 (2): ILR (1939) Kar 41: 175 Ind Cas 620 (DB).

——S. 417 — In order to entitle the Crown to ask the High Court to convert an order of acquittal into one of conviction, the High Court must be satisfied that the conclusions of the Sessions Judge are at least manifestly wrong. AIR (Vol 21) 1934 Lah 212: 35 Cr LJ 349: 35 PLR 75: 147 Ind Cas 234 (DB).

**——S. 417 — Perversity of error of lower Court, if condition precedent to interference — Fact that High Court, if trying the accused, would have come to different conclusion.**

In cases where the Local Government appeals from an order of acquittal and the grounds of appeal urged are that the Sessions Judge did not attach proper weight to the evidence adduced before him and has allowed his judgment to be prejudiced by attaching undue weight to discrepancies in the prosecution evidence of minor matters and no question of law is involved in the appeal, the Appellate Court will not, and should not, interfere unless it is satisfied that the order of acquittal is clearly wrong, and that the acquittal is tantamount to a miscarriage of justice. The Appellate Court in appeals from acquittals cannot consider that, because a Judge or Magistrate has taken a view of the case with which the view of the Government does not coincide and has acquitted an accused person, an appeal from such decision should succeed. It is quite possible that an Appellate Court may consider that, if it was trying the person acquitted, it would have come to a different finding from the learned Sessions Judge but this itself is not sufficient reason or justification for an Appellate Court to disturb the finding of the lower Court and set aside its order of acquittal. AIR (Vol 21) 1934 Rang 44: 35 Cr LJ 855: 148 Ind Cas 1069 (DB).

**——S. 417 — Right to be used sparingly.**

The right of appeal against an acquittal vested in the Crown should be used sparingly and with circumspection. An appeal against an acquittal should not be filed on a technical ground. AIR (Vol 20) 1933 Mad 230: 34 Cr LJ 948 (1): 145 Ind cas 371.

——S. 417 — When the trial Court acquitted the accused on a misconception with regard to the law, the acquittal was set aside and the case was remanded for re-trial. 1933 MWN 242 (DB).

**——S. 417 — Exclusion of evidence.**

Order excluding evidence can legitimately be attacked in an appeal against the order of acquittal. AIR (Vol 14) 1927 Sind 28: 21 SLR 55: 27 Cr LJ 1217: 97 Ind Cas 1041 (DB).

**——S. 417 — Appeal against acquittal — Ground.**

Appeal against orders of acquittal, under S. 417, Cr P. Code should be preferred only in cases of great importance such as where the order appealed against is manifestly wrong and results in miscarriage of justice. 10 PR 1911 Cr : 24 PWR 1911 Cr: 12 Cr LJ 864: 205 PLR 1911: 11 Ind Cas 182 (DB).

### 5. Limitation.

**——S. 417 — Application for admission of appeal should be filed as early as possible.**

Although there is subsisting a department circular stating that sanction to an appeal will be refused if it is filed after the expiration of three months, that does not mean that it is proper to wait for a period of three months, or anything like three months, before appealing against an acquittal. AIR (Vol 24) 1937 Rang 7: 38 Cr LJ 295: 166 Ind Cas 645 (DB).

——S. 417 — Though a period of six months is allowed by law for appeals from acquittals, it is recommended to the Government that such appeals, when made, should be preferred with all reasonable expedition possible not only in the public interest, but in justice to the persons whose acquittal it is sought to reverse. AIR (Vol 19) 1932 Rang 146: 10 Rang 312: 33 Cr LJ 701: 138 Ind Cas 523 (DB).

### 6. Powers of Appellate Court.

See also N. 10.

——S. 417 — Acquittal — Appeal against — Powers of High Court to review evidence and to set aside acquittal. AIR (Vol 32) 1945 PC 151 : 47 Cr LJ 1: 27 PLT 5: 48 Bom LR 287: ILR (1946) Kar (PC) 1.

**——S. 417 — Weight should be given to views of trial Court as to credibility of witnesses.**

In exercising the power conferred by the Code and before reaching its conclusion upon facts, the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

Held, that where the accused was a relative of the deceased by marriage and could have had no motive for the crime, the High Court should not interfere with an acquittal on the mere ground that he has the means and opportunity of committing the crime. AIR (Vol 23) 1936 Rang 90: 38 Cr LJ 927: 170 Ind Cas 502 (DB).

——Ss. 417, 439 — **Revision against acquittal by private person — Evidence, when can be gone into in revision.**

It is ordinarily not open to a private person to have an acquittal set aside in revision. The power to appeal against an order of acquittal is given to the Crown under S. 417, Criminal P. C., and the High Court should very sparingly interfere in applications filed against orders of acquittal by private persons. The High Court has jurisdiction under S. 439, Criminal P. C., to entertain an application in revision of an order of acquittal when the Crown has not preferred an appeal but the High Court would not move in such a case unless there was some glaring defect, either in the procedure or in the view of the evidence taken by the Court below. The High Court would not go into the question of evidence save in exceptional cases, as where the judgment is manifestly wrong and grossly and palpably unjust. AIR (Vol 22) 1935 Oudh 176: 11 OWN 810: 35 Cr LJ 1236: 10 Luck 192: 150 Ind Cas 951.

——Ss. 417, 418, 423 — **High Court's power to interfere with findings of fact and reverse the judgment.**

There is no foundation for the view apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court has "obstinately blundered", or has "through incompetence, stupidity or perversity", reached such "distorted conclusions as to produce a positive miscarriage of justice," or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result. Sections 417, 418 & 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and/or reach the conclusion that upon that evidence, the order of acquittal should be reversed. No limitation should be placed upon the power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses: (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; & (4) the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice. AIR (Vol 21) 1934 PC 227: 4 AWR 471: 36 Cr LJ 786: 61 IA 398: 40 LW 436: 11 OWN 1119: 1934 ALJ 905: 15 PLT 607: 1934 MWN 1017: 67 MLJ 664: 60 CLJ 276: 39 CWN 15: 56 A 645: 36 Bom LR 1185: 151 Ind Cas 322 (2).

——S. 417 — **Court's power to ascertain whether offence fell under any other section.**

Where in an appeal against the acquittal of the accused by the Appellate Court, the grounds relate only to one section, of the I. P. C., on acquittal under that section, the Court cannot at that stage ascertain whether the offence fell under any other section. AIR (Vol 21) 1934 Lah 843: 36 Cr LJ 165: 152 Ind Cas 615 (2) (DB).

——S. 417 — In considering an appeal by Government against an order of acquittal it is not for the High Court to say whether if it had been trying the case, it might not have taken a view opposed to that of the lower Court. The powers under S. 417, Criminal P. C., should be most sparingly enforced; and, in respect to pure questions of fact, only in those cases where, through the incompetence, stupidity of perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from evidence as to produce a positive miscarriage of justice. AIR (Vol 18) 1931 All 712: 32 Cr LJ 1073: 1931 ALJ 1002: 133 Ind Cas 795 (DB).

——S. 417 — **Appeal should not be allowed unless lower Court's judgment is perverse.**

It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on it by S. 272. The doing so should be limited to those instances in which the lower Court has so obviously blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interest of the public. AIR (Vol 18) 1931 All 439 (DB).

——S. 417 — The opinion of the trial Court on the credibility of oral evidence must be treated as almost conclusive when it is based on the demeanour of witnesses. But where the evidence of a large number of eye-witnesses including persons injured in the attack is discarded mainly on the ground that they belong to the party opposed to the accused persons, and where the testimony of disinterested witnesses supporting them is not acted upon, a Court of Appeal is clearly entitled to decide whether it will or will not attach the same importance as the Court below to an argument of a general nature based on enmity between the parties. AIR (Vol 18) 1931 Lah 18: 32 Cr LJ 485: 31 PLR 1026: 130 Ind Cas 324 (DB).

——S. 417 — With regard to the power of the High Court to interfere in appeal, there is no difference between an appeal from an acquittal and an appeal from a conviction. In the Lahore High Court, the weight of authority is also on the same side, the inclination being perhaps in the interests of the person acquitted to attach more value and give greater prominence than other High Courts to the judgment of the lower Court. AIR (Vol 18) 1931 Lah 18: 32 Cr LJ 485: 31 PLR 1026: 130 Ind Cas 324 (DB).

——S. 417 — In an appeal against an acquittal High Court is not entitled to weigh the evidence and decide whether or not the trial Magistrate has come to a wrong conclusion, unless it is able to hold that the finding of the trial Court is manifestly wrong or pervese, or such as no reasonable man could have arrived at upon that evidence. AIR (Vol 14) 1927 Lah 178: 99 Ind Cas 87: 28 Cr LJ 55 (DB).

——S. 417 — It is the practice of the Sind Judicial Commissioner's Court in all appeals, especially criminal appeals, to pay great deference to the opinion of the Judge presiding over the trial Court, but it will not hesitate to convict in an acquittal appeal more than it should hesitate to acquit in an appeal from a conviction, provided that there are valid grounds for reversing the decision of the learned Judge of the lower Court. AIR (Vol 14) 1927 Sind 92: 98 Ind Cas 467: 27 Cr LJ 1347: 21 SLR 141.

——S. 417 — **Appeal against acquittal — High Court — Procedure.**

There is no distinction between an appeal against conviction and an appeal against acquit-

tal. In an appeal against acquittal if the High Court thinks the lower Court has taken an erroneous view of the evidence and should have convicted, it has no jurisdiction to refuse to convict. The power of appeal against S. 417 of the Code is one that should be exercised sparingly by Government but the discretion to exercise that power appertains to Government and is not subject to control by the High Court. AIR (V 7) 1920 Bom 217 : 21 Bom LR 1054 : 21 Cr LJ 17: 54 Ind Cas 161 (DB).

**——S. 417 — Appeal against acquittal — Illegal trial.**

Where after an illegal trial the accused is acquitted and an appeal is preferred, the High Court cannot itself convict the accused, but can only direct a re-trial. The Court however may refuse to direct a re-trial having regard to the length of time that had elapsed from the date of the alleged offence. AIR (Vol 3) 1916 Mad 110 : 39 Mad 527: 29 MLJ 101: 18 MLT 95: (1915) MWN 504: 16 Cr LJ 593: 30 Ind Cas 145 (FB).

**——S. 417 — Appeal against acquittal — Duty of Appellate Court.**

The Cr. P. Code makes no distinction between an appeal from a conviction and an appeal from an acquittal. In an appeal from an acquittal, if the Court thinks that the Lower Court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict. The power of appeal under S. 417 of the Code is no doubt one which should be sparingly exercised by Govt. but is not subject to the control of the Court. AIR (Vol 2) 1915 Sind 8: 9 SLR 17: 16 Cr LJ 604: 30 Ind Cas 156 (DB).

——Ss. 417 and 423 — The Court will not convict the accused of an offence entirely different from that charged against him in the grounds of appeal. 63 PLR 1911: 46 PWR 1911 Cr: 12 Cr LJ 73: 9 Ind Cas 436.

**——S. 417 — Court of appeal — Facts and law.**

In an appeal from an order of acquittal under S. 417, Cr. P. C. the High Court is a Court of appeal on the facts as well as on the law. (1909) 9 CLJ 378: 10 Cr LJ 499: 4 Ind Cas 124 (DB).

**7. Procedure.**

——S. 417 — Government appealed against 58 persons under S. 417 — Some of the accused served and some not served.

Held, that to hear the appeal in absence of unserved accused is not desirable and permissible. AIR (Vol 31) 1944 Cal 234: 76 CLJ 415: ILR (1943) 1 Cal 181: 46 Cr LJ 31: 215 Ind Cas 176 (DB).

**——Ss. 417, 439 — Normal procedure not resorted to.**

The right of an accused person who has been acquitted, that he should not be tried a second time, is a valuable right and is not to be interfered with lightly. Although in exceptional circumstances, the High Court will interfere in revision even with an acquittal, the High Court will not consider doing so until the normal procedure has been followed and has failed. The normal procedure for the party aggrieved is to apply to the District Magistrate, who will then refer the matter, if he thinks proper, to Government and Government can, if they think proper, sanction proceedings under S. 417, Criminal P. C. and where this course has not been followed, High Court will not interfere. AIR (Vol 24) 1937 Sind 100: 38 Cr LJ 665: 169 Ind Cas 40 (DB).

**——S. 417 — District Magistrate's power to set it aside of his own initiative.**

A District Magistrate is not justified in setting aside an order of discharge which virtually amounts to an acquittal on his own initiative without moving the Local Government to file an appeal under S. 417, Criminal P. C., for setting aside the order of acquittal. AIR (Vol 21) 1934 Oudh 327: 11 OWN 818: 35 Cr LJ 1151: 10 Luck 187: 150 Ind 852.

**——S. 417 — In case of erroneous acquittal — Distinction between appeal from conviction and appeal from acquittal.**

Every erroneous decision is a miscarriage of justice and every such miscarriage is derogatory to the reputation of the judicature and detrimental to the common interest of society. If the scales of justice have not been held in an even hand, it is of no consequence, in abstract juridical theory, whether the deflection has been to this side or to that: to redress the balance is incumbent in either event upon the administration of impartial justice. The Legislature bearing these things in mind has made no distinction between the procedure which an Appellate Court is to follow whether it be dealing with an appeal against an acquittal or an apppeal against a conviction. The law makes no distinction; but there are certain established customs which supplement the statute law, and there are two such customs which all Courts invariably follow. These are (1) to presume every man to be innocent until he has been proved to be guilty; and (2) to give to the prisoner the benefit of whatever doubt there may be. The appellant who is arguing against a conviction has these two principles in his favour; but they are both adverse to the appellant who is arguing against an acquittal. AIR (Vol 21) 1934 Sind 84: 35 Cr LJ 1142: 150 Ind Cas 726 (DB).

——S. 417 — Appeal against acquittal are to be judged by a standard different from that applicable to those against conviction. AIR (Vol 18) 1931 Lah 465: 32 PLR 405: 32 Cr LJ 1079: 133 Ind Cas 865 (DB).

**——S. 417 — Reference — Reference by Sessions Judge to set aside erroneous acquittal is ordinarily acceptable but not one by District Magistrate as he can proceed under S. 417.**

A reference under S. 438 by the Sessions Judge, recommending that an erroneous acquittal by a Subordinate Court be set aside, is acceptable even in ordinary cases, for an appeal against such acquittal under S. 417 by the Local Government is restricted to only exceptional cases. However, such references by the District Magistrate, who has means to communicate with and move the Local Government under S. 417, may not be acceptable. AIR (V 16) 1929 Pat 139 : 116 Ind Cas 768 : 7 Pat 579 : 30 Cr LJ 673 : 13 AI Cr R 112 (DB).

**——S. 417 — Revision — Complainant aggrieved by order of acquittal should move District Magistrate to initiate appeal — No revision lies.**

The proper course for a complainant who is aggrieved by an order of acquittal by a Magistrate is to move the District Magistrate to initiate an appeal by Government under S. 417. The High Court will not interfere, by way of revision, with the order although it involves irregularities of procedure. AIR (Vol 15) 1928 Sind 176: 114 Ind Cas 110:: 30 Cr LJ 251: 12 AI Cr R 200 (DB).

**——Ss. 417 and 423 — Appeal against acquittal — Technical defect — Interference.**

Where an appeal is preferred against an acquittal, it is not fair to the accused to order a retrial simply because the trial was illegal on account of misjoinder of charges unless the Court is satisfied that the order of acquittal is obviously erroneous or is not one which should be maintained

owing to the trial court having omitted to consider material evidence. AIR (Vol 6) 1919 Lah 440: 19 Cr LJ 987: 48 Ind Cas 167 (DB).

8. Revision.

——S. 417 — **Jewel borrowed for purpose of wedding pledged with third person — Borrower convicted for cheating — Order directing return of jewel to owner — Interference.**

In making an order for return of property under the Criminal P. C., the Magistrate has a wide discretion and unless it is clear that he has exercised it on some wrong principle and returned the property to somebody who is obviously not entitled to have it, the High Court will not set aside his order in revision.

Where the accused represented to the owner of a jewel that he wanted it for use at a wedding and upon that representation obtained the jewel but instead of using it for that purpose, the jewel was pledged and the Magistrate, after convicting the accused of cheating, ordered the jewel to be returned to the owner:

Held, the order of the Magistrate could not be said to be wrong. AIR (V 24) 1937 Mad 313 : 1937 MWN 53 : (1937) 1 MLJ 128 : 38 Cr LJ 690 : 169 Ind Cas 80.

——**S. 417 — High Court, when will interfere in revision.**

As under S. 417, Criminal P. C., an appeal is permitted against an order of acquittal, the High Court does not ordinarily entertain an application for revision of such an order unless the order of acquittal has been made without jurisdiction, and if there be illegality in the proceedings. AIR (V 23) 1936 Rang 247 : 37 Cr LJ 832 : 14 Rang 744 : 163 Ind Cas 242 (2).

——**Ss. 417, 439 (5) — Appeal not preferred by Local Government.**

The High Court has no jurisdiction to entertain proceedings by way of revision when the Local Government could have appealed but has not appealed, where it cannot interfere without practically hearing the case on the evidence. AIR (V 20) 1933 Nag 259 : 35 Cr LJ 28 : 29 NLR 365 : 146 Ind Cas 332.

——**Ss. 417, 439 — Crown not preferring appeal — Interference by High Court — Guiding principles.**

Although the High Court has jurisdiction under S. 439, Criminal P. C., to entertain an application in revision of an order of acquittal when the Crown has preferred no appeal, yet the High Court would not move in such a case, unless there was some glaring defects either in the procedure or in the view of the evidence taken by the Court below. In regard to grounds of law, the Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice; and as regards questions of fact, though the Court's jurisdiction to interfere, in respect of the correctness of findings of facts, even when findings are concurrent, is unquestionable, it will not, as a rule, go into the evidence, save in exceptional cases, as where the judgment of the facts is manifestly wrong and grossly and palpably unjust.

The gravest suspicion against the accused will not suffice to convict him of a crime unless evidence establishes it beyond doubt. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution which must not only establish the guilt of the accused but should establish it beyond any reasonable doubt.

The High Court in India have always insisted that, before interference, the prosecutor must make out strong and cogent grounds to justify interference with a judgment of acquittal. AIR (V 20) 1933 Oudh 257 : 10 OWN 345 : 34 Cr LJ 661 : 143 Ind Cas 852.

——S. 417 — It is a most salutary principle, quite as necessary for the well being of society as the repression and punishment of crime, that interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature. AIR (V 19) 1932 Rang 146 : 10 Rang 312 : 33 Cr LJ 701 : 138 Ind Cas 523 (DB).

——S. 417 — Accused charged with murder — Public Prosecutor in lower Court asking for conviction for culpable homicide — Charge of murder withdrawn — Conviction for culpable homicide — Evidence supporting conviction for murder — Case taken up in revision by High Court — Public Prosecutor supplied with definite extra-judicial opinion of Judge regarding the case — Appeal against acquittal of murder — Accused held prejudiced and conviction for murder altogether improper. 1931 MWN 873 (DB).

——**S. 417 — Security order — Reversal of, on appeal if an acquittal.**

Order of Sessions Judge on appeal under S. 406 reversing the order of Sub-Divisional Magistrate directing certain persons to show cause why they should not find security to be of good behaviour for one year on the ground that they were habitual thieves, is not an original or an appellate order of acquittal within the meaning of S. 417 and no appeal lies but the Local Government has a right to apply in revision. AIR (V 13) 1926 Oudh 329 : 1 Luck 231 : 13 OLJ 276 : 3 OWN 390 : 27 Cr LJ 626 : 94 Ind Cas 402 (DB).

——**S. 417 — Acquittal order of — No appeal by District Magistrate — Revision — Competency.**

The fact that the District Magistrate does not move for an appeal against acquittal, is no ground for substituting a revision in place of an appeal. So far as the wording of S. 417, Criminal P. C., is concerned, there is nothing in it which shows that it is the District Magistrate alone who can move the Local Government to file an appeal. It is, in ordinary cases, a matter of practice that the Local Government is moved by private applicants or the police through the District Magistrate, or the latter, as the head of Criminal Administration in his district, himself moves the Local Government but the Government can move otherwise. AIR (V 10) 1923 Lah 163 : 24 Cr. LJ 433 : 72 Ind Cas 593.

——S. 417 — Where the Government does not prefer appeal under S. 417 against acquittal the High Court will not interfere under S. 439, unless there is error of law or procedure on the face of the judgment. AIR (V 9) 1922 Sind 22 : 15 SLR 171 : 23 Cr LJ 343 : 66 Ind Cas 999 (DB).

——**S. 417 — Revision against an acquittal.**

The powers of revision should be sparingly used against the order of acquittal and especially when the Government has refused to appeal against the order. AIR (V 3) 1916 Low Bur 91 : 9 Bur LT 47 : 8 LBR 356 : 17 Cr LJ 91 : 32 Ind Cas 683.

——**Ss. 417 and 422 — Appeal by Government — Notice not served on accused — Interference — Revision.**

Where in an appeal by Government from the acquittal of several persons, the High Court issued warrants for the accused and they were not found, the High Court interfered in revision and set aside the acquittal. AIR (V 2) 1915 All 443 : 37 All 419 : 13 ALJ 630 : 16 Cr LJ 586 : 30 Ind Cas 138 (DB).

9. Scope and applicability.

——**Ss. 417 and 439 — Acquittal on full trial — Government not thinking that there was miscarriage**

**of justice and no exceptional requirements for interference.**

The provision in the Criminal P. C., S. 417, is deliberately confined to the Provincial Government in order to prevent personal vindictiveness from seeking to call in question a judgment of acquittal by way of appeal. It is clearly the intention of the Legislature that there should not ordinarily be interference except in cases where there has been a miscarriage of justice so serious that Provincial Government considers that there ought to be an appeal. In an appeal by the Provincial Government it is open to the High Court to convert an order of acquittal into one of conviction but the High Court will be very reluctant to interfere in revision where that is not possible and the only course is to order a re-trial. Where the Provincial Government apparently does not consider that there was a miscarriage of justice so serious that there ought to be an appeal, and there are no exceptional requirements, it would not be proper to order a re-trial after there has been a very full trial. AIR (V 31) 1944 Nag 136 : 1944 NLJ 93 : ILR (1944) Nag 176 : 45 Cr LJ 766 : 215 Ind Cas 57.

**——S. 417 — Power when may be used.**

Section 417 is not to be used in every case in which Government thinks that there should be a conviction. It is not a power lightly to be used and should be used only where there is no reasonable doubt upon the record as to the guilt of the accused. AIR (V 31) 1944 Sind 124 : 46 Cr LJ 759 : 220 Ind Cas 452 (DB).

——S. 417 — The right of appeal against an order of acquittal is created by S. 417 and S. 449, in its application to appeals against acquittals, merely has the effect of enlarging the scope of such appeals in certain classes of cases. AIR (V 21) 1934 Cal 610 : 38 CWN 854 : 59 CLJ 482 : 35 Cr LJ 1367 : 61 Cal 991: 151 Ind Cas 662 (DB).

**——S. 417 — Order under S. 118 is not a "conviction" or "acquittal".**

The terms "conviction" and "acquittal" are nowhere applied throughout the Code to an order under S. 118, and they are, in fact, wholly inapplicable to the same. Therefore, no appeal lies on behalf of Government against an order of a Sessions Judge setting aside the order of a Magistrate calling upon a person to furnish security for good behaviour. AIR (V 15) 1928 All 1 : 8 LRA Cr 163 : 8 AI Cr R 557 : 26 ALJ 99 : 29 Cr LJ 92 : 106 Ind Cas 684 (DB).

——S. 417 — Orders passed under the Upper Burma Ruby Regulations of 1887, S. 6 are within the scope of the Criminal P. C. as regards appeal and revision though no provision is made in the Regulation for an appeal or revision. AIR (V 12) 1925 Rang 12: 2 Rang 321: 3 Bur LJ 163: 26 Cr LJ 289: 84 Ind Cas 433.

**——Ss. 417 and 247 — Appeal against acquittal — Conviction — Difference.**

There is no distinction under the Code between the right of appeal against an acquittal and the right of appeal against a conviction. There is an appeal from an acquittal under S. 417 of the Code, and it is not limited only to cases where a wrong decision has been arrived at, owing to error of law or misappreciation of evidence. AIR (V 1) 1914 Mad 628 : 38 Mad 1028 : 26 MLJ 160 : (1914) MWN 273: 15 Cr LJ 236: 23 Ind Cas 188 (DB).

**——S. 417 — Object and scope of the section.**

Section 417, Criminal P. C. does not aim at obtaining opinions on abstract points which do not arise for consideration in the case from Chief Court but it only enables the Local Government to have a wrongful acquittal converted into a conviction or to have a re-trial. (1910) 11 Cr. LJ 65 : 14 PR 1909, Cr : 25 PLR 1910 : 34 PWR 1909 Cr : 4 Ind Cas 863 (DB).

## 10. Interference by High Court in appeal.

See also N. 3 & 4.

(a) **Grounds for interference.**
(b) **Practice of High Court.**
(c) **Duty of High Court.**
(d) **Interference in petty cases.**
(e) **Setting aside of acquittal.**

### (a) Grounds for interference.

——S. 417 — The High Court will not interfere in appeal unless there are grounds to show that the view taken by the learned Sessions Judge was wrong and therefore order of acquittal clearly erroneous. (1937) 39 PLR 776 (DB).

**——Ss. 417 to 423 — Conditions justifying interference — Weight to be attached to opinion of trial Court — Mere fact that lower Court has not been incompetent, stupid or perverse or has not blundered — Whether sufficient for dismissing appeal against acquittal.**

If the appellate Court, after bearing in mind that there is the presumption of innocence in favour of the accused, still further strengthened by his acquittal, and that the trial Court was in a better position to judge of the credibility of the witnesses examined before it, and, therefore, great weight has to be attached to its views, is nevertheless fully convinced that the conclusion of the trial Court was clearly wrong and its conclusion was contrary to the weight of the evidence, it would be fully justified in setting aside the order of acquittal.

The mere fact that it is not possible to hold that the lower Court has been incompetent, stupid or perverse or has come to an unreasonable and distorted conclusion or has obstinately blundered would not be sufficient to prevent the appellate Court from allowing an appeal against an acquittal if it were fully convinced that the Court below has been misled by the extremely clever nature of some false defence supported by a forged document.

It is essential for an appellate Court to attach great weight to the opinion of the trial Court. Where two views are possible and each view is reasonable on the evidence and the Sessions Judge has taken one view, then even if the appellate Court, had it been sitting as a trial Judge, would have taken the other view, it should not ordinarily interfere, unless it be shown that there was some irregularity in procedure or that there had been some other serious defect which necessitates a re-examination of the entire evidence and a fresh conclusion. But even this is a mere rule of caution and sound practice, and not any rule of law. It is not possible to lay down any exhaustive list of the conditions which would justify interference with the order of acquittal passed by a lower Court. AIR (V 21) 1934 All 27 : 56 All 354 : 1933 ALJ 1573 : 35 Cr LJ 364 : 147 Ind Cas 238 (FB).

**——S. 417— Interference.**

Although there is no difference in law between an appeal from an acquittal and an appeal from a conviction, it is not the practice to interfere with an order of acquittal unless the indications of error in the judgment are clear and the evidence too strong to be rejected. AIR (V 21) 1934 Lah 710 : 33 Cr LJ 419 : 35 PLR 641 : 153 Ind Cas 889 (DB).

——S. 417 — In the case of appeals from acquittals, the decision of the Court below must be clearly wrong before the High Court will interfere, that is to say, a reasonable decision of a Court entitled to deal with the matter should not be set aside

merely because the High Court took a different view. AIR (V 21) 1934 Lah 523 : 35 PLR 581 : 36 Cr LJ 635 : 155 Ind Cas 118 (DB).

——S. 417 — Appeal — Presumption — Judgment, when liable to be interfered with.

In an appeal by Government from an acquittal, the accused starts with the double presumption in his favour. Firstly, there is the rule that it is for the prosecution to make out their case, and until they do so beyond all reasonable doubt, the accused must be presumed to be innocent, and secondly, that the accused having succeeded in securing an acquittal from Court, the superior Court will not interfere until the Crown shows conclusively that the interference of guilt is irresistible. To put it succinctly, where two opinions can be formed on the same evidence and one of them has been formed by the trial Court, then the appellate Court would not disagree, even if the balance of probabilities be in favour of the opposite view. On the other hand, if only one opinion could be formed on the material on the record and the trial Court has gone counter to it, it would be presumed that the Court has acted perversely in weighing the proof and its judgment will be liable to interference. AIR (V 21) 1934 Pesh 129 : 36 Cr LJ 443 : 153 Ind Cas 35 (DB).

——S. 417 — The statutory law makes no distinction between an appeal against an acquittal and an appeal from a conviction, and in order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court; but the indications of error in the judgment of acquittal ought to be clearer and more palpable, and the evidence more cogent and convincing, in order to justify its being set aside than would be necessary in the case of a conviction. Again, the finding of fact of a Court which has had the evidence before itself is ordinarily entitled to great weight and should be set aside by the Court of Appeal only when the indications of mistake are clear, and this is specially true in cases where the finding is in favour of the accused's innocence. If in such a case the evidence is all oral and its credibility is a mere matter of opinion, without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive. The indications of guilt must be obvious, or the evidence too strong to be rejected before the Court will interfere. AIR (V 20) 1933 Lah 388 : 34 Cr LJ 598 : 34 PLR 704 : 143 Ind Cas 499 (DB).

——S. 417 — **Grounds for interference — There is no difference between an appeal from acquittal and one from conviction.**

There is no difference between the treatment by a High Court of an appeal against a verdict of acquittal and that of an appeal from a conviction according to almost all the High Courts; the inclination of the Lahore High Court being perhaps in the interest of the person acquitted, to attach more value and give greater prominence than other High Courts, to the judgment of the lower Court. 4 All. 148. not Foll. AIR (Vol 18) 1931 Lah 18: 1931 Cr C 82 (DB).

——S. 417 — The Chief Court of Oudh is loath to interfere with an order of acquittal and will only do so if it is proved without any doubt not only that the accused person is guilty, but that he has been acquitted on unreasonable grounds. AIR (Vol 18) 1931 Oudh 116: 8 OWN 101: 32 Cr LJ 694: 6 Luck 539: 131 Ind Cas 436 (DB).

——S. 417 — **Appeal from acquittal by lower appellate Court — High Court can interfere to set it aside**

Whatever may be the value of the judgment of a trial Court, which has had the opportunity of seeing the witnesses and observing their demeancur, no such reason can apply where the trial Court convicts the accused and it is the appellate Court which acquits. In such case the High Court is in as better a position to weigh the evidence as the lower appellate Court and can interfere to set aside the lower Court's order of acquittal; 11 P.R. 1903, Cr., Diss. from. AIR (Vol 17) 1930 Lah 403: 1930 Cr C 463 (DB).

——S. 417 — Where the question involved relates purely to facts and the decision of acquittal was arrived at by unanimous verdict of assessors and the Judge, the High Court would not disturb the findings of the lower Court unless it comes to the cosclusion that the decision was one which no body of sensible men could arrive at. AIR (Vol 16) 1929 Pat 508: 119 Ind Cas 901: 30 Cr LJ 1116: 1929 Cr C 268 (DB).

——S. 417 — **Appeal from acquittal — Interference is justified if finding is wrong — It need not be perverse.**

In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the Court below can be said to have obstinately blundered in coming to it, but upon sound principles of criminal jurisprudence the indications of error in the judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction. AIR (Vol 14) 1927 Lah 549: 102 Ind Cas 492: 8 AI Cr R 196: 28 PLR 313: 28 Cr LJ 556 (DB).

——S. 417 — **Appeal from acquittal — High Court will not interfere except where the Lower Court has obstinately and seriously blundered.**

The High Court will not interfere unless lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public. But the reason that another tribunal or another Judge might have arrived at a view other than that formed by the assessors and the Judge in the cases is not the reason for disturbing the verdict of acquittal which is arrived upon the full consideration of the circumstances and evidence in case. AIR (Vol 10) 1923 Pat 119: 67 Ind Cas 506: 3 PLT 396: 23 Cr LJ 410 (DB).

——S. 417 — **Appeal against acquittal — Interference.**

The indications of the guilt of the accused must be obvious or the evidence too strong to be rejected before the High Court will interfere in an appeal against an order of acquittal. AIR (Vol 6) 1919 Lah 356: 20 Cr LJ 188: 49 Ind Cas 604: 12 PWR (Cr) 1919 (DB).

——S. 417 — **Appeal against acquittal — High Court when can interfere.**

In an appeal by Govt. against an order of acquittal, the interference of the High Court will be limited to cases where the judgment of the Court below is wrong and perverse and without jurisdiction and based upon obvious errors in procedure; a mere doubtful weighing of facts will not be any ground for interference. AIR (Vol 2) 1915 Cal 287: 18 CWN 666: 15 Cr LJ 160: 22 Ind Cas 736 (DB).

——S. 417 — **Appeal against acquittal.**

A lower Court's findings of acquittal unless clearly wrong and unreasonable on the evidence in the case, will not be interfered with by the Appellate

Court. 26 PWR (1913) Cr: 14 Cr LJ 525: 328 PLR 1913: 20 Ind Cas 1005 (DB).

**(b) Practice of High Court.**

**——S. 417 — Interference by High Court — Practice of Oudh Chief Court.**

It is not the practice of the Oudh Chief Court to interfere with an order of acquittal unless the judgment of the Court below is manifestly wrong. AIR (Vol 20) 1933 Oudh 372: 10 OWN 742: 35 Cr LJ 66: 146 Ind Cas 431 (DB).

**——S. 417 — Interference by High Court, when proper — Acquittal by trial Court and acquittal by Appellate Court — Distinction between.**

Before the High Court interferes in an order of acquittal passed by the lower Court, it must be shown not only that the judgment of the lower Court was wrong, but that it was wrong that its maintenance would constitute a miscarriage of justice. There is, however, some slight distinction to be made between acquittals passed by a trial Court would have the advantage of hearing and seeing the witnesses and is to that extent, in a better position to judge the value to be attached to their evidence, the High Court will be less reluctant to interfere with acquittals in appellate than in original cases. AIR (Vol 20) 1933 Pesh 27: 34 Cr LJ 384: 142 Ind Cas 312.

**——S. 417—Appeal against acquittal when can interfere.**

An appeal on behalf of Government in the exercise of the powers conferred by S. 417 should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. Where, therefore, the High Court cannot say that there were not some grounds which might justify the acquittal of the respondent and that the judgment of the learned Sessions Judge is perverse or one which no reasonable man could have come to, on the facts, it should not interfere with that judgment even if it comes to the conclusion that upon the evidence the prosecution case was sufficiently strong to justify a conviction. AIR (Vol 17) 1930 Mad 704: 59 MLJ 520: 125 Ind Cas 538: 31 Cr LJ 897: 1930 Cr C 761: 31 MLW 716 (DB).

**——S. 417 — High Court very reluctant to interfere.**

The High Court is very reluctant to interfere with an order of acquittal and it does not do so unless the necessity is clearly made out. AIR (Vol 12) 1925 Sind 295: 87 Ind Cas 916: 19 SLR 111: 26 Cr LJ 1023 (DB).

——S. 417 — An appellate Court will not interfere with the Trial Court's finding, when the evidence is all oral and not too strong to be rejected. AIR (Vol 7) 1920 Lah 244: 59 Ind Cas 924: 22 Cr LJ 172 (DB).

**——S. 417 — Appeal from acquittal — Interference by High Court.**

The High Court will not interfere with an order of acquittal unless the findings of the court below are obviously wrong or the evidence too strong to be rejected. AIR (Vol 5) 1918 Lah 105: 25 PR 1918 Cr: 29 PWR 1918 Cr: 19 Cr LJ 723: 46 Ind Cas 403 (DB).

**——S. 417 — Appeal against acquittal — Duty of Appellate Court — Conclusion of facts.**

Where the findings of fact of a trial Court are in favour of the accused's innocence, a Court of appeal will not in an appeal against the order of acquittal interfere with the verdict unless, the indications of mistake in the judgment of the lower Court are obvious or evidence as to the accused's guilt is too strong to be rejected. It is immaterial that the Appellate Court might have arrived at a different conclusion had it been trying the accused as a Court of original jurisdiction. AIR (Vol 5) 1918 Lah 54: 70 PLR (1918): 19 PWR (Cr) 1918: 19 Cr LJ 275: 44 Ind Cas 179 (DB).

**(c) Duty of High Court.**

**——S. 417 — Appeal against acquittal — Interference — Prosecution under Cotton Cloth and Yarn Control Order — Acquittal for want of proof of necessary sanction.**

Where the accused who was prosecuted under the Cotton Cloth and Yarn Control Order has been acquitted for want of legal proof of the sanction required by para. 23 of that Order, it is not right for the High Court on appeal to interfere with the order of acquittal for the purpose of enabling the Crown to patch up the defects in the prosecution of its case and revive the prosecution which, on the facts, terminated in the only way in which it could have terminated. AIR (Vol 34) 1947 Cal 318: 231 Ind Cas 468: 48 Cr LJ 815 (DB).

**——Ss. 417 and 418 — Appeal against acquittal — Appeal from conviction — Distinction — General rule.**

An appeal from an acquittal, is not different with regard to consideration of evidence, from an appeal from a conviction. No distinction is drawn in the Cr. P. Code between an appeal from an acquittal and an appeal from conviction. Due weight must of course be given to the decision of the Lower Court and the reasons advanced therefor. AIR (Vol 4) 1917 Cal 687: 20 CWN 128: 17 Cr LJ 9. 32 Ind Cas 137 (DB).

**(d) Interference in petty cases.**

**——S. 417 — Petty cases — Interference in acquittal — Not usual for High Court.**

High Court will not ordinarily interfere to set aside acquittals in petty assaults. AIR (Vol 14) 1927 Mad 298: 52 MLJ 32: 99 Ind Cas 346: 25 MLW 43: 38 MLT 35: 1927 MWN 40: 28 Cr LJ 138.

**(e) Setting aside of acquittal.**

——S. 417 — In an appeal by the Local Government against an order of acquittal, if the Appellate Court, after bearing in mind that there is the presumption of innocence in favour of the accused, which is further strengthened by his acquittal, and remembering the fact that the trial Court was in a better position to judge of the credibility of witnesses examined before it, and that, therefore, greater weight had to be attached to its view, is nevertheless fully convinced that the conclusion of the trial Court was clearly wrong, and its conclusion was contrary to the weight of evidence on the record, it would be fully justified in setting aside the order of acquittal. The mere fact that it was not possible to hold that the lower Court had been incompetent, stupid or perverse or had come to an unreasonable and distorted conclusion or had obstinately blundered, will not be sufficient to prevent the Appellate Court from allowing an appeal against an order of acquittal if it were fully convinced that the Court below was misled by the extremely clever nature of the defence set up on behalf of the accused and supported by a forged document. AIR (Vol 21) 1934 Oudh 229: 35 Cr LJ 843: 11 OWN 568: 148 Ind Cas 1059 (DB).

——S. 417 — An order of acquittal arrived at upon evidence should not, as a rule, be set aside unless the appellate Court holds it to be manifestly wrong or perverse or unless it can be said that the Court who tried the case has manifestly erred. AIR (Vol 12) 1925 Lah 600: 88 Ind Cas 453: 7 LLJ 528: 26 PLR 295: 26 Cr LJ 1141 (DB).

**——S. 417 — Appeal against acquittal — Interference.**

The indication of error in a judgment of acquittal ought to be more clear and palpable and the evidence more cogent and convincing, in order to justify its being set aside, than would be necessary in the case of conviction. AIR (Vol 7) 1920 Lah 21: 21 Cr LJ 349: 55 Ind Cas 685 (DB).

——S. 417 — **When acquittal order will be set aside.**

The Chief Court will not set aside a judgment of acquittal unless it is clearly and palpably wrong on the evidence. AIR (Vol 3) 1916 Lah 143: 15 PR 1916 Cr: 17 Cr LJ 194: 46 PWR 1916 Cr. 34 Ind Cas 306 (DB).

**11. Interlocutory order.**

——S. 417 — **Order refusing to amend charge followed by acquittal is appealable.**

Although S. 417 gives no power of appeal against an order refusing to amend charges, but if such order is followed by an original or appellate order of acquittal, the Local Government may direct the Public Prosecutor to present an appeal. Telang, J., in 16 Bom 414, Not foll.

Per Rupchand Bilaram, A. J. C. An interlocutory order which has resulted in the acquittal of the prisoner on charges for which he was tried, may, no doubt, be made a ground of appeal under S. 417, Cr. P. Code. But where the interlocutory order is an order passed under S. 227, Cr. P. Code, refusing to add a fresh charge and for which a fresh prosecution is permissible, in that case there has been no acquittal of the prisoner in respect of such additional charge, and cannot be relied on as a ground in support of an appeal against the acquittal on other charges altogether. AIR (Vol 14) 1927 Sind 28: 97 Ind Cas 1041: 21 SLR 55: 27 Cr LJ 1217 (DB).

**12. Right to appeal**

——S. 417 — **Right of Local Government to appeal in criminal cases — Whether restricted.**

The terms of S. 417, Criminal P. C., are unqualified by any restriction which may be derived from a consideration of the terms of S. 414. Had the Legislature intended to limit the right of the Local Government to appeal against an order of the lower Appellate Court in a criminal case, it would have said to specifically and as no such qualification appears in the statute, there is none. AIR (Vol 21) 1934 All 842 (844): 35 Cr LJ 1229: 1934 ALJ 839: 3 AWR 783: 151 Ind Cas 114 (DB).

——S. 417 — **Facts, if can be gone into.**

Section 417, Criminal P. C. gives the Local Government the same right of appeal against an acquittal as a person convicted has of appealing against his conviction and sentence. The appellant is entitled to go into facts and ask the Court to come to different view of the facts from that taken by the trial Court. AIR (Vol 21) 1934 Rang 44 : 35 Cr LJ 855: 148 Ind Cas 1069 (DB).

——S. 417 — **Private individual.**

Power to appeal against acquittal is a power vested in the Local Government, and that no right to appeal is possessed by a private person. AIR (Vol 14) 1927 Nag 170: 23 NLR 40: 102 Ind Cas 219: 28 Cr LJ 523.

——S. 417 — **Government alone has the right to appeal against acquittal (Obiter.)**

The practice in the Patna High Court is not to grant applications made by private persons for setting aside orders of acquittal. There is always remedy in the hands of such a person who feels himself really aggrieved by an order of acquittal and that is to go to the Government legal advisers and if he could show them that he had good ground for being aggrieved by an order of acquittal they would on his behalf take it up; and, in such circumstances, the position of the Crown, which, alone has the conduct of prosecutions is entirely different when appiying to the High Court against an order of acquittal from the position which a private person has. AIR (Vol 12) 1925 Pat 321: 85 Ind Cas 356: 2 Pat LR Cr 250: 26 Cr LJ 516 (DB).

——S. 417 — **Appeal against acquittal — Legal Remembrancer — Right to file appeal — Bengal Regulation III of 1829.**

An appeal against an acquittal, presented to the High Court by the Remembrancer of Legal Affairs appointed by the Local Government to be public prosecutor in all cases heard by the High Court in its appellate jurisdiction, is properly presented. AIR (Vol 6) 1919 Cal 203: 23 CWN 96: 46 Cal 544: 20 Cr LJ 170: 40 Ind Cas 490 (DB).

——S. 417 — **Appeal against acquittal — Right of Government.**

The law gives the Government the right to appeal against any acquittal and that right cannot be taken away from any private person. AIR (Vol 5) 1918 Lah 41: 19 Cr LJ 85: 43 PR (Cr) 1917: 43 Ind Cas 245 (DB).

**13. Right of accused.**

——Ss. 417 and 439 — **Right to go into findings of fact.**

In an appeal against acquittal the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. If, therefore, the counsel for the accused is entitled to argue on the facts of the case to show that the accused has not committed an offence under S. 304, I.P.C., then, although the acceptance of those arguments may not automatically set aside the conviction under S. 335, I.P.C., yet if the Court were satisfied that no offence was committed, it would undoubtedly exercise suo motu its powers under S. 439 (1), Criminal P. C., and set aside the conviction. AIR (Vol 25) 1938 Mal 723: 1938 MWN 605: 48 Mad LW 142: (1938) 2 MLJ 225: 39 Cr LJ 871: 177 Ind Cas 432.

——S. 417 — **Appeal against acquittal — Ground for — Perverse view of evidence.**

In an appeal from an acquittal, as in the case of an appeal from a conviction the appellant is entitled to go into facts and ask the appellate Court to take a view of the facts different from that taken by the trial Court. But the accused in an appeal from an acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him. He has the right which he had in the trial Court of being given the benefit of a reasonable doubt as to his guilt. He must also have the benefit of the opinion of the trial Court upon the credibility of the witnesses whom that Court had the advantage of seeing face to face and judging of their demeanour and he has a right to ask that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion. AIR (Vol 16) 1929 Pat 491: 120 Ind Cas 634: 31 Cr LJ 148: 8 Pat 496: 1929 Cr C 243: 10 PLT 838 (DB).

**14. Benefit of doubt.**

——S. 417 — **Appeal against acquittal and appeal against conviction — Distinction between.**

The Criminal P. C., makes no difference between an appeal from an acquittal and one from a conviction. In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the Appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the Court below can be said to have ob-

stinately blundered in coming to it; but sound principles of criminal jurisprudence require that the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. Although there is nothing in S. 417, Criminal P. C., which indicates that an appeal from an acquittal should receive any different treatment from any other appeal or class of appeals, there is in fact this marked distinction, namely, that when an accused has been acquitted by a Magistrate after hearing all the evidence against him, the presumption is that there was least reasonable doubt and the Appellate Court must be positively convinced that there was no such reasonable doubt, the benefit of all doubt shown to exist being against the appellant. But in an appeal from a conviction, the benefit of all reasonable doubt has to be given in favour of the appellant. AIR (Vol 20) 1933 Lah 871: 35 Cr. LJ 137: 34 PLR 1010: 146 Ind Cas 665.

**——S. 417 — Benefit of doubt — Presumption of innocence — Prosecution, duty of.**

If an appeal is filed from an acquittal, the Public Prosecutor must make out strong and cogent grounds to justify interference with the judgment of acquittal. One of the cardinal principles of criminal law is that an accused person is presumed innocent until his guilt is satisfactorily established. If there is any room for reasonable doubt the accused must have the benefit of it. The trial Court which has the opportunity of seeing the witnesses is in a much better position to judge of their veracity than the Court of Appeal and the Appellate Court must, therefore, be slow to differ from the opinion of the trial Judge as regards the value of their testimony unless there are good grounds for differing from it. AIR (Vol 20) 1933 Oudh 254: 10 OWN 323: 34 Cr. LJ 858: 144 Ind Cas 942 (DB).

——S. 417 — In appeals from acquittal, the Public Prosecutor must make out strong and cogent grounds to justify interference with a judgment of acquittal. The Appellate Court is loath to interfere and will only do so if it is proved without any doubt not only that the accused person is guilty but that he has been acquitted on unreasonable grounds.

An accused is presumed to be innocent until his guilt is satisfactorily established, and if there is any room for reasonable doubt, the accused must have the benefit of it. The trial Court which has the opportunity of seeing the witnesses is in a much better position to judge of their veracity than a Court of Appeal, and the Appellate Court should be slow to differ form the opinion of the trial Judge as regards the value of their testimony unless there are griunds for it. (1932) 139 Ind Cas 740: 9 OWN 145: 33 Cr LJ 932 (DB).

**——S. 417 — Duty of prosecution.**

In appeals from acquittal, the Public Prosecutor must make out strong and cogent grounds to justify interference with the judgment of acquittal. One of the cardinal principles of criminal law is that an accused person is presumed innocent until his guilt is satisfactorily established. If there is any room for reasonable doubt, the accused must have the benefit of it. The Appellate Court must be slow to differ from the opinion of the trial Judge as regards the testimony of witnesses unless there are good grounds for it. (1932) 139 Ind Cas 756: 9 OWN 321: 33 Cr LJ 929 (DB).

——S. 417 — Appeal from acquittal — Practice.

In an appeal from an acquittal, the benefit of all doubt is against the appellant but in an appeal from a conviction the benefit of all reasonable doubt should be given to the appellant. (1910) 11 Cr LJ 66: 15 PR 1909, Cr.: 37 PWR 1909, Cr: 4 Ind Cas 864 (DB).

——S. 418.

See also Criminal P. C., S. 417.

1. Scope and applicability.
2. Trial by Jury—Matter of law only.
3. Trial by Jury—Question of fact.
4. Trial by Jury—Case triable by assessors only.
5. Appeal by Crown.

1. Scope and applicability.

——S. 418 — Right of appeal under — Nature and limits of.

The right of appeal given to an accused person, who has had the benent of a trial by jury, is restricted and is to be found only within the four corners of S. 418 of the Cr. P. Code and it is only on a question of law that the High Court can be moved. AIR (V 34) 1947 All 72 : ILR (1947) All 385: 1946 ALJ 439: 1946 AWR (HC) 563: 1946 All Cr C 154: 230 Ind Cas 141: 48 Cr LJ 539.

——S. 418 — It is as from a Sessions Court to a High Court that appeals and revisions lie from a trial by the Sind Chief Court in its original criminal jurisdiction as the Sessions Court of Karachi to the Sind Chief Court in its High Court criminal appellate jurisdiction. AIR (Vol 31) 1944 Sind 65: 45 Cr LJ 505: ILR (1944) Kar 239: 212 Ind Cas 79 (DB).

——S. 418 — Appeal cannot be admitted on limited ground only.

An appeal cannot be admitted only on a limited ground, e.g., on the question of sentence only. AIR (Vol 29) 1942 Pat 46: 23 PLT 291: 8 BR 33: 43 Cr LJ 27: 196 Ind Cas 548.

——S. 418 — Section 376 is an exception to S. 418(2). AIR (Vol 24) 1937 Sind 162: 31 Sind LR 82: 38 Cr LJ 808: 169 Ind Cas 716 (DB).

——S. 418 — In cases where the appellants have been sentenced to death, they can appeal to the High Court on matters of fact as well as of law. AIR (Vol 23) 1936 Cal 73: 40 CWN 432: 63 Cal 929: 37 Cr LJ 394: 64 CLJ 154: 161 Ind Cas 74 (DB).

**——S. 418 — Verdict of jury — Scope — Power of High Court.**

When the Sessions Judge makes a reference under S. 307, the High Court has to see whether the verdict of the jury is perverse. But no such condition applies to S. 418 as amended in 1923. All that the High Court has to see is whether the offence charged is proved against each of the accused persons and for this purpose, the High Court has to take the definition of "proved" given in Evidence Act. AIR (Vol 20) 1933 All 535: 55 All 689: 35 Cr LJ 360: 147 Ind Cas 15 (DB).

**——Ss. 418 (2), 374 — Trial by jury — Death sentence on some accused — Appeal by other accused — Questions of fact and of law — Whether open in appeal.**

Section 418, Criminal P. C., restricts appeals in jury cases as a general rule, to matters of law. But this restriction does not apply to references under S. 374, Criminal P. C., and sub-s. (2) which was added to S. 418 in 1923, provides that, where in a case tried by a jury, any person is sentenced to death, any other person convicted in the same trial may appeal on a matter of fact as well as on a matter of law. AIR (Vol 19) 1932 Pat 302: 13 PLT 440: 34 Cr LJ 83: 140 IC 846 (DB).

**(Reversed on other points in AIR (Vol 20) 1933 PC 208: 34 Cr LJ 843 (2): 144 Ind Cas 911.)**

**——S. 418 — S. 418 is not narrowed down by S. 423 (2).**

S. 423 (2) only applies if it becomes necessary to consider whether the verdict of the jury was erroneous owing to a misdirection by the Judge. It does not narrow down S. 418 which allows an appeal in a jury trial on a question of law. AIR (Vol 13) 1926 Lah 193: 27 Cr LJ 793: 95 IC 393.

**2. Trial by Jury—matter of law only.**

**(a) General.**

**(b) Misdirection and non-direction.**

**(a) General.**

**——S. 418 — Right of appeal given to accused — Trial by jury — Allowed only on questions of law.**

The right of appeal given to an accused person, who had the benefit of a trial by jury, is restricted. That right can be found only within the four corners of S. 418. It is only a question of law on which the Court can be moved. AIR (Vol 34) 1947 All 72: 1946 AWR 563 (564): 1946 ALJ 439.

**——S. 418 — Trial by jury — Grounds of appeal.**

In a trial by jury, appeal lies only under S. 418, Criminal P. C., and must rest on legal grounds. The memorandum of appeal must state distinctly in what respect the law has been contravened. The line and points of attack must clearly be foreshadowed in the grounds of appeal and it is not enough to allege that the charge to the jury is full of misdirections and non-directions and that the verdict of the jury is perverse. If these requirements are not complied with, the appeal will be rejected. AIR (Vol 32) 1945 All 182: 1945 ALJ 43: 1945 OWN (HC) 3: 1945 AWR (HC) 19: ILR (1945) All 127: 46 Cr LJ 687: 220 Ind Cas 411.

**——S. 418 — Jury trial — Appeal only on point of law.**

In a trial by a jury, the appeal lies only on a matter of law. AIR (Vol 30) 1943 Bom 74: 45 Bom LR 64: 44 Cr LJ 411: 205 Ind Cas 411 (DB).

**——S. 418 — Unanimous verdict of jury accepted by Judge — Conviction — Appeal, if lies on merits.**

Where the Judge has convicted the accused accepting the unanimous verdict of the jury against them, no appeal lies on the merits of the case under S. 418, Criminal P. C. ('34) 147 Ind Cas 53: 10 OWN 971: 35 Cr LJ 285.

**——S. 418 — Appeal — Order, if should be perverse for interference.**

An appeal against acquittal lies on a matter of fact and no limitation is laid down that the High Court must find that the view of the Court which acquitted the accused was perverse. AIR (Vol 20) 1933 All 574: 34 Cr LJ 1232: 146 Ind Cas 244 (DB).

**——S. 418 — Appeal against verdict of jury — Matters of law and fact — Severity of sentence — Matters of law.**

Under S. 418, Criminal P. C., an appeal may lie on a matter of fact as well as on a matter of law except where the trial is by a jury, in which case the appeal shall lie on a matter of law only. The alleged severity of a sentence is a matter of law for purposes of appeal. AIR (Vol 18) 1931 Oudh 171: 8 OWN 344: 32 Cr LJ 858: 6 Luck 706: 132 Ind Cas 232.

**(b) Misdirection and non-direction.**

**——Ss. 418, 423, 449 and 537 — Trial by jury — Appeal — Serious misdirection or non-direction to jury — Court can consider evidence and maintain conviction — Re-trial need not be ordered.**

The primary duty of the Court on an appeal is indicated in S. 423 (1). It is to consider with the record before it whether there is "sufficient ground for interfering." In a trial by jury, that there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. If the Court so finds then it has a plain justification for interfering and indeed a duty to do so. The Court in deciding whether there has been in fact a failure of justice in consequence of a misdirection is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted. It cannot be said that it is not permissible for the appellate Court to go into the merits of the case in an appeal under Chap. 31 because of S. 418. An appeal may be entertained only on a question of law, but once it has been held by the appellate Court that there has been an error in law it is open to it to interfere with the jury's verdict and if it thinks that the error in law affords sufficient ground for doing so it will then proceed to consider which of the various forms of interference it will adopt and is not bound to order a re-trial. The circumstance that in some instances the appellant may appeal both on fact and on law while in others the appellant may appeal only on law is not one of much importance nor is it a determining feature and hence, the rule above mentioned is not confined to appeals under S. 449 where the appeal would be both on questions of law and fact. Therefore, the Court in an appeal can, where there has been a serious misdirection or non-direction, consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused. AIR (Vol 33) 1946 PC 82.

**(Overrules (1894) 21 Cal 955 and (1898) 25 Cal 230.)**

**——Ss. 418, 374, 376 — Power on reference under S. 374 — Appeal succeeding on its own grounds — Exercise of powers under Ss. 374 to 376 — In appeal, High Court finding charge to jury amounting to misdirection — It can direct re-trial.**

The power conferred on the High Court on a reference under S. 374, is subject to the results of the appeal under S. 418. If the appeal itself succeeds on its own grounds, its result should not be allowed to be affected by the exercise of any power conferred on the High Court by Ss. 374 to 376. If the High Court finds that the verdict of the jury is erroneous owing to a misdirection by the Judge, the High Court can direct a re-trial. AIR (Vol 29) 1942 Cal 524: 75 CLJ 10: 46 CWN 108: 43 Cr LJ 860: 202 Ind Cas 604 (DB).

**——S. 418 — Misdirection or non-direction is matter of law.**

Where there has been a trial by jury the appeal has to be confined within the restricted limits prescribed by the legislature. Misdirection or non-direction is a matter of law. If the verdict of the jury has been influenced by evidence which was inadmissible or proceeds upon no evidence at all, this is a matter of law. If this defect has affected the Crown or the accused prejudicially the order passed by the Court below ought to be set aside. AIR (Vol 17) 1930 All 24: 120 Ind Cas 264: 1929 ALJ 1261: 31 Cr LJ 33: 1930 Cr C 40.

**——Ss. 418 and 423 — Trial by jury — Charge to Jury — Heads of — Evidence, consideration of — Misdirection — Power of Appellate Court to alter conviction.**

S. 423, Cr. P. Code applies to a trial by Jury only to empower an Appellate Court to alter or reverse a verdict, for preventing a conviction from taking effect as the result of a misdirection. But an Appellate Court cannot substitute its own verdict for that of the Jury. S. 423 must be read with S. 418 and where facts are in issue the absolute finality of the verdict of a Jury on a question of fact must be given effect to. AIR (Vol 4) 1917 All 173: 39 A 348: 15 ALJ 205: 18 Cr LJ 491: 39 Ind Cas 331.

**3. Trial by Jury — Question of fact.**

**——S. 418 — Powers of the High Court to go into questions of fact.**

It is not competent to the High Court to go into questions of fact in an appeal against a conviction as a result of a verdict by a jury. It is not open to the High Court to examine the evidence and find out whether the conviction is justified or not. AIR (Vol 37) 1950 Mad 577: 1950 MWN 334: 51 Cr LJ 1341: 63 LW 371: (1950) 1 MLJ 520 (DB).

**——S. 418 — Identification, if satisfactory is for jury to decide — Direction by Judge to reject such evidence — Jury still convicting — No interference by High Court.**

It is purely for the jury to say whether they were satisfied with the evidence of identification, and if they convict in spite of the very strong view taken by the Judge that they ought to reject it, it is impossible for the High Court to interfere with this verdict. AIR (Vol 31) 1944 Cal 39: 45 Cr LJ 468: 211 Ind Cas 624 (DB).

**——S. 418 — Appeal against verdict of jury — Consideration of evidence by Appellate Court.**

It is not open to the Appellate Court in an appeal against a verdict by the jury to consider whether that Court would, on the same evidence, convict any one of the accused. AIR (Vol 30) 1943 Mad 527: 1943 MWN 290 (2): (1943) 1 MLJ 377: 44 Cr LJ 766: 208 Ind Cas 265.

**——S. 418 — Jury trial — No death sentence — Appellate Court, if can convict on its own appreciation of facts — Jury's verdict vitiated — Order by Appellate Court.**

In cases of trial by jury, where there has been no sentence of death, the Appellate Court cannot convict on its own appreciation of facts. If in its opinion the verdict of the jury is vitiated, that verdict is to be set aside and unless the Appellate Court acquits or discharges the accused, a re-trial by the jury should be directed. Section 418 (2), Criminal P. C., no doubt extends the right of appeal of an accused so as to entitle him to appeal on matters of fact as well. But that would not necessarily mean that where the accused prefer an appeal on a question of law only, the High Court will be entitled to look into the questions of facts as well in order to maintain the conviction. AIR (Vol 29) 1942 Cal 524: 75 CLJ 10: 46 CWN 108: 43 Cr LJ 860: 202 Ind Cas 604 (DB).

**——S. 418 — Whether High Court can go behind juror's findings of fact.**

In an appeal from a conviction in a trial by jury, it is not open to the High Court to go behind the findings of fact arrived at by the jurors. AIR (Vol 21) 1934 Oudh 122 (1): 11 OWN 202: 35 Cr LJ 566: 147 Ind Cas 1176.

**——S. 418 — Discrepancies in evidence.**

If there are any discrepancies in the evidence as recorded in a Magistrate's Court and the Sessions Court it is for the accused to bring them on the record of the Sessions Court so as to afford an opportunity to the prosecution to explain them. The High Court will not look into such evidence. AIR (Vol 17) 1930 Sind 308: 1930 Cr C 1145 (DB).

**——S. 418 — Jury Trial — Verdict of not guilty — Evidence for conviction slender — No interference.**

Where in a case of dacoity against a number of persons the evidence of identification was slender in the case of all the accused except one and there was evidence which threw doubt upon the genuineness of the test identification.

Held, it was not a proper case in which the High Court would interfere with the verdict of the jury. AIR (Vol 15) 1928 Pat 203: 7 Pat 55: 9 PLT 567: 29 Cr LJ 466: 109 Ind Cas 114 (DB).

**4. Trial by Jury—Case triable by assessors only.**

**—Ss. 418 (1), 536 — Trial by jury when it ought to be by assessors — Appeal on fact, if maintainable.**

Per Biswas, J. (Mc Nair, J., contra). — Trial by jury is not necessarily and in all circumstances a "privilege" which the accused is bound to accept as such, or which must be presumed as a matter of law to be so "beneficial" as may be thrust on him. If it is a question of choice, it should be for the accused and the accused alone to make the election. It may be that it was the policy but not intention of the Legislature to treat trial by jury as a privilege. A jury trial would be a privilege only if and to the extent it could be regarded as sacrosant, not where no finality attaches to it as in a Sessions trial held in a High Court. Any sentimental advantage that may be supposed to be inherent in such a mode of trial on notions derived from British criminal jurisprudence would be for outweighed by the "liabilities" incidental thereto, in so far as it tended to affect the right of appeal. Where, therefore, through no fault of his, a trial by jury is imposed on an accused person in disregard of the express provisions of the statute which entitle him as of right to a trial with the aid of assessors, it would be a manifest injustice to deprive him of a right of appeal which he would otherwise have had under the law. Such a result should be avoided by all means, unless, of course, this is necessitated by the constraining language of the Code. The words "where the trial was by Jury" in S. 418 (1), Criminal P. C., admit of two meanings and they must mean "where the trial in fact was by jury", and "where the trial was lawfuily by jury."

Section 536, Criminal P. C., merely cures an admitted irregularity in procedure, but even so it says nothing as to whether a trial which should have been a trial with the aid of assessors but was in fact held by a jury should be deemed to have been held as a valid trial by jury, or conversely whether a trial which should have been by jury but was actually held with the aid of assessors should be deemed a valid trial with assessors. In any case, S. 536 does not and cannot affect the right of appeal which is governed by S. 418 (1) read with S. 410. Where the trial ends in an acquittal, and there is or is not an appeal by the Local Government, there will be obviously no prejudice, and the trial may stand. But where it ends in a conviction, and the accused appeals, and the accused is sought to be shut out of an appeal on facts, he will certainly have been prejudiced, and on a strict reading of S. 536 (1), the trial will be incurably bad. To render the trial valid in such a case, the right of appeal on facts would indeed have to be conceded. Prejudice may arise also in another way, where the Judge takes a view more favourable to the accused than the jury but is unable to give effect to it because the trial is a trial by jury.

Per Mc Nair, J.—The principle on which S. 418 is founded is that once the jury have come to a decision on a question of fact that decision is final and cannot be challenged either by the Judge of first instance or by the Judges in the Court of Appeal. In a trial with assessors, the Judge is the Judge of fact, though his decision is aided by the expression of opinion of the assessors, and his decision on questions of fact is liable to challenge. The accused has secured, as a result of being tried by a jury when he ought to have been tried with the aid of assessors, a privilege as valuable as, if not more valuable than, the right of appeal on facts. AIR (Vol 25) 1938 Cal 51: 42 CWN 129: 39 Cr LJ 161: 66 CLJ 225: ILR (1938) 1 Cal 290: 173 Ind Cas 65 (DB).

**——S. 418 — Case triable by assessors but tried by jury — Appeal on facts.**

Where a jury tries a case which is triable by assessors, but no objection is taken during trial, the accused has no right to appeal on facts. AIR (V 24) 1937 Cal 756 : ILR (1937) 2 Cal 315 : 39 Cr LJ 182 : 172 Ind Cas 891 (DB).

——**S. 418 — Offence triable with assessors — Case tried by jury — Conviction — Appeal lies only on matters of law.**

When an offence, which ought to be tried with assessors, is tried by a jury, and a conviction follows, an appeal lies on matters of law only and not on matters of fact. The words 'when the trial was by jury' in S. 418, Criminal P. C., mean when the trial was in fact by jury and not when the trial should have been by jury. AIR (V 20) 1933 All 128 : 1932 ALJ 1103 : 34 Cr LJ 441 : 55 All 68 : 142 Ind Cas 800.

——**Ss. 418, 536 — Charge of an offence triable by a jury — Acquittal on such a charge — Finding of guilty by the jury on a minor offence not charged — Such offence only triable by assessors — Conviction on such offence — Appeal on a question of fact.**

Per Benson J. — Where a person is charged with an offence triable by a jury only and the jury finds that all facts necessary to constitute the accused guilty of an offence triable with assessors, and the judge acting on that opinion convicts the accused on the minor offence, an appeal lies on the facts also.

Per Bhashyam Aiyangar J. — The right to appeal on facts depends on the fact whether the accused was actually tried by a jury or with assessors and not upon the nature of the trial prescribed by law for a particular offence. Even the fact that the accused rightly objected to the particular mode of trial is ineffectual. (1902) 26 M 243 (247, 248) (DB).

——**Ss. 418, 439, 539—Trial by jury—Case triable with assessors — Appeal.**

No appeal lies on matters of fact where an accused person who ought to have been tried with jruy. (1901) 3 Bom LR 271 : 25 B 680 (689) (FB).

**5. Appeal by Crown.**

——**S. 418 — Appeal by Crown on point of fact.**

It is not usual for the Crown to prefer an appeal against an appellate judgment on a point of fact unless the judgment is perverse. AIR (V 30) 1943 Mad 33: 55 MLW 711: (1942) 2 MLJ 581: 44 Cr LJ 188: 1942 MWN 818(2). 204 Ind Cas 306.

——**Ss. 418 (1), 417 — Provisions of S. 418(1), applicability to Government appeal under S. 417.**

The provisions of S. 418(1) Criminal P.C. apply to a Government appeal under S. 417, Criminal P. C., against an order of acquittal, just as much they apply to an appeal by a convicted person where the trial is by jury. Consequently, no point other than a point of law can be raised on either side at the hearing of an appeal of this nature. AIR (V 23) 1936 Oudh 108: 1935 OWN 1153: 36 Cr LJ 1467: 158 Ind Cas 913 (DB).

——**S. 419.**

——**S. 419 — Powers of attorney — Prosecution evidence found to be bad but accused not acquitted because power-of-attorney filed by his counsel not signed by accused — Whether appellant was not present when appeal was filed, not certain.**

Where in an appeal by accused by A and B against their conviction, the appellate Court found the prosecution evidence to be very bad and acquitted A and also would have acquitted B but for the fact that the power-of-attorney filed by B's counsel did not bear B's signature and the Sessions Judge in revision held that it was not certain that B did not appear in person when the appeal was filed:

Held, that the omission was a mere slip and only an irregularity such as could have been cured by taking the signature of B upon the power-of-attorney subsequently and the accused B ought to have been acquitted. AIR (V 31) 1944 Oudh 84: 1946 O WN 479(1): 1943 AWR CC 184(1): 45 Cr LJ 286: 19 Luck 563: 211 Ind Cas 92.

——**Ss. 419, 420, 421, 561 — Represented appeal — Maintainability of, after dismissal of jail appeal — Power of High Court to review its own judgment.**

A represented appeal under the provisions of S. 419, Criminal P. C., is not maintainable after a jail appeal filed under the provisions of 420 has been summarily dismissed under the provisions of S. 421(1). The High Court has not and never has had any inherent power to review its own judgment and S. 561-A does not confer on it any power so to do. AIR (V 27) 1940 Oudh 369: 41 Cr LJ 711: 1940 AWR 255: 1940 OWN 594: 15 Luck 662: 189 Ind Cas 83 (DB).

——**S. 419 — Joint appeal by persons with common interests convicted at same trial — Legality of.**

A joint appeal by persons with common interest convicted at the same trial is in accordance with law and should be heard. But this principle has no application where the interests of any of the appellants conflict with each other. AIR (V 23) 1936 Lah 859: 38 Cr LJ 115: 17 Lah 771: 39 PLR 105: 166 Ind Cas 46.

——Ss. 419, 420, 421 — Even though a jail appeal has been dismissed summarily, an appeal through a Pleader is quite competent and Sessions Judge can hear it. 1935 MWN 1062(2).

——**Ss. 419, 421, 561-A — Order dismissing appeal filed under S. 419 — When can be set aside — Question whether conditions under S. 421 have been fulfilled, is a question of fact — Interference.**

An order passed under S. 421, Criminal P. C., dismissing an appeal filed under S. 419, Criminal P. C., is prima facie final.

Such an order cannot be under S. 561-A, Criminal P. C., unless it is proved that either of the conditions precedent to the passing of the order as laid down by S. 421 has not been fulfilled and this is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with, lies heavily on the person challenging the finality of the order.

Where it is proved that either of the conditions present has not been complied with, the High Court has power to interfere under S. 561A and in such a case, it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions has not been complied with, the High Court, whether the Bench is composed of the same or other Judges, has no power to interfere. AIR (V 22) 1935 Sind 84: 36 Cr LJ 831: 29 Sind LR 203: 155 Ind Cas 736 (FB).

——**Ss. 419, 420, 421 — Dismissal of jail appeal summarily — Whether bars hearing of appeal filed by counsel.**

The practice in the Allahabad High Court is that a summary dismissal of a jail appeal by a Judge does not in any way debar the hearing of an appeal filed by counsel. AIR (V 21) 1934 All 988(1): 4 AWR 344: 36 Cr LJ 300 (1): 153 Ind Cas 153 (1) (DB).

——S. 419 — Where an appeal was presented before Sessions Judge, who, on finding that there was no copy of the judgment along with the appeal memo granted time to the accused to file a copy of the judgment, and on expiry of the period, passed an order dismissing the appeal as no steps had been taken to complete the appeal by filing a copy of the judgment:

Held, that the order was one of rejection of the appeal for non-compliance with the provisions of S. 419, Criminal P. C., and not one of dismissal and the order rejecting the appeal could not be held to be an order amounting to a judgment within the meaning of S. 369, Criminal P. C. AIR (V 21) 1934 All 206: 35 Cr LJ 441: 1934 ALJ 329: 56 All 299: 4 AWR 516: 147 Ind Cas 347(2).

**——Ss. 419, 421 — Hearing of appellant's pleader — Sending for record — Summary dispossal after receiving record.**

Where on an appeal presented under S. 419, Criminal P. C., to the Sessions Judge, the Pleader for the appellant is heard and the Judge calls for the record, the Judge must hear the appellant or his pleader again before he summarily dismisses the appeal on receiving the record. AIR (V 19) 1932 Cal 397: 33 Cr LJ 602: 138 I nd Cas 384 (DB).

**——S. 419 — Affidavit to be filed in time.**

Where allegations of material facts are made in the grounds of appeal, they should be supported by an affidavit filed before the appeal comes on for hearing so that the opposite side may have time to make enquiries and file a counter-affidavit. AIR (V 19) 1932 Pat 302: 13 PLT 440: 34 Cr LJ 83: 140 Ind Cas 846 (DB).

**——S. 419 — Copy of judgment — Connected applications — Full order in one only — Copy of, not filed in appeal — Effect.**

Where the full order appealed against was on one of the connected applications and the order on the other applications was to the effect — See order in "Application No. 4 of 1927, decided to-day. I dismiss this application", although a copy of the full order should also have been attached, it is hard on the appellant to dismiss any of the appeals on this mere technical ground and it is unusual to adopt such a course in criminal appeals. AIR (V 16) 1929 Lah 614: 114 Ind Cas 61: 30 Cr LJ 235: 1929 Cr RC 183: 12 AI Cr R 222.

**——S. 419 — Discretion — Production of copy of order may be dispensed with.**

Section 419 gives the appellate Court discretion to dispense with a copy of the order appealed against and its wording does not preclude the exercise of this discretion even at the stage when appeals are admitted specially when the matter is not noticed when appeals are admitted. AIR (Vol 16) 1929 Lah 614: 114 Ind Cas 61: 30 Cr LJ 235: 1929 Cr C 183: 12 AI Cr R 222.

**——S. 419 — Joint trial.**

Appeals by different persons convicted by one judgment in a joint trial may be heard together, but they must be made separately. AIR (V 14) 1927 Nag 48: 27 Cr LJ 1062: 97 Ind Cas 38.

**——S. 419 — Dismissal for default cannot be made.**

There is no provision in Cr. P. C. for the dismissal of an appeal on account of the non-appearance of the appellant or his pleader. Having admitted the appeal and fixed a date for its hearing, the appellate Court is bound to peruse the record and to decide the appeal judicially. AIR (V 10) 1923 All 175(2): 21 ALJ 100: 24 Cr LJ 662: 73 Ind Cas 694: LR 4 A Cr 7.

**——S. 419 — Scope.**

There is no warrant in Cr. P. Code for differentiating between a judgment passed on an appeal filed under S. 420 by an appellant who is in jail and a judgment passed on similar appeal filed through counsel under S. 419. AIR (V 10) 1923 Oudh 56: 65 Ind Cas 612: 9 OLJ 1: 23 Cr LJ 148: 24 OC 304.

**——S. 419 — Criminal Circular No. 74 (Bombay) — Appeal judgment copy, of — Stamp — Discretion.**

In a criminal appeal by two accused along with a third, when one copy of the judgment is furnished along with the stamps requisite for three separate copies of the judgment appealed against, conditionally necessary under Criminal Circular No. 74, the District Magistrate will be exercising a sound discretion if he dispenses with separate copies of the judgment. (1903) 5 Bom LR 704 (704) (DB).

**——S. 420.**

See also Criminal P. C. S. 419.

**——S. 420 — Practice followed in Oudh Chief Court of treating jail appeals summarily dismissed as not finally dismissed until they are sealed, has no justification in law.**

The practice which has been followed in recent years of treating jail appeals summarily dismissed by Judges of the Oudh Chief Court as not finally dismissed unless & until they are settled at the end of period of limitation, has no justification in law. Such appeals, as soon as a Judge or a Bench of Judges has decided them and signed and dated their order, are decided appeals and in such cases, a represented appeal subsequently filed is not maintainable. AIR (V 27) 1940 Oudh 369: 41 Cr LJ 711: 1940 AWR 255: 1940 OWN 594: 15 Luck 662: 189 Ind Cas 83 (DB).

**——Ss. 420, 421, Proviso — Appellant, if can insist on personal hearing — Power of Appellate Court in this behalf.**

The rule 'hear the other side' audi alteram partem cannot be extended without qualification, to criminal appeals presented by a convict from jail under S. 420, Criminal P. C. The relevant provisions are contained in Ss. 419, 420 and 421, Criminal P. C. It is clear that the proviso to the last section deals with appeals presented under S. 419 and by the language used, the Legislature has expressly restricted the right of the appellant to be heard in cases under S. 419. By necessary implication, the right to be heard under S. 420, Criminal P. C., has been denied though the inherent power of the Court to do justice, by directing the accused to be produced before it for being heard upon his case, is not in any way limited. In spite of the restriction contained in the proviso to S. 421, wherever the Appellate Court considers it desirable that the accused should be heard, the Court has power to direct the production of the prisoner before it for disposing of the appeal. But it cannot be said that a convicted person presenting his appeal under S. 420 from jail has a right to be heard in prison. AIR (V 25) 1938 Bom 279: 40 Bom LR 317: 39 Cr LJ 578: ILR (1938) Bom 357: 175 Ind Cas 352.

**——Ss. 420, 419 — Jail appeal dismissed — Convict, if can file another appeal through counsel.**

Once an appeal presented by a convict from jail has been dismissed, it is not open to the same prisoner to file another memorandum of appeal through a counsel. AIR (V 23) 1936 Oudh 219: 1936 OWN 194: 37 Cr LJ 362: 12 Luck 30: 160 Ind Cas 969 (DB).

**——Ss. 420, 419—Jail appeal dismissed — Another appeal through Pleader.**

The Criminal P. C., does not confer more than one right of appeal to any accused person from a conviction and sentence passed on him nor does the Code or the Letters Patent of the Patna High Court permit an appeal in a criminal matter from an order of one or more Judges of the Court to other Judges of the Court. The Court cannot entertain an appeal from the conviction and sentence passed on the accused after the dismissal of the appeal which he preferred from jail nor has any Court power to review or revise the order of

dismissal. Where, therefore, an accused in jail files an appeal under the provisions of S. 420, Criminal P. C., which is dismissed, another appeal under S. 419, through a pleader is not maintainable. AIR (V 22) 1935 Pat 426: 14 Pat 392: 2 BR 62: 37 Cr LJ 58: 16 PLT 683: 159 Ind Cas 241 (DB).

——S. 420 — Argument.

The objection to permit convict appellants appealing from jail, arguing in person is founded in the main not on convenience to prosecution but on their own interests. AIR (V 14) 1927 Oudh 369: 2 Luck 631: 6 LC 339: 8 AICrR 449: 106 Ind Cas 721 (DB).

**——S. 420 — Counsel — Appeal from jail — Counsel appointed by Government for accused — Accused refusing to instruct — Counsel should still argue the case on his behalf.**

If an appeal is filed in person under S. 419 —a procedure which is only possible when the appellant is not in jail — the appellant is permitted to argue in person under the provisions of S. 423; but a person appealing from jail is not permitted to argue in person and ordinarily jail appeals are ex parte. Where the Government has granted, as a concession to prisoner sentenced to death subject to confirmation by a High Court, the privilege of being represented by counsel at the cost of the Crown, but the accused refuses that help, it is still the duty of the counsel engaged to conduct the appeal without considering what the accused would say on the subject. AIR (V 14) 1927 Oudh 312: 4 OWN 638: 103 Ind Cas 407: 28 Cr LJ 679 (DB).

——S. 420 — Summary dismissal.

The practice of the Court, in dismissing summarily appeals filed by accused through jailor under S. 420, without calling on the appellant to appear is a correct procedure. AIR (V 14) 1927 Sind 223: 20 SLR 189: 7 AICrR 15: 27 Cr LJ 933: 96 Ind Cas 389 (DB).

——S. 421

See also CRIMINAL P.C., Ss. 419 AND 430

1. Procedure.
2. Reasons.
3. Records.
4. Right to be heard.
5. Scope.
6. Withdrawal of appeal.

See Criminal P. C., S. 423.

### 1. Procedure

**——S. 421 — Applicability — Appeal — Non-compliance with S. 419 — Copy of judgment under appeal not filed — Proper procedure — Summary dismissal — If bar to hearing on merits.**

Where an appellate Court dismisses a criminal appeal for non-compliance with S. 419, Cr. P. Code, namely, for not producing a copy of the judgment or order appealed against, the dismissal is a summary rejection and not a dismissal under S. 421, as S. 421 postulates the perusal of a copy of the judgment. The proper procedure in cases where S. 419 is not complied with, is to reject the appeal & not to dismiss it. Hence the rejection (or dismissal) for non-compliance with S. 419 does not bar the consideration of the appeal on the merits. AIR (V 37) 1950 Nag 77:1950 NLJ 161:ILR (1950) N 327 : 51 Cr LJ 662.

**——S. 421 — Power of appellate Court — Admission of appeal — Subsequent summary dismissal— Legality.**

Where an appeal has been admitted for full hearing, it is the duty of the appellate Court to pass a reasoned order after hearing the parties; it is illegal for the Court to dismiss the appeal summarily under S. 421, Cr P. Code, after it has been admitted for full hearing. Such a summary rejection is misconceived. AIR (V 35) 1948 Sind 23: 48 Cr LJ 981 (DB).

**——S. 421 — Jail appeals — Fresh appeal on the same matter, by the same party — If Court can entertain — Revisional powers.**

In a case respondents were persons coming under cls. (a) and (f) of S. 110, Criminal P. C. Magistrate directed respondents to furnish security but they failed and were committed to rigorous imprisonment. Jail appeal against the order was dismissed by Sessions Judge under S. 421. Another appeal was presented by the same respondents against the same order. The Judge inadvertently set aside the order as regards some respondents. He referred to a decision of Allahabad High Court in support of his order. Judge discovered his mistake and made a reference:

Held, the order in the later appeal was without jurisdiction. The practice of the Madras High Court is not the practice of the Allahabad High Court. After the disposal of the appeal, the Court is functus officio and cannot hear the appeal again. Hence the order in the earlier appeal should be revised in view of later appeal. ('46) 1946-2 MLJ 169 : 59 LW 459 : 1946 : MWN 546 (DB).

**——S. 421 — Order must show that Sessions Judge examined record and tested arguments on questions of fact by examination of evidence.**

Where it does not appear from the order of the Sessions Judge dismissing the appeal summarily, that he examined the record of the case or that he tested the arguments on question of fact by examination of the evidence actually given by the witnesses, the order is illegal. AIR (V 25) 1938 Pat 176 : 19 PLT 28 : 4 BR 331 : 39 Cr LJ 380 : 173 Ind Cas 751 (1) (DB).

**——S. 421 — Judgment must reveal that Court has applied its mind to facts and come to the conclusion.**

The order of dismissal passed by the appellate Court ran as follows: "Read judgment. Heard applicants' pleader. The appeal is summarily dismissed under S. 421, Criminal P. C.":

Held, that it was not a proper judgment and the practice of passing such stereotyped judgments should be condemned. ('37) 166 Ind Cas 494 (495) 3 BR 172: 38 Cr LJ 232.

**——S. 421 — Dismissal of appeal summarily and modification of order appealed from — Legality of.**

It is illegal at the same time to dismiss an appeal summarily and to modify the order appealed from. AIR (V 23) 1936 Pat 109 : 2BR 172 (1) : 37 Cr LJ 234 (1) : 160 Ind Cas 152 (1).

**——S. 421 — Appellants not present — Duty of Appellate Court.**

An appeal should not be dismissed merely because the appellants do not appear to suport the appeal, but the Appellate Court should consider whether there is sufficient ground for interfering which would imply judicial consideration of the appeal on the merits. AIR (V 22) 1935 Pat 460 : 16 PLT 607 : 2 BR 73 : 37 Cr. LJ 93 : 159 Ind Cas 334.

——S. 421 — Appellate Court summarily dismissing appeal under S. 421 does not act illegally but takes risk that appeal should be remanded unless High Court is satisfied that appellate Court has considered arguments adduced. AIR (V 17) 1930 Pat 520 : 127 Ind Cas 897 : 1930 Cr C 1016.

**——S. 421 —Appeal from conviction on two separate charges — One summarily dismissed and the other admitted — Procedure is not illegal.**

Applicant was convicted in one trial on two separate charges of cheating. On appeal the appellate Court summarily dismissed the appeal on one

charge and admitted the appeal on the other. The appeal on the second charge was ultimately successful.

Held, that the procedure of the appellate Court in disposing of the piecemeal was unusual and undesirable but not illegal. AIR (V 14) 1927 Rang 239 : 5 Rang 274 : 103 Ind Cas 845 : 28 Cr LJ 765.

**——S. 421 — Appellant in jail.**

Where a Sessions Judge in ignorance of the fact that a convict had already preferred an appeal through a mukhtar, rejected his appeal preferred through jail, the High Court in revision set aside the order of rejection and directed the Judge to re-hear the appeal preferred through mukhtar. AIR (V 13) 1926 All 178 : 48 All 208 : 23 ALJ 1051 : 6 LRA Cr 202 : 26 Cr LJ 1621 : 90 Ind Cas 917.

——S. 421 — Even though no one may appear in a criminal appeal it is the duty of the Court to examine the matter and to come to some sort of decision on the merits. AIR (V 11) 1924 Pat 376 : 72 Ind Cas 891 : 1 Pat LR Cr 29 : 24 Cr LJ 475.

**——S. 421 — Summary dismissal — Criminal appeal.**

An appellate Court is entitled to dismiss an appeal summarily under S. 421, Cr P. C., and the order is not improper, where the appellant's case has been carefully considered and intelligently disposed of by arriving at independent finding of its own upon a perusal of the evidence. AIR (V 7) 1920 Pat 663 : 1 Pat LT 318 : 21 Cr LJ 609 : 57 Ind Cas 273.

**——S. 421 — Summary dismissal of appeal — Discretion, exercise of.**

Though the law does not require a Sessions Judge to write a regular judgment when exercising the powers of summary dismissal given to him by S. 421 still the matter being one for discretion for the Subordinate Appellate Courts, such discretion should be exercised upon sound and reasonable lines. (1910) 13 OC 309 : 11 Cr LJ 631 : 8 Ind Cas 379.

**——S. 421 — Criminal appeal — Judgment— Contents — Cr. P. C., S. 421.**

It is very much to be desired that an appellate magistrate without going to the length of writing an elaborate judgment, should in deciding an appeal, notice briefly but clearly what objections were urged on appeal and how they were disposed of. (1904) 32 C 178 (179) : 2 Cr LJ 170 (DB).

**——S. 421 — Admission of a connected appeal, effect of.**

A court of appeal can dismiss an appeal summarily if on reading the judgment it thinks that there is no ground for interference; and the fact that the appeal of one accused has been admitted does not affect the right of the court to dispose of the appeal of another accused summarily. (1901) 5 CWN 332 (334) (DB).

**——S. 421 — Summary dismissal of appeal — No judgment need be written.**

A court when dismissing an appeal summarily under S. 421 of the Code of Criminal Procedure is not bound to write a judgment in conformity with the provisions of S. 367. (1901) 25 M 534 (534) : 2 Weir 473.

**2. Reasons.**

**——S. 421 — Duty of Court to give reasons.**

An appellate Court, before dismissing the appeal summarily, should give indications that it has actually considered the various aspects of the cases before it so that, in revision, the High Court can know that the appeal was fully considered. The Court should in short give its reason for the conclusions. AIR (V 25) 1938 Pat 366 : 19 PLT 395 : 4 BR 734 : 39 Cr LJ 732 : 176 Ind Cas 558.

**——S. 421 —Judgment not giving reasons but simply noting "Heard, I see no reason to interfere."**

Where a judgment does not give reasons for the decision and contains only the words, "Heard, I see no reason to interfere," it is not a sufficient compliance with the requirements of S. 421, Criminal P. C., in a case where both oral and documentary evidence had been produced by both sides and where the memorandum of appeal contained a number of grounds that admitted of argument. AIR (V 22) 1935 Pat 37 : 36 Cr LJ 261 (1) : 1 BR 131 (1) : 16 PLT 72 : 153 Ind Cas 152.

**——S. 421 — Duty of trial Court to give reasons for dismissal.**

A Sessions Judge or a Magistrate whose orders are subject to revision by the High Court, ought, save, in very exceptional cases, to give some reasons for summarily dismissing a criminal appeal under S. 421, Criminal P. C., which will show that he had really considered the points raised by the appellant & that the appeal is actually without foundation. Where there are a number of accused persons who have not put forward a common defence, the case is not an exceptional one & reasons have to be given. AIR (V 22) 1935 Pat 32 : 36 Cr LJ 191 : 16 PLT 48: 1 BR 101 : 152 Ind Cas 801.

**——S. 421 — Duty to record reasons for dismissing appeal — Practice in mofussil Courts.**

Notwithstanding the provisions of the Criminal P. C., it is desirable that a final Court of facts should record concisely some reason in order to enable the High Court in revision to appreciate the final findings of the lower Appellate Court on facts and to see if any question of law arises on these findings.

The real test in such cases is to consider whether in the particular circumstances of a case, where questions of title to immoveable properties are raised by the defence, the lower Appellate Court will be justified in rejecting an appeal summarily without recording its finding on the defence.

Practice in the mofussil to admit criminal appeals without any hearing except on the question of bail condemned. AIR (V 20) 1933 Cal 515 : 37 CWN 235 : 34 Cr LJ 812 : 144 Ind Cas 704.

**——S. 421 — Reasons to be stated — Appellate Court — Powers to be used with great care.**

It is necessary that a Magistrate dismissing a case summarily under S. 421, Criminal P. C., should state his reasons for thus dismissing it.

An Appellate Court should exericse its powers under S. 421, with great care. AIR (V 20) 1933 Pat 160 : 34 Cr LJ 1017 (1) : 145 Ind Cas 652 (1).

**——S. 421 — Judge should, except in exceptional case, give reasons for summary dismissal.**

It is true that where an appeal is summarily dismissed under S. 421, it is not necessary to deliver a formal judgment in accordance with the provisions of S. 367. But a Sessions Judge or Magistrate, whose orders are subject to revision by the High Court, ought, save in very exceptional cases, to give some reasons for his decision which will show that he had really considered the points raised by the appellant and the appeal actually is without foundation. AIR (V 17) 1930 Pat 331 : 125 Ind Cas 121 : 31 Cr LJ 760 : 11 PLT 242 : 1930 Cr C 616.

——S. 421 — No reasons need be recorded in support of the summary dismissal of an appeal. AIR (V 16) 1929 Cal 773 : 1929 Cr C 517 : 50 CLJ 285 : 123 Ind Cas 243 : 31 Cr LJ 474.

——S. 421 — Judgment, dismissing the appeal summarily under S. 421 (1), need not be elaborate but must be such as to show on the face of it that the appellate Court has applied its mind to the consideration of the evidence on record and the pleas

raised by the accused both in the Court below and in the memorandum of appeal. AIR (V 16) 1929 Nag 150 : 117 Ind Cas 279 : 30 Cr LJ 791 : 1929 Cr C 19.

——S. 421 — An appeal can be rejected under S. 421 without any formality. There need be no recorded judgment or reason of any description. AIR (V 13) 1926 Lah 196 : 26 PLR 616 : 27 Cr LJ 23 : 91 Ind Cas 55.

——S. 421 — A Court when rejecting an appeal in a criminal case under the provisions of S. 421 should record shortly its reasons for such rejection in view of the possibility of such order being challenged by an application for revision. AIR (V 12) 1925 Oudh 290 : 83 Ind Cas 484 : 26 Cr LJ 4.

——S. 421 — An appellate Court is not required by law to write a judgment when dismissing an appeal summarily. It is no doubt necessary that in dismissing the appeal summarily the appellate Court should give the reasons for dismissing the same. A mere order to the effect that the appeal is summarily dismissed, without giving any reason whatsoever, would be bad in law. AIR (V 12) 1925 Pat 183 : 82 Ind Cas 165 : 25 Cr LJ 1237.

**——S. 421 — Power under, should be exercised with caution — Judgment even in case of summary dismissal must give reasons.**

The powers which are capable of being exercised under S. 421 should be exercised with considerable caution and where there has been a dispute as to facts and the credibility of witness for the prosecution impugned, though not very successfully, it is proper for the appellate Court to call for the records and look at the evidence. It is also desirable, as has been often pointed out by the High Court in this country, that in dismissing appeal summarily although it is not necessary for the appellate tribunal which is thus acting, to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction. AIR (V 9) 1922 Pat 552 : 72 Ind Cas 893 : 24 Cr. LJ 477.

——S. 421 — S. 421, Cr. P. Code, empowers the Appellate Court to dismiss an appeal summarily, but in doing so, it must record an order giving reasons for the dismissal, and showing that the point raised were duly considered by it. Where this is not done, the order is illegal. (1921) 61 Ind Cas 49 : 2 PLT 10 : 22 Cr LJ 321.

**——S. 421 — Summary dismissal of — Appellate judgment.**

It is the duty of an appellate court, in dealing with an appeal under S. 421, Cr P. Code, to record reasons for dismissing it summarily and its judgment should show that the evidence and argument advanced have been considered. AIR (V 7) 1920 Pat 522 : 21 Cr LJ 139 : 54 Ind Cas 619.

**——S. 421 — Summary dismissal of appeal — When proper.**

In dismissing appeal under S. 421 of the Cr. P. Code, reasons for dismissal should be given and the omission to give such reasons would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court on appeal. AIR (Vol 5) 1918 Pat 660 : 4 Pat LW 212 : 19 Cr LJ 304 : 44 Ind Cas 208.

**——S. 421 — Summary dismissal of appeal — Reasons for**

An Appellate Court dismissing an appeal under S. 421 should give some reasons for dimissing the appeal summarily although it is not required by law to write a judgment. AIR (Vol 5) 1918 Pat 597 : 2 PLJ 695 : 4 PLW 153 : 19 Cr LJ 151 : 43 Ind Cas 439 (DB).

**——Ss. 421 and 367 — Summary dismissal — Appeal — Dismissal under S. 421 — Reason for dismissal.**

A court of criminal appeal is not bound, though it should, when dismissing an appeal summarily under S. 421, write a judgment as defined in S. 367. AIR (Vol 4) 1917 Nag 203 : 13 NLR 169 : 18 Cr LJ 993 : 42 Ind Cas 721.

**——Ss. 421, 423 — Summary dismissal — Illegality of hearing.**

Sections 421 and 423 read together, make it imperative on a Criminal appellate court, to hear the appeal, at the time and place mentioned in the notices of appeal. A hearing without notice is illegal. If an appeal is not dismissed summarily, the court is bound to see the record and give judgment, even though the parties do not appear. (1909) 5 NLR 76 : 9 Cr LJ 553 : 2 Ind Cas 247.

**——S. 421 — Reasons, if to be recorded.**

It is not necessary when an appeal is summarily dismissed under S. 421, Cr. P. C., for the Magistrate to give any reasons for his decision. It must be taken, if he does dismiss an appeal summarily, that he considered there were no sufficient grounds for interfering. (1905) 9 CWN 623 (623) (DB).

### 3. Records.

**——S. 421 Sessions Judge hearing pleader for appellant — Record of the case sent for — Desirability of noting points for which record is sent for.**

Where a Sessions Judge before whom a criminal appeal is presented, hears the pleader but is in doubt whether he should summarily dismiss the appeal, but in order to satisfy himself as to the points raised by the appellants' lawyer, he sends for the record of the case and having perused the same, dismisses the appeal summarily, it is not open to the appellants to say that they were not given sufficient opportunity at that time they presented the appeal. It is true that the Judge does not, in such a case, commit any illegality in the course so adopted by him but it is desirable in all cases where a busy Sessions Judge sends for all the record in a criminal appeal, which is presented to him for admission, that he should note in the order-sheet the points for which he is sending for the record in order to satisfy himself as to the correctness of the submissions made by the appellants before him. It will be difficult in many cases, if not in all, for a busy Sessions Judge to remember the submissions which were advanced by the appellants' Advocate which had satisfied him to this extent that he was forced to send for the record. AIR (Vol 25) 1938 Pat 12 : 18 PLT 915 : 4 BR 204 : 39 Cr LJ 254 : 1938 PWN 113 : 172 Ind Cas 944.

**——S. 421 — Sending for record.**

It cannot be said as a rule of law that the Court is bound to send for the papers before taking action under S. 421. AIR (Vol 17) 1930 Mad 863 : 58 MLJ 836 : 1930 MWN 686 : 32 MLW 203 : 53 Mad 865 : 1930 Cr C 1039 : 127 Ind Cas 803.

——S. 421 — Where there are disputed questions of fact and a large number of documents and the trial Court has come to certain finding, an appeal ought not to be summarily dismissed without sending for the record. (1921) 22 Cr LJ 349 : 61 Ind Cas 173 (Cal.).

**——S. 421 — Summary dismissal of appeal.**

An appeal memorandum was signed by a pleader and presented by the party in person. The con-

viction was based on the evidence of witnesses who were alleged by the accused to have been dismissed by them :

Held, that the Magistrate was wrong in having summarily dismissed the appeal without sending for the records and reading the evidence or hearing the pleader. (1905) 29 Mad 236 (237).

**4. Right to be heard.**

**——S. 421 — Propriety of.**

The Magistrate, after admitting the appeal, insisted on the Advocate to argue the appeal without any further adjournment. On the Advocate's pleading inability the case was adjourned to another date on which date the Magistrate passed order acquitting the accused :

Held, that the order of the Magistrate could not be sustained. AIR (Vol 28) 1941 Mad 802 : 1941 MWN 670.

**——S. 421 — Pleader, if should be heard.**

Before dismissing the appeal summarily, the Court ought to give the Pleader an opportunity of arguing the case. AIR (Vol 23) 1936 Cal 294 : 37 Cr LJ 831 : 163 Ind Cas 238 (DB).

**——S. 421 — Pleader for appellant once heard when presenting appeal — If should be heard again before dismissal.**

Section 421, Criminal P. C., provides that on receiving the petition under S. 419 or S. 420, the Appellate Court shall peruse the same, and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily, provided that no appeal under S. 419, shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. Sub-section (2) provides that before dismissing the appeal under this section, the Court may call for the record, but shall not be bound to do so. There is nothing contained in the section about the right of the appellant or his Pleader to have two reasonable opportunities of being heard by the Court. Provision is made only for one reasonable opportunity. Consequently, the Appellate Court, before dismissing an appeal summarily after calling for record and perusing the same, is not bound to hear the appellant or his Pleader again, if he was once heard when presenting the petition of appeal. ('36) 164 Ind Cas 270 : 40 CWN 128 : 37 Cr LJ 904 (DB).

**——S. 421 — Appellant or his Pleader, if must be heard.**

Section 421, Criminal P. C., does not require that the appellant or his Pleader shall be heard before the appeal is decided, but all that it requires is that a sufficient opportunity should be afforded to them of being heard. If a sufficient opportunity of being heard is afforded to either of them, the neglect of the appellant or his Pleader who is his agent debars him from claiming a second hearing. AIR (Vol 22) 1935 Sind 84: 36 Cr LJ 831: 29 Sind LR 203: 155 Ind Cas 736 (FB).

**——S. 421 — Magistrate, on presentation of appeal, allowing Pleader of appellant to argue case in full — It is unnecessary to hear appellant or his pleader again after arrival of record.**

All that S. 421, Criminal P. C., requires is that the Appellate Court, before dismissing an appeal summarily must afford the appellant or his pleader a reasonable opportunity of being heard. It would be a sufficient compliance with the statute if such reasonable opportunity is afforded either on the first presentation of the appeal or if the Appellate Court sends for the record, after the record has been received. Hence where a Magistrate allows the Pleader for the appellant to argue his client's case in full, the appellant is allowed a reasonable opportunity of being heard in support of his appeal within the meaning of S. 421, Criminal P. C., and it is unnecessary to hear the appellant or his pleader again after the arrival of the record in the Appellate Court. AIR (Vol 26) 1939 Cal 541 : ILR (1939) 1 Cal 314 : 40 Cr LJ 839 : 183 Ind Cas 742.

**——S. 421 — Court hearing pleader for appellant dismissing appeal summarily — Non-issuing of notice to Crown, if can be made a grievance.**

Where on an appeal, the Sessions Judge appoints a day for hearing the pleader of the appellant and after hearing him, dismisses the appeal summarily but his judgment is a complete one dealing with the evidence in detail and with the points raised on behalf of the appellants, no grievance can be made of the fact that he did not issue notice to the Crown, considering it unnecessary to call upon the Public Prosecutor to reply to the arguments adduced on behalf of the appellant. AIR (Vol 26) 1939 Pat 24 : 39 Cr LJ 950 : 5 BR 12 : 177 Ind Cas 697.

**——S. 421 — Postponement of hearing.**

So long as a reasonable opportunity is given to the appellant or his pleader to be heard in support of the appeal there is no legal requirements as to any postponement of the hearing after the presentation of the appeal. AIR (Vol 17) 1930 Mad 863 : 59 MLJ 836 : 53 Mad 865 : 1930 Cr C 1039 : 1930 MWN 686 : 32 MLW 203 : 127 Ind Cas 803.

**——S. 421 — Hearing appellant — Presentation of appeal — Hearing at time of — Propriety.**

In the great majority of cases when an appeal is presented, neither the appellant nor the pleader may be in a position to straightway argue in support of the appeal and therefore it may be a wise rule in proceeding under S. 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under S. 421, and consequently provided the pleader had a reasonable opportunity of being heard, hearing the appeal when presented is not improper. AIR (Vol 17) 1930 Mad 863 : 59 Mad LJ 836 : 53 Mad 865 : 1930 MWN 686 : 32 MLW 203 : 1930 Cr C 1039 : 127 Ind Cas 803.

——S. 421 — The provisions of S. 421 (1) are mandatory. Before an appeal, filed under S. 419, is dismissed S. 421 (1) requires that the appellate Court should give the appellant before him or his pleader a reasonable opportunity of being heard in support of the same. AIR (Vol 16) 1929 Nag 150 : 30 Cr LJ 791 : 1929 Cr C 19 : 117 Ind Cas 279.

——S. 421 — Appeal filed beyond time — Appellant's pleader should be heard before dismissal. AIR (Vol 14) 1927 Bom 445 : 29 Bom LR 701 : 28 Cr LJ 653 : 103 Ind Cas 109 (DB).

**——S. 421 — Appellant's pleader heard at the time of presenting the appeal — Record sent for them — Summary dismissal without giving further opportunity of being heard is not illegal.**

Ordinarily, if the Court does send for the record, it is preferable to hear the pleader when the record is before the Court but there is nothing in S. 421 to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if the appellant's pleader desires that course; and if the Court desires to send for the record then it is not an illegality to summarily dismiss the appeal without giving further opportunity of being heard to the appellant's pleader. AIR (Vol 14) 1927 Bom 361 : 29 Bom LR 488 : 28 Cr LJ 467 : 8 AI Cr R 81 : 101 Ind Cas 595 (DB).

——S. 421 — After the record is sent for and received, the appellate Court is bound to hear the pleader and cannot dismiss the appeal summarily without hearing him. AIR (Vol 13) 1926 Cal 174 : 42 CLJ 551 : 27 Cr LJ 382 : 92 Ind Cas 894 (DB).

——S. 421 — Where the Judge sends for the record under S. 421, the appellant is entitled to be heard in support of his appeal. AIR (Vol 13) 1926 Cal 161 : 42 CLJ 554 : 27 Cr LJ 412 : 93 Ind Cas 76 (DB).

——S. 421—A posting for the purpose of hearing under S. 421 must be a special posting after reasonable time — not less than a week, and the appeal should not be heard at the time of the presentation of the papers even for dismissal under S. 421. If questions of fact are argued in the appeal, the appeal ought not to be disposed of without sending for the original records of the Court below. AIR (Vol 11) 1924 Mad 895 : 20 MLW 623 : 1924 MWN 893 : 48 Mad 385 : 26 Cr LJ 411 : 47 MLJ 661 : 84 Ind Cas 1051.

——S. 421 — Appeal admitted — Bail granted — Order dismissing appeal without notice of hearing to advocate is a grave irregularity. AIR (Vol 11) 1924 Rang 294 : 3 Bur LJ 18 : 25 Cr LJ 933 : 81 Ind Cas 549.

**——S. 421 — Reasonable notice to appellant to be given.**

Where the Advocate filing the petition of appeal is not himself the Advocate for the appellant, a reasonable opportunity for hearing the Advocate cannot be said to have been given where he is called upon forthwith to support the appeal. AIR (Vol 2) 1915 Upp Bur 1 : 16 Cr LJ 538 : UBR (1515) II, 52 : 29 Ind Cas 666.

**——S. 421 — Reasonable opportunity of being heard in support of appeal.**

'Opportunity of being heard in support of appeal' includes also the right of reply. (1911) 38 Cal 307 : 12 Cr LJ 9 : 9 Ind Cas 65 (DB).

**——S. 421 (1) — Reasonable opportunity to be heard.**

Where on the presentation of a criminal appeal the appellant's pleader stated that some other pleader would argue the cases, but the Magistrate called on the pleader present to argue at once, and on his refusal to do so, dismissed the appeal. Held, that reasonable opportunity was not given to the appellant's pleader to be heard in support of the appeal. (1909) 6 MLT 309 : 10 Cr LJ 491 : 4 Ind Cas 37.

**——S. 421 — Reasonable opportunity.**

Where a pleader on an appeal being filed was at once called to support the appeal, it was held that he had not had reasonable notice within the meaning of S. 421 and a week's notice was necessary. (1909) 36 Cal 385 : 13 CWN 684 : 9 Cr LJ 401 : 1 Ind Cas 868 (DB).

**——S. 421 — Practice — Appeal — Summary dismissal of — Pleader not heard.**

A convict filed an appeal from jail to the Court of Sessions and also presented a petition of appeal through a legal practitioner, Held, that the Sessions Judge was not competent to dismiss the appeal from jail summarily but should have heard the convict's pleader. 3 ALJ 693 (694) : 1906 AWN 303.

**——S. 421 — 'Reasonable opportunity' — Pleader to be heard after — District Magistrate — Appeal.**

A pleader in presenting an appeal was called upon by the District Magistrate to argue it the same day that the appeal was presented, and the latter refused to grant him time to acquaint himself with the evidence in the case before he was heard.

Held, that the District Magistrate's order dismissing the appeal summarily should be set aside, and the appeal should be re-heard, inasmuch as the appellant's pleader was not afforded reasonable opportunity of being heard in support of the appeal as required by S. 421. (1905) 7 Bom LR 89 (89) (DB).

**5. Scope.**

**(a) General.**
**(b) Appeal under S. 476-B, Cr. P. C.**
**(c) Jail appeals.**

**(a) General.**

**——Ss. 421, 422, 423, 439—Powers of Appellate Court to dismiss appeal summarily — Appeal not dismissed summarily — Duty of Court to comply with provisions of Ss. 422 and 423 — Power of Appellate Court under S. 423 and High Court under S. 429.**

Upon the true construction of the Criminal P.C., the Appellate Court is not entitled to dismiss an appeal summarily in terms of S. 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, and where the appeal is not dismissed summarily, the Court is bound in order to the disposal of the appeal, to comply with the provisions of S. 422 as to notice, and with the provisions of S. 423 as to sending for the record, if such record is not already in Court.

The terms of S. 421 exclude the possibility of partial summary dismissal, e.g., in so far as the conviction is appealed against. Failing summary dismissal, the provisions of Ss. 422 and 423 apply and, the provisions as to notice in S. 422 and the provision as to sending for the record in S. 423 are clearly peremptory, and there can be no room for revision at that stage. The words 'admitted' and 'admission' in reference to appeals which are not summarily dismissed, though not infrequently used in the Courts in India, are not happily chosen. From their ordinary meaning, they would imply that the appeal requires to be admitted at this stage, whereas the Appellate Courts are bound to deal with the appeal, and they can only do so when they have complied with the preliminary steps of giving the statutory notices under S. 422, and sending for the record, which will enable the Court to deal with the appeal in accordance with the provisions of S. 423. The powers conferred on the Appellate Court under S. 423 are as ample as the High Court would have on revision under S. 439, with the exception of the power to enhance the sentence, and if the appeal is before a High Court, and it is thought to be desirable, there is no reason why the accused should not be warned that, at the hearing of the petition, he may be called on to show cause why his sentence should not be enhanced. The jurisdiction of the Court in these matters is statutory, and the Court, however admirable its intentions, is not entitled to go outside these provisions and, in effect, to legislate for itself. AIR (Vol 22) 1935 PC 89 : 1935 OWN 576 : 1935 MWN 469 : 39 CWN 626 : 36 Cr LJ 838 (2) : 41 MLW 792 : 62 IA 129 : 68 MLJ 653 : 37 PLR 314 : 16 PLT 387 : 62 Cal 983 : 61 CLJ 259 : 1935 ALJ 802 : 37 Bom LR 557 : 1935 AWR 691 : 1 BR 487 : 155 Ind Cas 386.

**——Ss. 421, 369 — Dismissal of appeal summarily in exercise of powers under S. 421 — Whether judgment.**

There is no dismissal of a criminal appeal for default of appearance by a party as in a civil case and therefore, when an appeal is summarily dis-

missed deliberately and openly by a Court of competent jurisdiction, in the apparent exercise of the powers vested in it under S. 421, Criminal P. C., it is prima facie, a judgment within the meaning of S. 369, Criminal P. C. AIR (Vol 22) 1935 Sind 84 : 36 Cr LJ 831 : 29 Sind LR 203 : 155 Ind Cas 736 (FB).

**——Ss. 421, 422 — Dismissal of appeal in part at the time of presentation — Whether appellants entitled to be heard on whole appeal.**

Section 422, Criminal P. C., only applies if and in so far as an appeal has not been dismissed summarily. If, in part, it has not been so dismissed, the provision will apply in respect of such part; it cannot, however, operate to nullify a definite order of dismissal under S. 421. Therefore, the Court is bound by an order dismissing an appeal in part passed at the time of presentation of the appeal and the only portion of the appeal which will remain for decision will be that in respect of which there was no order of dismissal. AIR (Vol 20) 1933 Pat 38 : 11 Pat 697 : 34 Cr LJ 118 : 141 Ind Cas 154 (DB).

**——Ss. 421, 476-B — Appeal under S. 476-B — Summary dismissal, legality of.**

An appeal under S. 476-B, Criminal P. C., is subject to all the provisions applicable to criminal appeals as laid down in S. 419 and the following sections and may, therefore, be summarily dismissed under S. 421 of the Code. AIR (Vol 18) 1931 Cal 3 : 34 CWN 923 : 32 Cr LJ 325 : 58 Cal 157 : 129 Ind Cas 317 (DB).

**——S. 421 — Default of appearance.**

Appeal cannot be dismissed for non-appearance of appellant. AIR (Vol 17) 1930 Lah 659 : 11 Lah 242 : 31 PLR 501 : 1930 Cr C 803 : 31 Cr LJ 979 : 126 Ind Cas 77.

——S. 241 — De Souza, A. J. C. — The order summarily dismissing the appeal virtually amounts to an order affirming the findings both of fact & of law recorded by the lower Court and there is no reason to discriminate between an order summarily dismissing the appeal under S. 421 and an order dismissing the appeal after hearing under S. 424 so far as its liability to attach in revision for purposes of S. 439, Cl. (6) is concerned. AIR (Vol 16) 1929 Sind 26 : 22 SLR 453 : 29 Cr LJ 936 : 111 Ind Cas 856 (DB).

**——S. 421 — Effect of admission of Appeal.**

Appeal once formally admitted, cannot be summarily dismissed. AIR (Vol 11) 1924 Cal 642 : 23 Cr LJ 733 : 69 Ind Cas 461 (DB).

**——S. 421 — Summary dismissal of appeal — When proper.**

Section 421 of the Criminal P. C., empowers an Appellate Court to dismiss an appeal summarily without writing a judgment or giving reasons. The High Court in revision can decide whether the Appellate Court has exercised a proper discretion in acting under that section. The High Court will send the case back ordering the Appellate Court to hear it on its merits and pass a judgment in a proper case. AIR (Vol 6) 1919 Low Bur 154 : 19 Cr LJ 316 : 44 Ind Cas 332.

**——S. 421 — Summary dismissal of appeal — When proper.**

Though S. 421 of the Cr. P. Code, gives an Appellate Court power to summarily dismiss an appeal, the power must be exercised with judicial discretion. Appeals which are complicated both in law and in fact should not be disposed of under this section. AIR (Vol 5) 1918 Cal 106 : 19 Cr LJ 228 : 43 Ind Cas 820 (DB).

**(b) Appeal under S. 476-B, Cr. P. C.**

**——S. 421 — Appeal under S. 476-B.**

An appeal under S. 476-B, Cr. P. Code, may be summarily dismissed — Such appeals are subject to all provisions applicable to criminal appeals as laid down in S. 419 and following sections. AIR (Vol 18) 1931 Cal 3 : 34 CWN 923 : 32 Cr LJ 325 : 58 Cal 402 (DB).

**——Ss. 421, 476-B — Applicability of S. 421 to appeal under S. 476-B.**

Section 421, Criminal P. C., applies to all appeals including those under S. 476-B of the Code. AIR (Vol 18) 1931 Pat 144 : 32 Cr LJ 735 : 12 PLT 336 : 131 Ind Cas 536.

**(c) Jail appeals.**

**——S. 421 — Jail appeal — Fresh appeal by counsel on a matter that had already been disposed of in an earlier jail appeal by the same party — Competency of Court to entertain — Revisional powers — Exercise of.**

The practice of the Madras High Court has been for not allowing a jail appeal by counsel on a matter that had already been disposed of under S. 421 of the Criminal P. C. The Court is functus officio where an appeal has been disposed of, and cannot hear the appeal again. In a case it was alleged that the respondents were persons coming under Cls. (a) and (f) of S. 110 of Cr. P. Code, and were ordered to furnish security and upon failure to comply with that order they were committed to prison to undergo rigorous imprisonment. An appeal against the order was received from jail and Sessions Judge dismissed it summarily under S. 421. Another appeal was presented by the same respondents though counsel against the same order already appealed against and the Sessions Judge not knowing that the same matter had already been disposed of by him under S. 421 passed orders setting aside the order as regards respondents 1 and 2 and confirming it as regards third respondents.

Held, that the order of the Judge in the later appeal was without jurisdiction and therefore should be set aside.

Held further, that though normally the order dismissing the earlier appeal of the respondents should stand, still in view of the conclusion in the later, in the exercise of the Court's powers of revision, the order in the earlier appeal should be revised by allowing it in regard to respondents 1 and 2 and dismissing it only against the third respondent. AIR (Vol 34) 1947 Mad 243 (1) : ILR (1947) Mad 156 : 48 Cr LJ 73 : 59 LW 459 : 1946 MWN 546 : (1946) 2 MLJ 169 : 228 Ind Cas 39 (DB).

**——S. 421 — Jail appeal — Discretion unfettered.**

Under S. 421, Criminal P. C., a Judge receiving an appeal from the jail has power to dismiss the appeal summarily on perusing the same if he considers there is no sufficient ground for interference. He is not bound to call for the records or to state the reasons and has an unfettered discretion. AIR (Vol 18) 1931 All 555 : 1931 ALJ 644 : 53 All 797 : 33 Cr LJ 259 (1) : 136 Ind Cas 281 (1).

——S. 421 — Petition of appeal sent through jail being dismissed by the High Court, no subsequent appeal filed through a counsel can be entertained. AIR (Vol 11) 1924 Oudh 425 : 11 OLJ 536 : 25 Cr LJ 1313 : 82 Ind Cas 545.

——S. 421 — A second petition of appeal, on behalf of a convict is not entertainable if an order of summarily dismissing the petitions of appeal received through the Superintendent of the jail has been passed before. AIR (Vol 9) 1922 All 480: 44 All 759: 20 ALJ 739: 23 Cr LJ 505: 68 Ind Cas 41 (DB).

——S. 421 — Summary dismissal of appeal.

A Court of appeal ought not to reject an appeal summarily if the appeal on the face of it involves a question of law or if the judgment under appeal is a long and intricate one requiring careful consideration. AIR (Vol 5) 1918 Pat 653 : 3 Pat LJ 389 : 1 PLW 39 : (1918) Pat HCC 287 : 19 Cr LJ 209 : 43 Ind Cas 785 (DB).

——S. 421 — Summary dismissal of jail — Appeal — Appeal subsequently presented by accused's counsel — Court, duty of.

The summary dismissal of a jail appeal is no bar to subsequent appeal presented by the prisoner's counsel who ought to be given an opportunity for arguing the case. AIR (Vol 4) 1917 All 421 : 3 OLJ 326 : 17 Cr LJ 453 : 36 Ind Cas 133.

——S. 421 — Summary hearing of appeal without previous notice — Practice.

The practice in the moffusil is to admit criminal appeals without hearing. The only cases that are usually dealt with under S. 421, Cr. P. C., are jail appeals. The practice in the High Court is generally to have the case argued on its merits with due time before admission. But the notice (at least of a week) should be given before the case is so heard. It is irregular to call upon a pleader to argue the case as soon as it is filed. (1909) 36 Cal 385 (386, 387) : 13 CWN 684 (DB).

6. Withdrawal of appeal.

See also Cr. P. C., S. 423.

——S. 421 — Once the appeal has been admitted, it cannot be withdrawn either by Crown or accused. The Court must proceed under S. 421 or S. 422 and S. 423 to decide the appeal on merits. AIR (Vol 29) 1942 Lah 296 : ILR (1942) Lah 241: 44 Cr LJ 14 : 203 Ind Cas 501 (FB).

——S. 421 — Failure of accused to prosecute appeal — Summary dismissal, if warranted.

The law requires that before an Appellate Court dismisses an appeal summarily, it shall read a copy of the judgment; and then, if there is no sufficient ground for interfering it may dismiss the appeal summarily. But the dismissal of the appeal shall depend upon the exercise by the Judge of the independent and impartial judgment after he has read a copy of the judgment, and not upon the failure of the accused to prosecute his appeal. He cannot dismiss the appeal merely because the accused fails to prosecute it. AIR (Vol 25) 1938 Sind 171 : 39 Cr LJ 890 : ILR (1939) Kar 204 : 177 Ind Cas 346 (DB).

——S. 422.

1. Notice — General.
2. Notice to appellant or pleader.
3. Notice to accused.
4. Notice to Complainant -Respondent.
5. Officer appointed by the Provincial Govt.
6. Time and place of hearing.

1. Notice—General.

——S. 422 — Scope of.

Section 422, Criminal P. C., deals only with appeals and there is no similar section dealing with revisions, nor does any section apply this procedure to revisions. AIR (V 27) 1940 All 426: 1940 ALJ 462: 41 Cr LJ 876: 1940 AWR 379: ILR (1940) All 539: 190 Ind Cas 225.

——S. 422 — Omission to issue notice under S. 422 — Whether fatal to proceedings before Appellate Court.

Obiter—The omission to issue notice under S. 422, Criminal P. C., is fatal to the proceedings before the Appellate Court. AIR (V 23) 1936 Rang 247: 37 Cr LJ 832: 14 Rang 744: 163 Ind Cas 242(2).

——S. 422 — Dismissal.

Appeal admitted — Bail granted — Order dismissing appeal without notice of hearing to advocate is a grave irregularity. AIR (V 11) 1924 Rang 294: 81 Ind Cas 549: 3 Bur LJ 18: 25 Cr LJ 933.

——S. 422 — Want of notice — Effect.

S. 422 does not render a notice necessary. The High Court will not interfere in revision on the ground of want of notice unless there is some illegality in the order. (1910) 33 Mad 89: 5 MLT 262: 19 MLJ 130: 9 Cr LJ 150: 1 Ind Cas 79 (DB).

2. Notice to appellant or pleader.

——S. 422 — Right of audience — Appellant's right to appear in person.

Where the stage has been reached of an appellant being given notice under S. 422, Cr. P. Code, he is entitled, if he so desires, to appear in person if he is not represented by a pleader of his own choice. 13 All 171 (FB); 1927 Oudh 312, not foll. AIR (V 36) 1949 EP 321: 51 PLR 274: 50 Cr LJ 834.

——S. 422 — Appellant in jail.

Where the stage has been reached of an appellant from jail being given notice under S. 422, he is entitled, if he so desires, to appear in person, if he is not represented by a pleader, to argue his case. 13 All 171 (FB), and AIR 1927 Oudh 312, Diss. from. AIR (V 15) 1928 All 84: 50 All 543: 29 Cr LJ 334: 108 Ind Cas 122: 9 AI Cr R 150: 26 ALJ 275: 9 LRA Cr 22. (FB).

3. Notice to accused.

——S. 422 — Notice of appeal under, should be given to accused though no express provision exists.

Whert an appeal is preferred against an order directing payment of compensation to accused, held, that although there is no express provision nevertheless on the principle audi alteram partem the accused should have notice of the appeal in order that they should have an opportunity of supporting the order passed in their favour. AIR (V 11) 1924 Lah 675: 76 Ind Cas 641: 25 Cr LJ 209.

4. Notice to complainant-respondent.

——Ss. 422, 423 — There is no provision for appearance of complainant's Advocate in appeal even in non-cognizable offence — But Court has discretion in allowing him to argue case.

There is no provision in the Criminal P. C., for appearance or argument by the complainant's Advocate in an appeal even in a non-cognizable case in addition to or in substitution for appearance or argument by the Public Prosecutor, and although Ss. 422 and 423, Criminal P. C., are not exhaustive they clearly indicate that by necessary implication the Legislature has excluded the appearance in appeal of an Advocate for the complainant. Should the Public Prosecutor not appear, it would necessarily be in the discretion of the Court to allow the complainant's Advocate to argue the case. Where the Public Prosecutor appears, the complainant's Advocate can, as an Advocate, attend the Court and be prepared to assist the Court if the Court requires his assistance. AIR (V 29) 1942 Sind 5: ILR (1941) Kar 451: 43 Cr LJ 345: 198 Ind Cas 281.

——S. 422 — Complainant, if has right of audience — Acquittal — Appeal by private complainant.

When the Crown appears, it is undesirable to allow complainant or any one else to appear as well. The principle applies with even greater force to appeals, especially when S. 422 does not require or even contemplate, the complainant's presence. It would be unfortunate to allow private passions and prejudices to creep into the conduct of a criminal trial, when it can be avoided. It would be

even more undesirable to leave the matter in two sets of hands with a possible conflict of interest, undesirable generally from broad view point of public policy, undesirable also because it would be unfair to the accused. Therefore, if the other side is properly represented by the Crown, not only has the complainant no right of audience, but ordinarily he should not be allowed to appear at all.

When the Crown does not only not appeal against acquittal but the Government Advocate states that the Local Government did not want to appeal, even if the High Court has power to interfere at the instance of a private prosecutor, the practice is not to interfere except in exceptional cases. AIR (Vol 24) 1937 Nag 123: 19 NLJ 158: 38 Cr LJ 433: 167 Ind Cas 569.

**——S. 422 — Notice of appeal to complainant, if unnecessary — Absence of notice — Interference, if called for.**

Under S. 422, Criminal P. C., notice of appeal is not necessary to the complainant and he has no right of audience. Although there has been a practice in the Central Provinces to issue notice to complainant in certain class of cases and it is desirable to do so if he is likely to be personally affected, the High Court will not necessarily interfere if it is not issued. AIR (Vol 24) 1937 Nag 123: 19 NLJ 158: 38 Cr LJ 433: 167 Ind Cas 569.

——S. 422 — In the case of an appeal against conviction and order giving compensation to the complainant the fact that the notice of appeal was not served on the complainant is no ground for interfering with an order of acquittal in appeal. AIR (Vol 20) 1933 Mad 277: 1932 MWN 722: 33 Cr LJ 596: 138 Ind Cas 385.

**——S. 422 — Appeal — Notice should be given to complainant where compensation has been awarded to him.**

Though there is no express provision of law in case of an order under S. 250 or S. 545, Cr. P. Code, with regard to notice upon the opposite party, one of the fundamental principles of law is that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard in defence, and therefore a Court hearing the appeal would be exercising proper discretion to give notice to the complainant, who has been awarded compensation, of the hearing of the appeal. AIR (V 13) 1926 Cal 1054 : 43 CLJ 583 : 53 Cal 969 : 27 Cr LJ 1086 : 7 AI Cr R 94 : 97 Ind Cas 62 (DB).

**——S. 422 — Practice.**

Although under S. 422 of the Cr. P. Code the Court is not required to issue notice to the complainant in cases instituted upon a complaint, it is nevertheless, as a matter of practice, always desirable to do so where compensation has been ordered to be paid to him. Failure to do so, however, is not a ground for interference in revision. 14 NLR 131: 19 Cr LJ 927: 47 Ind Cas 443: AIR (Vol 4) 1917 Nag 122.

**5. Officer appointed by the Provincial Government.**

**——S. 422 — No notice to Crown — Acquittal supported by Crown — Complainant cannot insist on interference in revision.**

The fact that notice is required under S. 422 to go to the Crown but no mention of notice to a private party is made indicates that the parties concerned in a criminal appeal from a conviction are the convicted person and the Crown. If the Crown supports the order of acquittal, then the Court is not concerned with the attitude taken by the complainant who instituted the proceedings in the trial Magistrate's Court particularly when no important question is at issue. Hence non-compliance with the mandatory provision of S. 422, Criminal P. C., does not necessarily call for interference in revision with an order of acquittal. AIR (Vol 30) 1943 Mad 566: 1943 MWN 227: 56 LW 259: (1943) 1 MLJ 351: 44 Cr LJ 794: 208 Ind Cas 482.

**——Ss. 422, 545 — Accused convicted and ordered to pay compensation to complainant — Appeal by accused — Notice sent to Crown and not to complainant — Conviction set aside and with it order to pay compensation.**

Where the Magistrate took cognizance of the case on a private complaint, notice of appeal by the accused against his conviction goes to the Crown and not to the private party. As in an ordinary appeal the Legislature intends that notice should go to the representative of the Crown and not to any other party, there can be no irregularity and much less illegality in not giving notice to the complainant merely because he was awarded compensation under S. 545 of the Code. In a straightforward case, where the matter has been fairly heard after notice to the Crown, and after hearing the Public Prosecutor, and where a proper judgment has been written, it would be grossly unfair to require an accused who had been acquitted to go through a fresh order because the Appellate Judge had heard only the Public Prosecutor, which is all that is required under S. 422, Criminal P. C., and not the complainant's vakil also. AIR (Vol 29) 1942 Mad 465: (1942) 1 MLJ 108: 1942 MWN 125: 55 MLW 176 (2): 43 Cr LJ 743: 201 Ind Cas 521.

**——S. 422 — Appeal against conviction — No notice to Crown under S. 422 — Appeal allowed and accused acquitted.**

An order allowing the appeal of the accused against their conviction and acquitting them without notice to the officer appointed by the Provincial Government under S. 422 of the Criminal P. C., cannot be sustained. AIR (Vol 29) 1942 Mad 356: 55 MLW 170 (1): 1942 MWN 128 (1): 43 Cr LJ 768: 201 Ind Cas 515.

**——S. 422 — Omission of notice.**

Failure to issue notice to Crown by appellate Court under S. 422 is a sufficient ground to set aside the appellate order. 53 Cal 969: 43 C LJ 583: 27 Cr LJ 1086: 7 AI Cr R 94: 97 Ind Cas 62: AIR (Vol 13) 1926 Cal 1054 (DB).

**——S. 422 — Notice to District Magistrate.**

Where the rules require notice to the District Magistrate the fact that the appeal which is ultimately heard by a joint Magistrate does not relieve the joint Magistrate of his duty of giving notice to the District Magistrate. 83 Ind Cas 349: 25 Cr LJ 1389: AIR (Vol 12) 1925 Mad 375.

——S. 422 — Quaere: — Whether omission to give notice to the officer mentioned in the section is an illegality or mere irregularity. 83 Ind Cas 349: 25 Cr LJ 1389: AIR (Vol 12) 1925 Mad 375.

——S. 422 — In the absence of notice to the District Magistrate the order of acquittal on appeal from conviction is revisable but not at the instant of the complainant. 86 Ind Cas 287: 25 Bom LR 251: 26 Cr LJ 751: AIR (Vol 10) 1923 Bom 264 (DB).

——S. 422 — The section is imperative and the omission to give notice of appeal to the District Magistrate cannot be treated merely as an irregularity. An order passed in appeal without such notice is an invalid order. 73 Ind Cas 812: 24 Bom LR 1150: 24 Cr LJ 700: AIR (Vol 10) 1923 Bom 74 (DB).

——S. 422 — In appeals against compensation orders the District Magistrate is the person to whom notice must be given, but when he is hearing the appeal judicially, there is no necessity for him to give notice to himself. 62 Ind Cas 823: 13 MLW

669: 1921 MWN 387: 22 Cr LJ 583: AIR (Vol 8) 1921 Mad 281: 41 MLJ 17.

**6. Time and place of hearing.**

**——S. 422 — Counsel appearing after appeal was disposed of — Counsel's absence not wilful.**

Where a criminal appeal is dismissed in an early part of the day and the counsel for the appellant appears later on and his absence at the time of taking up appeal was not wilful, the appeal should be restored. 1937 MWN 91.

**——S. 422 — Notice of hearing — Sufficient time to be given.**

The order dismissing the appeal was set aside since the appeal had been disposed of in the absence of the appellants and there was no sufficient notice to their pleader of the date and the place of hearing, one day's notice being quite insufficient. 22 Bom LR 188: 21 Cr LJ 373: 55 Ind Cas 853: AIR (Vol 7) 1920 Bom 318 (DB).

**——S. 423.**

See also Cr. P. C. Ss. 376 and 417.

1. **Acquittals.**
2. **Alteration of conviction.**
3. **Alteration of charge.**
   See also N. 2.
4. **Applicability and scope.**
5. **Appreciation of evidence.**
6. **Burden of proof.**
7. **Duty of an appellate Court.**
8. **Enhancement of sentence.**
   See also Cri. P. C. S. 439.
9. **Limitation.**
10. **New case or plea.**
11. **Powers of Appellate Courts.**
    See also Cr. P. C. S. 439.
12. **Remand.**
13. **Retrial.**
    See also Cr. P. C. S. 439.
14. **Reversal of finding.**
15. **Right to be heard and to reply.**
16. **Verdict of jury.**
    See also Cr. P. C. Ss. 297 and 307.
17. **Withdrawal of appeal.**
18. **Admission of inadmissible and additional evidence.**
19. **Alteration of finding.**
20. **Award of costs.**
21. **Co-accused.**
22. **Compounding of offence.**
23. **Dismissal for default.**
24. **Order restoring property.**
25. **Revision and Reference.**
26. **Summary dismissal.**

**1. Acquittals.**

**——Ss. 423 and 417 — Acquittal — No appeal — Sessions Judge intimating High Court that the acquittal was one by mistake — High Court if can interfere with the acquittal.**

Where an accused has been acquitted of a charge and there is no appeal, it will not be open to the High Court to convert that acquittal to one of conviction on the basis of communication from the Sessions Judge that the acquittal was by a mistake. AIR (Vol 33) 1946 All 457: 226 Ind Cas 481: 47 Cr LJ 955: 1946 AWR (HC) 177 (DB).

**——S. 423 — Charges under Ss. 467 and 420 — Conviction under S. 467 and acquittal under S. 420 — Appeal — Power of Appellate Court.**

The accused was charged under Ss. 467 and 420, the allegation being that he forged a signature on a money order form and by impersonating the true owner, cheated. The Assistant Sessions Judge acquitted the accused of cheating but convicted him of forgery. The accused appealed:

Held, that the Appellate Court could come to its conclusion with regard to the appeal against the conviction under S. 467 quite untrammelled by the fact that the acquittal under S. 420 stands. AIR (V 32) 1945 Mad 240 : 58 MLW 118 : 1945-1 MLJ 183 : 1945 MWN 185(2): ILR (1945) Mad 894: 46 Cr LJ 744: 220 Ind Cas 370.

**——S. 423 — Acquittal — Appeal against — Interference by High Court — Grounds of.** AIR (V 31) 1944 Sind 124: 46 Cr LJ 759: 220 Ind Cas 452.

**——S. 423 — When allowed.**

Appeals from acquittals are allowed only in exceptional circumstances. AIR (Vol 30) 1943 Sind 130: ILR (1943) Kar 3: 44 Cr LJ 607: 207 Ind Cas 446 (DB).

**——S. 423 — Erroneous view of law — Acquittal, if can be set aside.**

An Appellate Court has power to set aside an acquittal based on an erroneous view of the law and in lieu thereof convict the accused.

Where the accused are acquitted under Ss. 302-149 on an erroneous view of the law and convicted under Ss. 148 and 326, the High Court can, in appeal, set aside the acquittal and convict the accused under Ss. 326-149 in lieu thereof. AIR (Vol 29) 1942 Pat 190: 20 Pat 881: 8 BR 569: 43 Cr LJ 493: 23 PLT 368: 199 Ind Cas 475 (DB).

**——Ss. 423, 439 — Acquittal under Ss. 302-149, Penal Code, whether can be converted into conviction under Ss. 326-149.**

Quaere. — Where accused charged under Ss. 302-149 and also under S. 147, Penal Code, are acquitted by the Sessions Judge of charge under Ss. 302-149, but are convicted under S. 147 and the accused prefer an appeal against the conviction and the complainant files a revision to convict the accused under Ss. 302-149 or in the alternative, to enhance the sentences; whether the High Court under its combined appellate and revisional powers can convert the acquittal under Ss. 302-149 into a conviction under Ss. 326-149 and then pass a sentence, where none is passed by the Sessions Judge for the latter offence. AIR (Vol 26) 1939 Pat 611: 41 Cr LJ 191. 18 Pat 544: 6 BR 203: 21 PLT 45: 185 Ind Cas 529 (DB).

**——S. 423 (1), (b) — If applies to cases of acquittal.**

The words "alter the finding, maintaining the sentence" occurring in S. 423 (1) (b) (2), Cr. P. C., must be read as a whole. The powers under S. 423 (1) (b) of altering the finding and then as a Court of Revision, enhancing the punishment cannot turn upon chance. Clause (b) of S. 423 (1), Criminal P. C., does not apply to cases of acquittal, not partial or total, but to cases of conviction, and cl. (a) applies to cases of acquittal; and if the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under S. 423 (1) (a) and not on an appeal against a conviction under S. 423 (1) (b). AIR (Vol 25) 1938 Sind 202: 40 Cr LJ 93: ILR (1939) Kar 75: 178 Ind Cas 520 (DB).

**——S. 423 — Acquittal based on facts and appreciation of evidence — Distinction between appeal from conviction and appeal from acquittal.**

In dealing with an appeal from an order of acquittal on a matter of fact, the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon the evidence, the order of acquittal should be reversed. Such power is not limited to cases of obstinate blunder on the part of the lower Court and incompetence, stupidity or perversity of conduct or misconduct resulting in a clear miscarriage of justice. In exercising this power, the High Court will always give proper weight and consideration to such matters as the views of the trial Court as to the credibility of the witnesses, the presumption of innocence in favour of the accused, his right to the benefit of any doubt, and the slowness of an Appellate Court in disturbing a finding of fact by a Judge who had the advantage of seeing the witnesses.

Though there is no distinction made in Criminal P. C., between an appeal from an acquittal and appeal from conviction, yet there is a real distinction, apart from the provisions of the Criminal P. C. (distinction pointed out.) AIR (Vol 25) 1938 Sind 67: 39 Cr L 462: 32 Sind LR 694: 174 Ind Cas 694 (DB).

**——S. 423 — Riot case — Magistrate faced with conflicting facts and conflicting testimony.**

Appeals by the Crown against acquittals on questions of fact and fact alone are not often encouraged by Appellate Courts.

Where faced with conflicting facts and conflicting testimony, the Magistrate has acquitted the accused in a riot case, the High Court will not interfere in appeal. AIR (V 24) 1937 Cal 156: 38 Cr LJ 638: 168 Ind Cas 738 (DB).

**——S. 423 — Appeal from acquittal, when can be entertained.**

Although the Court is competent to entertain an application to set aside an acquittal, it is not the custom of the Court to do so on a consideration of the evidence at the instance of private individual except in extreme cases. It is open to the applicant, should he so desire, to move the Local Government to appeal against the acquittal on the facts. AIR (Vol 24) 1937 Nag 103: ILR (1937) Nag 163: 38 Cr LJ 719: 169 Ind Cas 96.

**——S. 423 — Acquittal for serious offence, if and when can be set aside.**

Where a man is tried of a more serious offence and is convicted of less serious one, he must be held to have been aquitted of the more serious offence and the acquittal cannot be set aside upon an appeal filed by the Local Government. AIR (Vol 23) 1936 All 758: 1936 ALJ 1083: 1936 AWR 921: 38 Cr LJ 71: 165 Ind Cas 734.

**——S. 423 — Powers of Appellate Court.**

Per Lort-Williams J.—No power is given by S. 423 (1) (a), Criminal P. C., to an Appellate Court to interfere with an order of acquittal in the absence of an appeal from that order, or with a conviction in the absence of an appeal from that conviction. (1936) 162 Ind Cas 931: 39 CWN 677 : 62 CLJ 217: 62 Cal 928 : 37 Cr LJ 707 (DB).

**——S. 423 — Appeal from acquittal — Principles.**

The accused, in an appeal from an acquittal, retains his right of being presumed to be innocent until the charge is fully brought home to him. He has the right which he had in the trial Court of being given the benefit of a reasonable doubt as to his guilt. He must also have the benefit of the opinion of the trial Court upon the credibility of the witness whom that Court had the advantage of seeing face to face and judging of their demeanour and he has the right to ask that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion. AIR (Vol 23) 1936 Pat 350 : 15 Pat 108 : 17 PLT 302 : 2 BR 696 : 37 Cr LJ 877 : 164 Ind Cas 74 (DB).

**——S. 423 — Interference with judgment of acquittal on question of fact.**

In order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the Appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence ; but upon sound principles of criminal jurisprudence, the indications of errors in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction. AIR (Vol 20) 1933 Lah 296 : 35 Cr LJ 626 (2) : 143 Ind Cas 36 (DB).

——S. 423 — The prosecution not satisfactorily conducted — The evidence-in-chief of prosecution witnesses consisting of a few lines, leaving the defence to elicit from the witnesses their story of riot — The trial ending in acquittal leaving several public servants under the stigma of having been responsible for an unnecessary taking of life :

Held, the acquittal must be set aside, and the case be retried. 1932 MWN 427 (DB).

**——Ss. 423, 439 — Acquittal — Appeal.**

Where an accused being charged under S. 302 is convicted under S. 302/109 his conviction under Ss. 302/109 can be regarded as an acquittal on the charge under S. 302 and an appeal from such acquittal is competent. AIR (Vol 17) 1930 Lah 338 : 12 Lah LJ 33 : 1930 Cr C 386 : 127 Ind Cas 855 (DB).

**——S. 423 (1) — Appeal against acquittal — Grounds for setting aside.**

In appeals against acquittal, the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on an obvious error of procedure. AIR (Vol 3) 1916 Mad 711 : 16 Cr LJ 529 : 29 Ind Cas 657.

**2. Alteration of conviction.**

**(a) General principles.**
**(b) To that for abetment.**
**(c) When permissible.**
**(d) When illegal.**

**(a) General principles.**

——S. 423 — Alteration of conviction — What is — Correction of mistake committed by trial Court by oversight — Effect of. AIR (Vol 36) 1949 All 84 : 49 Cr LJ 641.

**——S. 423 (1) (b) and (d) — Conviction under Ss. 324 and 148, Penal Code — Sentence under S. 324 only — Appellate Court setting aside conviction under S. 324 but maintaining that under S. 148 — Appellate Court, held could impose sentence under S. 148.**

The accused was convicted by the Sessions Court under Ss. 324 and 148, Penal Code, and was sentenced to three years' imprisonment only for the offence under S. 324 but no separate sentence was imposed under S. 148 as the sentence imposed under

S. 324 was considered sufficient. The appellate Court set aside the conviction under S. 324 but maintained that under S. 148 and imposed a sentence of 18 months' imprisonment. It was objected that this could not be legally done :

Held, that it would be a grave anomaly if when an appellate Court had found that a man had been rightly convicted for a serious offence it had to let him go scot-free merely because the trial Court had imposed the sentence under a wrong section. The appellate Court had ample power to transpose the sentence so long as the transposition did not amount to an enhancement. The effect of appellate Court's order was to reduce the sentence. The wording of S. 423 (1) (b) would cover the case, but if it did not, then it would be covered by that S. 423 (1) (d) which authorises an appellate Court to make any amendment of consequential or incidental order that might be just or proper. AIR (Vol 33) 1946 Pat 235 : 24 Pat 708 (DB).

**——S. 423 — Wrong section.**

Under S. 423 (1) (b), Criminal P. C., the Appellate Court is authorised on the same facts to alter the conviction from one under a wrong section to one under the proper section. AIR (Vol 31) 1944 Cal 92 : ILR (1943) 1 Cal 493 : 45 Cr LJ 431 : 211 Ind Cas 574 (DB).

**——S. 423 — Trial Court recording conviction under section.**

If the trial Court has found the facts proved but recorded a conviction under the wrong section, it is open to an Appellate Court to alter the conviction to one under the section under which the accused ought properly to have been convicted. AIR (Vol 31) 1944 Pat 67 : 22 Pat 681 : 45 Cr LJ 624 : 10 BR 494 : 25 PLT 57 : 212 Ind Cas 298 (DB).

**——S. 423 — Interference with sentence.**

The Court on whom is imposed the duty of determining the sentence is in the first instance the trial Court, which knows local conditions, and an Appellate Court ought not to interfere with the sentence unless it thinks that the trial Court has proceeded on some wrong basis. AIR (Vol 30) 1943 Bom 304 : 45 Bom LR 581 : 44 Cr LJ 786 : 208 Ind Cas 455 (DB).

**——S. 423 — Acquittal under S. 302, Penal Code — High Court can in appeal convict under S. 193, Penal Code.**

The appellate Court, under S. 423 at least, has the power of the original Court which tried the case under S. 237, provided no prejudice was given to the defence. Therefore, the appellate Court in an appeal from acquittal cannot only find the accused guilty of the offence with which he was charged and for which he was tried but of which he was acquitted, but also can convict an accused of some other offence. Where the accused was charged under S. 302, Penal Code, and was acquitted and Government appealed.

Held, that the appellate Court could convict him for an offence under S. 193, Penal Code, even though the opinions of the assessors were not recorded in regard to the charge under S. 193. 19 Bom 51, Not. foll. AIR (Vol 15) 1928 Bom 130: 52 Bom 385: 30 Bom LR 330: 10 AI Cr R 118: 29 Cr LJ 403: 108 Ind Cas 501 (DB).

——S. 423 — Conviction under Ss. 379 and 341, Penal Code — Appellate Court setting aside conviction under S. 379, but maintaining the sentence — Procedure is illegal. AIR (Vol 14) 1927 All 375 : 25 ALJ 396 : 8 LRA Cr 49 : 7 AI Cr R 339 : 28 Cr LJ 495 : 49 All 484 : 101 Ind Cas 671.

**——S. 423 — Changing conviction of graver offence to minor offence — Maintaining the sentence is not necessarily illegal.**

Where the petitioner was convicted of voluntarily causing hurt with a dangerous weapon under S. 324, I. P. Code, and was sentenced to rigorous imprisonment for two months, and in appeal the conviction was altered into one under S. 323, I. P. Code, but the sentence was maintained.

Held, that where the appellate Court adopts the view taken by the original Court as to the act committed by the accused and only differs from it in the application of the law, neither the letter nor the spirit of S. 423 is broken by maintaining the sentence. AIR (Vol 14) 1927 Mad 789 : 53 MLJ 694 : 39 MLT 20 : 28 Cr LJ 824 : 104 Ind Cas 440.

——S. 423 — The powers of an appellate Court to vary a sentence must be measured by those of the Court of first instance. AIR (Vol 11) 1924 All 130 : 45 All 594 : 25 Cr LJ 312 : 76 Ind Cas 1032 (DB).

**——S. 423 — "Altering conviction" does not include setting aside an acquittal.**

On appeal, the Sessions Judge upheld the conviction and sentence and further passed an order setting aside the order of acquittal of the offence under S. 379, Penal Code, which had been passed by the trying Magistrate.

Held, the Sessions Judge had no jurisdiction to set aside the acquittal of the petitioner. It was not a case of altering the conviction within S. 423, Penal Code. AIR (Vol 10) 1923 Cal 658 : 27 CWN 555 : 37 CLJ 409 : 24 Cr LJ 938 : 75 Ind Cas 362 (DB).

——S. 423 — An Appellate Court under S. 423 has power to alter conviction under one section of the Indian Penal Code into another of the same Code. Section 238 of the Code is no bar to such alteration being made. AIR (Vol 9) 1922 All 143 : 20 ALJ 213 : 23 Cr LJ 198 : 65 Ind Cas 854.

**——Ss. 423 (d) and 522 — Appellate Court if can set aside order while maintaining conviction.**

An Appellate Court can under S. 423, Cl. (d), set aside an order under S. 522, while affirming the conviction. AIR (Vol 3) 1916 Cal 733 : 19 CWN 990 : 16 Cr LJ 607 : 30 Ind Cas 159 (DB).

**(b) To that for abetment.**

**——S. 423 — Conviction for abetment when accused cannot be convicted of substantive offence — Power of appellate Court.**

A Criminal Court can alter a conviction for a substantive offence into one for abetment, if the facts are such that principles of Ss. 236 and 237, Cr. P. Code, may be applicable and if no prejudice is caused to the accused in his defence.

It would be open even to the appellate Court to convict the accused of the offence of abetment of the offence even though he cannot be convicted of the substantive offence. (1950) 3 Sau LR 8 (DB).

——S. 423 — The only section under which the appellate Court can base a conviction for abetment on acquitting the accused of the main charge is S. 423. AIR (Vol 14) 1927 All 35 : 49 All 120 : 24 A L J 998 : 7 L R A Cr 180 : 27 Cr L J 1118 : 97 Ind Cas 430.

——S. 423 — The fact that an accused person has been charged with dacoity does not necessarily invalidate a verdict of guilty of abetment of robbery though he was not charged with abetment. Where a person was charged only under S. 398, I. P. Code, but convicted of abetting the offence under the section and the evidence showed abet-

ment of the commission of the attempted robbery, the appellate Court altered the conviction to one under S. 393/114, I. P. Code. AIR (Vol 13) 1926 Rang 207 : 5 Bur LJ 103 : 27 Cr LJ 1285 : 98 Ind Cas 181.

**(c) When permissible.**

**——S. 423 (1) (b) — Power of appellate Court — Conviction by trial Court under S. 307, I. P. Code, on a charge under S. 393, I. P. Code — Alteration of conviction in appeal to one under S. 393, I. P. Code.**

An appeal against a conviction opens out the entire case, and the appellate Court, being empowered to alter the finding by S. 423 (1) (b), Cr. P. Code, may record a conviction in respect of an offence of which the trial Court has found the accused not guilty. Where therefore the accused who was tried on a charge under S. 393, I. P. Code, was convicted under S. 307, I. P. Code, by the trial Court, it is open to the appellate Court to set aside the conviction under S. 307, I. P. Code, and alter it to a conviction under S. 393, I. P. Code, for which the accused was tried. AIR (Vol 37) 1950 Lah 71 : Pak LR (1950) Lah 105 : 51 Cr LJ 766.

**——Ss. 423 and 439 — Powers of High Court — Alteration of conviction from S. 304 to S. 302, I. P. Code, and imposition of proper sentence.**

Where there is an appeal by a convict and a revision petition by the complainant of which notice has been sent to the appellant, the High Court has jurisdiction to alter the conviction from S. 304 to S. 302, I. P. Code, and thereupon in the exercise of its revisional jurisdiction to impose a proper sentence. AIR (Vol 35) 1948 Lah 74 : 49 Cr LJ 106 : 49 PLR 305 (DB).

**——S. 423 — Number of persons found in appeal as concerned with offence not justifying conviction of rioting — Accused can be convicted under S. 34, Penal Code.**

It is permissible for an appellate Court, where the number of persons found on appeal to have been concerned does not justify a conviction for rioting and offences committed in the course of a riot, to convict for such other offences as are proved to have been committed. In determining what offence has been committed it is permissible to invoke the provisions of S. 34, Penal Code, though that section has not been referred to in the charge. AIR (Vol 33) 1946 All 7 : 1945 ALJ 359 : 1945 OWN (HC) 293 : 47 Cr LJ 415 : 222 Ind Cas 332.

**——S. 423 — Appellate Court can interfere.**

(Per Full Bench, Mulla and Hamilton JJ. contra) — An Appellate Court is, subject to the other provisions contained in the Code, empowered under S. 423 (1) (b) (2) to alter a finding of acquittal into one of conviction. This power is subject to the condition that the Appellate Court cannot enhance the sentence imposed by the trial Court. AIR (Vol 31) 1944 All 137 : 46 Cr LJ 38 : 1944 ALJ 203 : ILR (1944) All 403 : 215 Ind Cas 213 (FB).

**(Overrules AIR (Vol 24) 1937 All 240 : 1937 ALJ 143 : 168 Ind Cas 17).**

**——S. 423 (1) (b) — Accused charged alternatively under S. 366-A, or S. 498, Penal Code — No finding — Conviction under S. 366-A — Acquittal under S. 498, if implied — High Court, if can alter conviction from S. 366-A to S. 498.**

Where an accused is alternatively charged under S. 366-A, or S. 498, Penal Code, the conviction under S. 366-A, Penal Code, does not, by necessary implication, involves an acquittal on the charge under S. 498, Penal Code, and where the Court below has omitted, apparently by an oversight, to record a finding one way or the other, whether specifically or in the alternative, under S. 498, Penal Code, the High Court is competent under S. 423 (1) (b), Criminal P. C., to alter the conviction under S. 366, Penal Code, into a conviction on the alternative charge under S. 498, Penal Code. AIR (Vol 24) 1937 All 353 : 1937 AWR 203 : 1937 ALJ 547 : 38 Cr LJ 621 : 168 Ind Cas 833 (DB).

**——S. 423 — Charge under S. 304, read with S. 147 — Sessions Judge convicting only under S. 304 — Finding as to guilt under S. 147 also — Conviction under Ss. 304 and 147 by High Court — Propriety of.**

Certain accused persons were charged under Ss. 147 and 304, Penal Code, and the Sessions Judge convicted them under S. 304. But, from the language used by the Sessions Judge, it appeared clear that the accused were guilty of rioting and that the killing of the deceased and the injuring of certain other villagers were incidents of the riot and that the accused were jointly responsible because the offences were committed by the certain members and were likely to have been committed in the prosecution of their common object :

Held, that in appeal, under S. 423, Criminal P.C., the High Court could convict the accused under S. 147, in the view of the finding of the Sessions Judge which was not an express acquittal under S. 147 but merely an omission to record a conviction under that section. AIR (Vol 20) 1933 All 565 : 34 Cr LJ 1064 : 1933 ALJ 1377 : 55 All 834 : 145 Ind Cas 849 (DB).

**——Ss. 423, 439 — Power of High Court to alter conviction under S. 326 to one under S. 302, Penal Code.**

The High Court has, under the combined provisions of Ss. 423 and 439, Criminal P. C., power to alter a conviction under S. 326, Penal Code, to one under S. 302. AIR (Vol 20) 1933 Lah 661 : 35 Cr LJ 250 : 35 PLR 238 : 146 Ind Cas 949 (DB).

**——S. 423 — Cheating to criminal breach of trust.**

An Appellate Court is competent to alter a conviction of cheating to one of criminal breach of trust. AIR (Vol 20) 1933 Pat 26 : 34 Cr LJ 419 : 142 Ind Cas 704 (1).

**——S. 423 — Conviction under S. 302 — Whether can be altered to one under Ss. 366-109.**

Under S. 423 (1) (b), Criminal P. C., the Appellate Court may, in an appeal from conviction, 'alter the finding' and this power is not in any way qualified or restricted by Ss. 236, 237 and 238, Criminal P. C. It is open to an Appellate Court, under proper circumstances, to alter a conviction under S. 302, Penal Code, to one under Ss. 366 and 109, Penal Code, if no new facts are charged and no prejudice or injury is thereby caused to the accused. AIR (Vol 20) 1933 Pesh 9 : 34 Cr LJ 266 : 142 Ind Cas 182.

——S. 423 — Appellate Court can alter conviction from one under S. 380 to one under S. 403, Penal Code, the two offences being of the same nature. AIR (Vol 16) 1929 Lah 508 : 11 LLJ 113 : 30 Cr LJ 413 : 1929 Cr C 61 : 12 AI Cr R 378 : 115 Ind Cas 25.

**——S. 423 — Rejecting part of prosecution story — Conviction on the rest believed — Validity.**

Where in a trial for the offence of rioting the appellate Court refused to believe part of the prosecution story as to theft and house-breaking but gave sufficient reasons for believing the story of rioting.

Held, that the conviction for rioting was right as the Court was not precluded from exercising

its powers of discretion from eliminating exaggeration from evidence otherwise found to be true. AIR (Vol 14) 1927 Mad 410 : 25 MLW 325 : 28 Cr LJ 238 : 99 Ind Cas 1038.

——S. 423 — S. 238, Cr. P. Code is no bar to alter the conviction from one under S. 147 to one under S. 323. Whether S. 147 is applicable or not depends on the number of persons concerned and this is a question which has to be determined by the Judge. AIR (Vol 9) 1922 Bom 114 : 46 Bom 79 : 23 Bom LR 745 : 64 Ind Cas 156.

**(d) When illegal.**

**——S. 423 (1) — Powers of appellate Court — Accused acquitted under S. 302, I. P. Code, but convicted under S. 304, I. P. Code — Appellate Court, if can convert finding of acquittal into one of conviction under S. 302.**

Where an accused is acquitted of an offence under S. 302 but convicted under S. 304, I. P. Code, an appellate Court cannot alter the finding of acquittal into one of conviction under S. 302 either as an appellate Court or as an appellate Court acting under its revisional powers. AIR (Vol 37) 1950 All 380: 51 Cr LJ 1040 (DB).

**——S. 423(1)(b) (2)—Accused charged alternatively — Conviction under one charge only — Appellate Court acquitting accused altogether — Propriety.**

The accused was charged alternatively with an offence under S. 379, Penal Code, and under S. 215, Penal Code. He was convicted of the offence under the latter section alone. The Appellate Court held that there was no evidence for the offence under S. 215 but that there was satisfactory evidence for the offence under S. 379. It acquitted the accused altogether :

Held, that the conviction ought to have been altered to one under S. 379 and the sentence maintained. AIR (Vol 28) 1941 Rang 340 : 1941 Rang LR 582 : 43 Cr LJ 426 : 198 Ind Cas 766.

——S. 423 — The Appellate Court is not entitled to quash a conviction not appealed against. 1935 MWN 816.

**——S. 423 — Charge under Ss. 302, 392 read with S. 114, Penal Code — No conviction under S. 392 — High Court if can alter conviction from S. 302-114, to S. 379-511.**

Where an accused was charged under Ss. 302 and 392 read with S. 114, Penal Code, and the Sessions Judge convicted him under S. 302 read with S. 114, Penal Code, and not under S. 392, Penal Code :

Held, that it amounted to an acquittal under S. 392, Penal Code, and on such acquittal, the High Court could not alter conviction from S. 302-114 to 379-511, Penal Code. AIR (Vol 22) 1935 Rang 512 : 37 Cr LJ 246 : 160 Ind Cas 210 (DB).

——S. 423 — Appellate Court cannot alter the conviction under Ss. 147 and 323 into one under Ss. 147 and 149 read with S. 323, Penal Code, since the petitioners were not asked to plead to a charge of that nature. 1933 MWN 910.

**——S. 423 — Alteration of sentence.**

Under S. 423, Criminal P. C., an Appellate Court has power, without altering the finding, to alter the nature of the sentence passed but not so as to enhance the same. Consequently, provided the effect of the change is not to enhance the sentence, it is open to an Appellate Court to alter a sentence of imprisonment into one of whipping where the accused has been found guilty of an offence which is punishable with whipping in lieu of any other punishment. The Court should consider the part of the original sentence which, before its order, the accused person has, in fact, undergone and this part of the original sentence together with the sentence that the Appellate Court inflicts should not in effect be more than the sentence passed by the trial Court.

Where the accused who was sentenced to nine months' rigorous imprisonment under S. 457, Penal Code, and failed in appeal to Sessions Judge for alteration of sentence, and it appeared when the case came to the High Court that he had undergone 3½ months of the sentence :

Held, that the alteration of sentence into whipping at this stage would be inappropriate. AIR (Vol 19) 1932 Rang 150 : 10 Rang 317 : 33 Cr LJ 758 : 139 Ind Cas 284 (DB).

**——S. 423 — Setting aside conviction.**

Wrong assumption of jurisdiction — No failure of justice pleaded — Conviction cannot be set aside by the Appellate Court on the ground of want of such jurisdiction. AIR (Vol 18) 1931 Oudh 273 : 8 OWN 341 : 32 Cr LJ 828 : 132 Ind Cas 50 (DB).

**——S. 423 — Alteration of conviction.**

It is not open to an appellate Court to alter the sentence of the trial Court and substitute a sentence of whipping, a sentence not within the power of trial Court. Though such course be most suitable it must be considered to be an enhancement and hence becomes illegal. AIR (Vol 17) 1930 Lah 318 : 31 Cr LJ 166 : 1930 Cr C 350 : 1 PLR 2643: 120 Ind Cas 787.

**——S. 423 — Charge of criminal breach of trust — Altering the conviction on appeal to abetment of the offence is unfair.**

If in the case of a breach of trust where proof of abetment differs from proof of substantive offence in material particulars, if the attention of the accused is not directed at the time of framing the charges or during the trial to the fact that he might have to meet a charge of abetment, it would be highly unfair for the High Court on appeal to alter the conviction to one of abetment. AIR (Vol 15) 1928 Lah 382 : 30 Cr LJ 18 : 11 AI Cr R 405 : 112 Ind Cas 850.

**——S. 423 — Charge and conviction under S. 379, Penal Code — Alteration to conviction under S. 143, Indian Penal Code by appellate Court — Accused is prejudiced.**

If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused by his defence endeavoured to meet the accusation of the commission of these acts, then the appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance. But where the accused is charged under S. 379, Indian Penal Code, and the appellate Court alters the conviction to one under S. 143, Indian Penal Code, the accused is prejudiced. AIR (Vol 14) 1927 Cal 520 : 54 Cal 476 : 31 CWN 527 : 28 Cr LJ 404 : 8 AI Cr R 56 : 101 Ind Cas 180 (DB).

——S. 423 — In the absence of a charge under S. 323, Penal Code, framed during the trial, the conviction under S. 147, Penal Code, cannot be altered to one under S. 323, Penal Code. AIR (Vol 13) 1926 Cal 431 : 26 Cr LJ 1018 : 30 CWN 528 : 87 Ind Cas 842 (DB).

——S. 423 — In appeal High Court is not justified in altering the conviction under S. 302, I. P. Code, to a conviction under one of the sections dealing with offences against property. AIR (Vol

13) 1926 Lah 691 : 7 Lah 561 : 27 PLR 611 : 27 Cr LJ 1004 : 7 AI Cr R 31 : 9 LLJ 39 : 96 Ind Cas 860 (DB).

——**S. 423 — Lower Court convicting under one section — Appellate Court cannot set aside conviction under that section and convict under another section.**

The accused was convicted by the trial Court of an offence under S. 159 of the Madras Local Boards Act (XIV of 1920). The appellate Magistrate after having found that S. 159 (1) had no application went on to convict the accused, under S. 163 (1) of that Act.

Held, that the action of the Appellate Magistrate was illegal as no charge had been framed under S. 163 (1) and the accused had not been tried for that offence or convicted by the first Court of any such offence. AIR (Vol 12) 1925 Mad 706 : 26 Cr LJ 1036 : 21 MLW 520 : 87 Ind Cas 924.

——S. 423 — When the accused was charged and convicted by the trial Court under S. 468, I. P. Code and the appellate Court convicted the accused under S. 471, I. P. Code.

Held, that the conviction was wrong as it was impossible to postulate that the accused was not prejudiced by having no notice that he was to be convicted of the offence under S. 471. AIR (Vol 12) 1925 Nag 294 : 8 NLJ 87 : 26 Cr LJ 1358 : 89 Ind Cas 398.

——**S. 423 — Penal Code, Ss. 323 and 325 — Alteration of conviction by appellate Court — Prejudice to accused is caused.**

The Petitioners along with one K were convicted by the Trial Court under S. 325 for having broken the knee-cap of the complainant. The Appellate Court found that the injury to the knee-cap was caused by the accused K alone and it came to the conclusion that the petitioners had been guilty of the offence under S. 323 for some other injuries they had inflicted on the complainant.

Held, that the alteration of the conviction of the petitioners from S. 335 to S. 323 by the Appellate Court was unauthorised as they had not been given any opportunity of answering the charge of inflicting injuries other than the injury to the knee-cap. AIR (Vol 11) 1924 Cal 532 : 24 Cr LJ 312 : 72 Ind Cas 72 (DB).

——**S. 423 — Alteration of charge.**

Alteration of conviction under Ss. 147 and 323, Penal Code, into one under S. 160 is not justifiable. AIR (Vol 11) 1924 Mad 375 : 46 MLJ 120 : 47 Mad 61: 18 MLW 741: 1923 MWN 814: 25 Cr LJ 554: 81 Ind Cas 42.

——**S. 423 — Appellate Court cannot convict for offence totally different from that charged in Lower Court.**

The offence of entering into a conspiracy with the Lambardars not to report a boy's death is one of a different nature from the offence under S. 189 and is constituted by an entirely different set of facts and if the accused are not called upon in the Trial Court to answer a charge of an offence under section 176-109, appellate Court is not justified in appeal in altering the convictions. Further an offence under section 176-109, Indian Penal Code, requires sanction which is not necessary for a prosecution for an offence under section 189. AIR (Vol 10) 1923 Lah 260 : 3 Lah 440 : 23 Cr LJ 709 : 69 Ind Cas 437.

——**S. 423 — No charge for the offence in the trial Court — Conviction by Appellate Court — If sustainable.**

The accused should not be convicted by the Appellate Court of a charge of which they had no notice and which they were not called upon to answer in the Trial Court. AIR (Vol 8) 1921 Pat 496 : 2 PLT 243 : 22 Cr LJ 485 : 62 Ind Cas 181 (DB).

### 3. Alteration of charge.

See also N. 2.

(a) **When legal.**
(b) **When illegal.**
(c) **Appeal against sentence.**

#### (a) When legal.

——**S. 423 — Amendment of charge in appeal — Powers and discretion of Court.**

Section 423, Criminal P. C., and in particular, sub-s. (1) (d) of that section gives wide powers of amendment in a criminal appeal. The power, however, must be used with discretion. If there is any chance of injustice being done or of the accused having been prevented from giving or of his having failed to give evidence material to his defence by reason of the amendment of the charge, the Court should at least make him the offer of a new trial on the charge as amended. But it is not always necessary to do so. More particularly it is not necessary where it does not appear that any fresh case could be made or fresh evidence given on behalf of the person convicted.

The prosecution's case was that the appellant, T procured certain insertion in two documents and abetted the forgery. By the charge they asserted and in evidence they sought to prove that the forgery was carried out as to one of the documents by J abetted by M and as to the other by M abetted by J. The appellant T was accused of abetting both these persons in the offence of forging the two documents. J and M were acquitted of the crime of forgery. T and J were, however, convicted of abetment by the High Court. The High Court held that the essential part of the charge was that T abetted the commission of the offence and that it was immaterial that the offence was not committed by the persons named in the charge provided at any rate that T engaged in a conspiracy with one of the named persons for the purpose of effecting the forgery. In their opinion the substance of the charge was the abetment of the particular offence and the persons by whom it was committed was a secondary consideration :

Held, (i) that the High Court had the power to amend the charge so as to turn it into a charge of abetment of a person or persons unknown or having justifiably found J guilty of abetment of forgery to accept a charge against T of abetting that abetment under explanation 4 of S. 108 of the I. P. C. The amendment sanctioned by the High Court fell within the terms of S. 423, Criminal P. C., which gave wide powers of amendment in a criminal appeal :

(ii) that the amendment in the persons alleged to have committed the offence was an amendment within S. 423 of the Criminal P. C., and not the charging of a fresh offence. AIR (Vol 30) 1943 PC 192 : 1943 ALJ 507 : 23 Pat 88 : 45 Cr LJ 126 : (1943) 2 MLJ 532 : 1943 OWN 538 : 56 MLW 706 : 48 CWN 90 : 1944 MWN 23 : 70 IA 196 : 77 CLJ 500 : 1943 AWR 79 : ILR (1944) Kar (PC) 1 Sup : 46 Bom LR 513 : 209 Ind Cas 276 (PC).

——**S. 423 — Conviction of offence not specifically charged.**

An Appellate Court can convict a person of an offence even if there is no specific charge in respect of it, if evidence establishes that charge. AIR (Vol 23) 1936 Nag 132 : ILR (1936) Nag 99 : 38 Cr LJ 390 : 19 Nag LJ 84 : 167 Ind Cas 465 (DB).

——S. 423 — Accused acquitted of murder — Whether can be convicted under S. 307, Penal Code, in appeal.

The powers of an Appellate Court under S. 423, Criminal P. C., are very wide and are only subject to the provisions of Ss. 234 to 238. Under S. 423, it can alter the finding of the trial Court and either maintain the sentence or reduce it and S. 238 (2-A) clearly provides that when a person is charged with an offence, he may be convicted of an attempt to commit such an offence although the attempt is not separately charged. The fact that the accused were acquitted of the offence of murder is no bar to their conviction under S. 307, Penal Code, in appeal. AIR (Vol 23) 1936 Oudh 44: 1935 OWN 1177 : 37 Cr LJ 12 : 158 Ind Cas 945 (DB).

——Ss. 423 (1) (b) and 439 — Alteration of charge — Appellate Court — Robbery — Death.

Three persons attacked the accused and gave him blows with lathis which resulted in his death. Held, all the three were equally guilty of murder. An appeal against a conviction opens out the entire case, and an Appellate Court being empowered under S. 423 (1) (b) of the Cr. P. Code to alter the finding, may record a conviction for an offence of which the trial Court has found the accused not guilty. AIR (Vol 5) 1918 All 65 : 16 ALJ 918 : 20 Cr LJ 22 : 48 Ind Cas 502 (DB).

——S. 423, sub-s. (1) — Alteration of charge — Scope of — Police Act (V of 1861), S. 29 (b) — Charges under Ss. 409, 379, I. P. C. — Acquittal by the trying Magistrate of charge under S. 29 — Conviction by the Sessions Judge on appeal by the accused — Legality.

The senior officer at the station allowed another literate constable to dictate the first information contents to one who took them down. The head constable was acquitted of the charge under S. 29, Police Act by the trying Magistrate. Held, that no offence was committed under Ss. 109 and 379 as there was no evidence that the head constable used the document within the meaning of S. 409, I. P. C. or removed it within S. 379 and as there was no dishonest intention. Provisions of Cl. (b) of sub-s. (1) of S. 423, Cr. P. C. are very wide and enable a Court in disposing of an appeal from a conviction upon the facts to alter finding. There is no express restriction to the effect that a finding of acquittal cannot be converted into one of conviction upon the facts which have resulted in a conviction in the First Court under another provision of law. AIR (Vol 4) 1917 Pat 625 : 2 Pat LW 188 : (1917) Pat HCC 297 : 18 Cr LJ 982 : 42 Ind Cas 598.

——S. 423 — Alteration of charge.

An Appellate Court can in certain cases convict an accused for abetment where the charge was only for the principal offence. AIR (Vol 3) 1916 Cal 431 : 42 Cal 1094 : 19 CWN 1239 : 17 Cr LJ 113 : 33 Ind Cas 289 (DB).

——S. 423 — Alteration of charge — Appellate Court — Conviction altered.

Under the section, an Appellate Court can alter a conviction from one under S. 353, I. P. C., to one under S. 183, I. P. C. (1913) 14 Cr LJ 239 : (1912) MWN 1110 : 19 Ind Cas 335.

——S. 423 — Alteration of charge.

Appellate Court can in appeal from conviction under the several sections of the Penal Code mentioned in the charge sheet, alter the Lower Courts finding and find the appellant guilty of an offence of which he was acquitted. (1912) 34 All 115 : 8 ALJ 1239 : 12 Cr LJ 572 : 12 Ind Cas 836.

——S. 423 — Alteration of charge — High Court — Offences under Ss. 323 and 325, I. P. C.

Where the accused have been acquitted by the Sessions Judge of a charge under S. 325, I. P. C., the High Court can convict them under S. 323. (1912) 39 Cal 896 : 16 CWN 1053 : 13 Cr LJ 481 : 15 Ind Cas 481 (DB).

——Ss. 423 (b) and 439 — Alteration of charge — Conviction of one offence — Acquittal of — Power of Appellate Court.

On a prosecution under S. 497, I. P. C., the trying Magistrate held adultery not proved but found the accused guilty of insult likely to provoke a breach of peace under S. 504. On appeal, the Sessions Judge held, that no offence under S. 504 had been committed but he was of opinion that the charge under S. 497 was sustainable. Held, that the Sessions Judge has power under S. 423, Cr. P. C., to interfere in the case and could alter the conviction to S. 497 of the Penal Code, as the conviction under S. 504 and the acquittal under S. 497 were based on the same evidence. (1911) 1 UBR 100 : 13 Cr LJ 457 : 15 Ind Cas 89.

(b) When illegal.

——S. 243 — In an appeal from a conviction on a charge under S. 304, Penal Code, the Appellate Court cannot convict the accused on a charge under S. 302, even if the lower Court could have convicted him under S. 302 on the findings arrived at by it, as a conviction under S. 304 is tantamount to an acquittal of the offence under S. 302. AIR (Vol 29) 1942 Pesh 51 : 43 Cr LJ 766 : 201 Ind Cas 705 (DB).

——S. 423 — Alteration of charge.

The accused is prejudiced by changing of conviction in the Appellate Court to an offence, the elements of which have not been fully considered in the trial. AIR (Vol 23) 1936 Nag 275 : 38 Cr LJ 380 : ILR (1937) Nag 145 : 167 Ind Cas 378.

——S. 423 — High Court, if will substitute new offence in exercise of powers as Appellate Court.

A man should not be charged, tried and convicted without being heard in his defence. The High Court will not use any power that they have as an Appellate Court to substitute a new charge against him and convict him of that offence. AIR (Vol 22) 1935 Cal 561 : 39 CWN 334 : 62 Cal 433 : 36 Cr LJ 1275 : 157 Ind Cas 1070 (SB).

——S. 423 — Alteration of charge — Appellate Court, powers of to alter conviction.

Where a person is convicted of a particular offence it is illegal for an Appellate Court to alter the finding to one for an altogether different offence. AIR (Vol 7) 1920 Pat 590 : 1 PLT 221 : 21 Cr LJ 496 : 56 Ind Cas 592.

——S. 423 (1) (b) — Alteration of charge — Power of Appellate Court to alter finding.

An Appellate Court cannot pass a finding which the First Court could not have passed. AIR (Vol 4) 1917 Lah 233 : 4 PR Cr 1917 : 18 Cr LJ 511 : 39 Ind Cas 479.

——S. 423 — Alteration of charge.

An Appellate Court cannot alter a conviction of an accused into one of abetment. If an accused who abetted the offence was present at its commission he is rightly convicted of the offence. AIR (Vol 2) 1915 Mad 538 : 15 Cr LJ 694 : 26 Ind Cas 142.

——S. 423 (1) (b) — Alteration of charge — Appellate Court — Conviction for theft — Alteration into abetment.

An Appellate Court cannot convict an offence of theft into one of abetment of theft if it finds that the former offence had not been committed. (1912) 13 Cr LJ 203 : 14 Ind Cas 203 (DB).

——S. 423 — Penal Code, Ss. 352, 379, 447 — Alteration of charge — Appellate Court.

Conviction by the Appellate Court under S. 379 by altering the conviction of the original Court under Ss. 447 and 352 is illegal and should be set aside. (1910) 7 MLT 202 : 11 Cr LJ 340 : 5 Ind Cas 974.

——S. 423 and Ss. 237 and 238 — Alteration in charge.

Appellate courts should not use, their power of altering a finding under S. 423 arbitrarily but should use it in accordance with Ss. 237 and 238. The Court of appeal cannot ordinarily change the conviction of an accused under a certain offence to that of abetment of the same offence. (1910) 33 Mad 264 : 7 MLT 79 : 11 Cr LJ 49 : 20 MLJ 84 : 5 Ind Cas 145 (DB).

——S. 423 — Conversion of — Trial by jury.

Where the trial was by jury, the High Court refused to convert the charge from one under S. 496/109 to one under S. 494/109, I. P. C. (1906) 10 CWN 982 (984) (DB).

(c) Appeal against conviction.

——S. 423 — Except in the cases provided for in S. 412, an appeal cannot be admitted on the limited ground of sentence only. If it is admitted at all, the whole appeal must be heard. AIR (Vol 18) 1931 Pat 351 (1) : 12 PLT 539 : 32 Cr LJ 1017 : 133 Ind Cas 163 (1).

——Ss. 423, 422 — Grounds for admission.

The practice of admitting appeals only on the question of sentence is incorrect. AIR (Vol 12) 1925 Pat 453 : 4 Pat 254 : 6 PLT 381 : 3 Pat LR Cr 80 : 26 Cr LJ 862 : 86 Ind Cas 718 (DB).

——Ss. 423, 422 — Criminal appeal — Restrictive order — Admission — Ultra vires.

An order in a criminal appeal rectricting the appellant to any selected ground of the petition of appeal is ultra vires, though an appeal is admitted for consideration of sentence, the whole appeal is open for argument, at the final hearing. AIR (Vol 1) 1914 Cal 276 : 41 Cal 406 : 14 Cr LJ 485 : 18 CLJ 582 : 18 CWN 147 : 20 Ind Cas 741 (DB).

4. Applicability and scope.

——S. 423 (1) (b) — Scope.

There is nothing in S. 423 (1)(b), Criminal P.C, which enables the Appellate Court, while ordering a commitment, to lay down what the Advocates of the parties may or may not do at the trial. Hence the observations of the Appellate Court that the Assistant Public Prosecutor should inform the accused or their Advocates within next two weeks what evidence he proposes to lead or to leave out at the trial and also furnish the accused with the particulars of any further documents he may wish to prove and a gist of the evidence of any witnesses who have not been examined before the Magistrate, whom he may propose to examine, cannot in any way fetter the discretion of the trial Court in the matter of procedure of evidence. AIR (Vol 32) 1945 Sind 125 : ILR (1945) Kar 109 : 47 Cr LJ 37 : 221 Ind Cas 31 (DB).

——S. 423 — It is the nature of the sentence which does or does not give a right of appeal and it is hardly open to the accused person to say that they should have been given higher sentence so that they might have a right of appeal. AIR (Vol 23) 1936 All 147 : 1936 AWR 129 : 1936 ALJ 209 : 37 Cr LJ 417 : 161 Ind Cas 307.

——S. 423 — If provisions of Civil P. C., do not apply to applications under Ss. 476, 476A & 476B, Criminal P. C., the provisions of Chap. XXXI, Criminal P. C., will apply except where it is clear from sections themselves that the provisions are restricted to matters arising solely under that Chapter. Section 423, Criminal P. C., clearly applies to these proceedings. AIR (Vol 18) 1931 Cal 604 : 59 Cal 68 : 35 CWN 775 : 33 Cr LJ 38 : 134 Ind Cas 1063 (DB).

5. Appreciation of evidence.

——S. 423 — Large number of people collected at spot of incident — Some eye-witnesses believed by trial Judge — That another witness said he did not see them there is no ground for disbelieving them.

Where a large number of people were collected at the spot where the murder was committed, either as participants in the attack or as on-lookers attracted by the uproar, it is no ground for disbelieving witnesses who have given an apparently reliable account and whose evidence was believed by the trial Judge that another witness says he did not see them there, as might well be the case. AIR (Vol 33) 1946 PC 1 : 1945 ALJ 550 : 12 BR 274 : 50 CWN 201 : 27 PLT 1 : 59 MLW 92 : 72 IA 270 : ILR (1945) Lah 451 : ILR (1945) Kar 366 : 222 Ind Cas 189.

——S. 423 — Where the case depends upon the appreciation of evidence, it would not be proper to ignore entirely the verdict of the jury, who have seen the witnesses and heard them give evidence. AIR (Vol 33) 1946 Sind 132 (DB).

——S. 423 — Question as to admissibility of evidence is matter for trial Court.

Questions as to the admissibility or cogency of the evidence or any part of the evidence of any of the witnesses in the case are clearly matters for the trial Court. AIR (Vol 33) 1946 Sind 1 : ILR (1945) Kar 275 : 47 Cr LJ 455 : 222 Ind Cas 431.

——S. 423 — Powers of High Court.

Although the High Court is competent to decide an appeal on facts on setting aside the verdict, it will not do so where, on account of misdirection, the jury has no opportunity to appreciate the evidence in its true perspective and will not deprive the accused of his valuable right to be tried by a new jury. AIR (Vol 32) 1945 Bom 265 : 47 Bom LR 145 : 46 Cr LJ 714 : ILR (1945) Bom 614 : 220 Ind Cas 182 (FB).

——S. 423 — Opinion of trial Court.

Considerable weight as to reliability must be attached to the opinion of the trial Judge, since the witness remains before him and he has ample opportunity of watching the demeanour of the witness. (1945) 47 Pun LR 254 (DB).

——S. 423 — Interference by Appellate Court.

An Appellate Court is always slow and reluctant to substitute for the appreciation of the evidence by the trial Judge, its own estimate thereof, as undoubtedly the trial Judge has the great advantage of having seen the witnesses, heard their testimony and marked their demeanour. But the Appellate Court will not accept the appreciation of the evidence by the trial Court when it has failed to notice certain important aspects in the case regarding the evidence and has failed to properly appreciate them. AIR (Vol 31) 1944 Sind 94 : ILR (1943) Kar 294 : 45 Cr LJ 526 : 212 Ind Cas 109 (DB).

——S. 423 — Trial Court is in better position than Appellate Court.

Where a case depends upon the appreciation of simple facts, ordinarily, the Judge who tries a case, is generally in a better position to appreciate the oral evidence than the Appellate Court, who must rely only upon the paper record and upon arguments. AIR (Vol 31) 1944 Sind 38 : 45 Cr LJ 393 : ILR (1944) Kar 86 : 211 Ind Cas 403 (DB).

——S. 423 — Appellate Court cannot have regard to evidence which is not on record. AIR (Vol 28),

1941 Bom 412 : 43 Bom LR 872 : 43 Cr LJ 213 : 197 Ind Cas 585.

**——S. 423 — Trial Court's opinion as to credibility of witnesses.**

The trial Court has the opportunity of watching the demeanour of the witnesses when they are in the witness-box and its opinion as to their credibility is of great value. AIR (Vol 27) 1940 Oudh 209 : 1940 OWN 177 : 42 Cr LJ 483 : 15 Luck 499 : 193 Ind Cas 770.

**——S. 423 — Value of appreciation of evidence by Court actually hearing it.**

Where the record does not show that the testimony of witnesses is materially shaken, weight must be attached to the appreciation of the evidence by the Court which actually heard it. AIR (Vol 25) 1938 Pat 49 : 16 Pat 116 : 4 BR 225 : 19 PLT 164 : 39 Cr LJ 281 (2) : 173 Ind Cas 230 (DB).

**——S. 423 — Appellate Court should scrutinize evidence independently.**

In all cases in which the Court sits in criminal appeal, it has to consider the case against the appellant bearing in mind exactly the same principles as must be borne in mind by the Court of trial in the first instance. The appellant does not come here as one who has been convicted and has to satisfy the Court beyond all reasonable doubt that he has been wrongly convicted. If after a conviction before a Subordinate Court, the Court of Appeal comes to the conclusion that there may have been a miscarriage of justice, the Appellate Court cannot allow the conviction to stand. The task of the appellant is, therefore, to bring before the consideration of the Appellate Court such matters as may cast a reasonable doubt of his guilt, having regard to all the circumstances of the case. It is true that a Sessions Judge hears and sees the witnesses and in many cases, his opinion as to their demeanour or truthlessness may be of the highest value, and an Appellate Court should not lightly disregard the conclusion at which for properly expressed reasons, he arrived. On the other hand, that does not absolve the Appellate Court from an independent duty of scrutinizing the evidence with care and of being satisfied not that a reasonable person might have come to the conclusion which the learned Sessions Judge came to, but that no reasonable person could have come to any other conclusion but that the accused was guilty of the offence charged against him. AIR (Vol 25) 1938 Rang 45 : 39 Cr LJ 248 : 173 Ind Cas 94 (DB).

——S. 423 — Where the decision in the case does not really turn upon questions about the veracity of witnesses or upon the finding of doubtful facts, but upon the questions as to what inference is to be drawn from well-established facts about the existence of which there is no reasonable doubt, the High Court in appeal is at least as well, if not better, qualified than the jury to draw the necessary inference. AIR (Vol 23) 1936 Cal 73 : 40 CWN 432 : 37 Cr LJ 394 : 63 Cal 929 : 64 CLJ 154 : 161 Ind Cas 74 (DB).

——S. 423—When a witness whose evidence is corroborated, in the most striking manner has been disbelieved by the trial Judge not because of his behaviour in the witness-box but for different reasons and probabilities the Appellate Court is in as good a position to form an opinion of it as the trial Judge himself. 1936 MWN 1384.

**——S. 423 — Accused in appeal, if can complain that trial Court refused to refer to statement and at the same time say that Appellate Court is not entitled to refer to them.**

The appellant cannot complain that the trial Court refused to refer to the statement, although requested by the appellant to do so, and then say that the Appellate Court is not entitled to refer to them because the appellant has not requested it so to refer. He cannot be permitted to approbate & reprobate at the same time. AIR (V 22) 1935 Rang 98: 13 Rang 1: 36 Cr LJ 665: 155 Ind Cas 66 (DB).

**——S. 423 — Trial by jury.**

Unless there has been a misdirection on the part of the Judge, the Appellate Court cannot go into the question of fact and examine the evidence. By merely showing that the prosecution story was improbable or that there were material discrepancies or even contradictions in the evidence, counsel for the accused cannot succeed in persuading the Court to set aside the conviction. AIR (Vol 21) 1934 All 1032 : 1934 ALJ 1160 : 36 Cr LJ 322 : 4 AWR 788 : 153 Ind Cas 364 (DB).

**——S. 423 — Appeal — Relying on evidence disbelieved by trial Court, propriety of.**

In a criminal appeal, it is not desirable in most cases to rely upon the evidence which has been definitely disbelieved by the trial Judge for good reasons and to try to support the conviction of an accused person on such evidence. AIR (Vol 20) 1933 Lah 232 : 34 PLR 349 : 34 Cr LJ 318 : 142 Ind Cas 20.

**——S. 423 — Trial Judge's opinion as to credibility of witnesses — Value of.**

At all times, an Appellate Court attaches considerable weight to the opinion of the trial Judge who heard the witnesses, as to their relative credibility. When the Judge has tried the case with marked care and intelligence, his opinion as to the credibility of the witnesses should ordinarily be accepted. AIR (Vol 20) 1933 Oudh 372 : 10 OWN 742 : 35 Cr LJ 66 : 146 Ind Cas 431 (DB).

**——S. 423 — Finding of fact of lower Court based on credibility of witnesses — Interference in appeal.**

Where an appeal on facts lies, it is within the competence of the Court of first appeal to reverse a finding of fact but such a course should only be adopted upon very clear proof of error where the case depends upon the credibility of witnesses whom the trial Court has believed. In cases where there is a direct conflict of evidence and there is no sufficient balance of improbability to displace the trial Judge's finding as to truth of oral evidence, the Appellate Court should not interfere with findings of the trial Judge on a question of fact. AIR (Vol 20) 1933 Sind 325 : 35 Cr LJ 129 : 146 Ind Cas 419 (FB).

——S. 423 — Under the Criminal P. C., when the Code provides for an appeal on a matter of fact, it is always open to the appellant to contend that the evidence on behalf of the prosecution is not sufficient to support the conviction; and, in such a case, it is the duty of the Court of Appeal to examine the evidence in order to come to a finding of its own as to whether the evidence is sufficient to support the conviction. Although, therefore, an appeal is not a re-hearing of the case, yet when an issue on a disputed question of fact is raised, the law is different in criminal cases from that in civil cases. AIR (Vol 18) 1931 Pat 379 : 12 PLT 601 : 32 Cr LJ 1197 : 11 Pat 143 : 134 Ind Cas 619 (DB).

### 6. Burden of proof.

**(a) General.**

**(b) Conviction — Appeal against.**

### (a) General.

**——S. 423 — Acquittal — Appeal against — Burden of proving guilt of accused lies on prosecution.**

Although the High Court has the same power to reverse on appeal an acquittal under the Criminal P. C., as it has to reverse on appeal a conviction, nevertheless, while in an appeal against a conviction the appellant, the accused is entitled to the benefit of any reasonable doubt which exists, in an appeal against an acquittal Government is not entitled to the benefit of any reasonable doubt of the guilt of the accused. The burden lies on the prosecution and on Government to prove the guilt of the accused. AIR (Vol 31) 1944 Sind 33 : 45 Cr LJ 650 : ILR (1944) Kar 123 : 212 Ind Cas 467.

——S. 423 — In a criminal appeal, it is for the Crown to establish that the judgment of the trial Court is right. The Appellate Court must remember that the presumption of the innocence of the accused still persists and that it has to satisfy itself that the judgment of the Magistrate was right. AIR (Vol 30) 1943 Cal 465 : 45 Cr LJ 71 : 47 CWN 332 : ILR (1943) 1 Cal 423 : 209 Ind Cas 105.

**——S. 423 — Appeal by Crown — Burden of proof as to approver's evidence.**

When the Crown files an appeal, the prosecution ought to show that the view taken by the first Court as to the reliability of the approvers is erroneous. AIR (Vol 20) 1933 Pat 500 : 147 Ind Cas 1160 (DB).

——S. 423 — Though when there has been a conviction and an appeal has been preferred against it, the onus is upon the appellant to prove that the conviction was bad, yet if the point taken in appeal is that the evidence for the prosecution was unreliable and insufficient to support the conviction, it is the duty of the Court of Appeal to examine the evidence for itself so as to be satisfied that the evidence supported the conviction. AIR (Vol 18) 1931 Pat 379 : 12 PLT 601 : 32 Cr LJ 1197 : 11 Pat 143 : 134 Ind Cas 619 (DB).

**——S. 423 — Distinction between matters to be considered under Ss. 374 and 423 pointed out.**

If the evidence in a case affords such a degree of certainty of the guilt of the accused as is mentioned in S. 3 of Evidence Act, the sentence must be based on the facts found proved by however little the proof of them exceeds the standard stated in that section; otherwise the accused must be acquitted. A Judge or Magistrate who says an accused person is proved guilty but should be lightly punished because the proof of his guilt is weak, contradicts and stultifies himself. The sentence of death is not an exception to this principle either at the trial or appeal. But the law naturally makes full provision for the undoubted fact that a capital sentence differs from all others in being irrevocable after it has been carried out, and if the matters to be considered under S. 423 are left out, there is nothing left to be considered under S. 376 except the one matter whether the certainty of guilt is sufficiently in excess of the minimum certainty required by S. 3 of the Evidence Act to remove the danger of the carrying out of the sentence on an innocent person. AIR (Vol 13) 1926 Nag 368 : 27 Cr LJ 731 : 95 Ind Cas 59 (DB).

### (b) Conviction — Appeal against.

**——Ss. 423 (1) (b), 107 — Appeal against order under S. 107, if one against conviction.**

Quaere : — Where an order is passed under S. 107, Criminal P. C., against the applicant, it is doubtful whether it can be said that for the purpose of S. 423 (1) (b), the applicant had been convicted and was appealing from his conviction. AIR (Vol 29) 1942 Oudh 416 : 1942 OWN 387 : 1942 AWR 251 : 43 Cr LJ 729 : 201 Ind Cas 60.

**——S. 423 — Appeal from conviction.**

No distinction is drawn in the Code between an appeal from an acquittal and an appeal from conviction. But due weight must of course be given to the decision of the Lower Court and the reasons advanced therefor. AIR (Vol 4) 1917 Cal 687 : 20 CWN 128 : 17 Cr LJ 9 : 32 Ind Cas 137 (DB).

### 7. Duty of an appellate Court.

**——Ss. 423, 424 — Detailed scrutiny of evidence.**

In an appeal from a conviction, it is for the Appellate Court, as it is for the first Court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt.

A detailed scrutiny of the prosecution evidence is essential in a case in which most of the evidence emanates from witnesses who were not independent and have previously been on bad terms with the accused. AIR (V 32) 1945 Nag 116 : 1945 NLJ 87: 46 Cr LJ 595 : ILR (1945) Nag 441 : 219 Ind Cas 320.

**——S. 423 — Duty to examine defence evidence and to be satisfied about guilt.**

Where the counsel for the appellant has failed to examine the evidence for the defence, it is the duty of the Appellate Court to examine the evidence and to come to a decision thereon. AIR (V 32) 1945 Nag 116 : 1945 NLJ 87 : 46 Cr LJ 595 : ILR (1945) Nag 441 : 219 Ind Cas 320.

**——S. 423 — Absence of appellant.**

It is the duty of the Appellate Court to examine the record and to dispose of the appeal on merits and this duty is cast upon the Court of Appeal notwithstanding that the appellant does not appear. Where the Appellate Court is not the High Court, it is necessary that the appellate judgment should embody inter alia the point or points for determination, the decision thereon and the reasons therefor. A dismissal of appeal, in default of the appellant merely after a perusal of the judgment under appeal does not fulfil the requirements and the judgment is not maintainable. AIR (V 32) 1945 Oudh 52 : 1944 OWN 393: 1944 AWR 256: 46 Cr LJ 684: 220 Ind Cas 430.

**——S. 423 — Subordinate Courts and superior Courts, how to act.**

It is not desirable that a subordinate Court should pass orders which may conflict with the orders of a superior Court in pending and connected proceedings. A subordinate Court should respect and obey the orders of a Superior Court. On the other hand, the superior Court should conduct its proceedings in so lawful and proper a manner that its orders of themselves command the respect and obedience of its subordinate Courts. AIR (V 30) 1943 Sind 149 : ILR (1943) Kar 105 : 44 Cr LJ 728 : 208 Ind Cas 35 (DB).

**——S. 423 — Appeal from acquittal.**

In exercising its jurisdiction in matters of appeals against acquittals, the High Court should confine its exercise to the particular acquittal complained of by the Government. AIR (V 25) 1938 Sind 108 : 39 Cr LJ 630 (2) : ILR (1939) Kar 41 : 175 Ind Cas 620 (DB).

**——S. 423 — Absence of appellant.**

A criminal appeal cannot be dismissed in default and even if an appellant has defaulted, the Appellate Court is not relieved of the duty of hearing the appeal on the merits and deciding it. AIR (V 21) 1934 Pesh 21 : 35 Cr LJ 963 : 148 Ind Cas 1078.

——S. 423 — Duty of appellate Magistrate — Need for recording independent findings.

The High Court in Criminal Revisions, as a rule, depends mainly upon the findings arrived at by the lower appellate Courts on question of evidence. It is therefore the duty of such Courts to see that their judgments are self-contained and give a full analysis of the evidence and that their findings are clear, so that the High Court accepting those findings may be able to direct itself to the considerations of the questions of law and procedure only. It is not proper for the Magistrate in the lower appellate Court to say that as the trial Magistrate has discussed the evidence under several heads he need not repeat what has been said in the judgment of the lower Court. This method of dealing with evidence of a case in appeal is highly unsatisfactory. AIR (V 17) 1930 Lah 1051 : 1930 Cr C 1227.

——S. 423 — Under S. 423 the Court is bound to peruse the record and to hear the appellant or his pleader if he appears before disposing of the appeal and even if the appellant is not present, the Court is bound to go through the record itself and to decide the appeal upon merits. AIR (V 14) 1927 Pat 176 : 100 Ind Cas 831 : 6 Pat 16 : 28 Cr LJ 351 : 8 PLT 376 : 7 AI Cr R 473 (DB).

——S. 423 — Several accused — Appellate Court must separately consider case of each.

Where in a criminal appeal there are a number of appellants, it is the duty of the Court to bring to bear, with regard to the case of each of the accused, a judicial mind for the purpose of considering whether he was guilty or not, having regard to the charges against him and the special evidence directed to him and his particular defence if any. AIR (V 12) 1925 Mad 712 : 48 MLJ 504 : 88 Ind Cas 177 : 26 Cr LJ 1089.

——S. 423 — It is the duty of the Appellate Court to come to a definite finding of its own as to how, where and by whom the injuries were caused to the complainant in a case under S. 324, I. P. Code. If the accused sets up the plea of self-defence but does not produce any evidence, the Appellate Court should consider whether by cross-examination of the prosecution witnesses matters have been elicited which might go to support that defence. (1921) 61 Ind Cas 654 : 22 Cr LJ 414 (Cal) (DB).

——S. 423 — Duty of Appellate Court to consider evidence.

The Appellate Court has to consider evidence both oral and documentary before recording judgment. If it fails to do this, the judgment is not in accordance with law. AIR (V 7) 1920 Pat 121 : 1 Pat LT 716 : 21 Cr LJ 648 : 57 Ind Cas 664 (DB).

——S. 423 — Duty of Appellate Court — Perusal of Judgment only — Whether sufficient.

Where in a criminal appeal, no one appears on behalf of the appellant, the Court must peruse the record. A decision on perusal of the judgment only is not legal. (1913) 14 Cr LJ 182 : 19 Ind Cas 182 (DB).

——S. 423 — The first duty of a Criminal Appellate Court is to find whether the conviction had by the Lower Court against each accused, is sustainable. A general agreement with the Lower Court cannot be sufficient to uphold the conviction of each particular individual. (1911) 12 Cr LJ 43 : 9 Ind Cas 261 (DB).

### 8. Enhancement of sentence.

See also Cri. P. C. S. 439.

(a) Principles and procedure.
(b) When it amounts to.
(c) When it does not amount to.

(a) Principles and procedure.

——Ss. 423 and 439 — Powers of the High Court — If can be combined to the prejudice of the accused — Charge under S. 395, I. P. Code — Conviction under S. 427, I. P. Code — Appeal by accused and revision by complainant — Sentence, if can be enhanced by High Court.

The two powers of the High Court, namely, appellate and revisional, cannot be combined to the prejudice of the accused.

Where an accused is charged with an offence under S. 395, I. P. Code, but is convicted under S. 427, I. P. Code and the accused appeals and the complainant also files a revision, it is not open to the High Court to enhance the sentence even though it might feel that the accused ought to have been convicted under S. 395, I. P. Code. AIR (V 37) 1950 All 471 : 51 Cr LJ 1244 (DB).

——S. 423 — Powers of High Court — Sentence — Enhancement — Considerations. AIR (V 36) 1949 Ajmer 54.

——S. 423 — Accused sentenced to transportation — On appeal, High Court should not enhance sentence to that of death.

Where in a murder case, the Sessions Judge finds the accused guilty of murder but sentences him to transportation for life or for a long term of imprisonment and an appeal from that decision is heard by the High Court a long time afterwards, the High Court even if it confirms the conviction of murder, should not open revision proceedings with a view to consider the desirability of enhancing the sentence to one of death, since the accused has been led to believe that his life has been spared. AIR (V 26) 1939 Rang 225 : 40 Cr LJ 725 : 183 Ind Cas 145.

——S. 423 — Appellate Court, if can enhance amount of fine in absence of appeal by Crown.

It is objectionable on appeal to enhance the sentences of fine as, under S. 423, Criminal P. C., an Appellate Court cannot, in an appeal by the accused from conviction, enhance the sentence passed by the lower Court. AIR (V 23) 1936 Lah 729 : 38 P LR 247 : 37 Cr LJ 950 : 164 Ind Cas 462.

——S. 423 — Appellate Court imposing fine—When amounts to enhancement—Interference in revision, when called for.

The mere fact that a fine was imposed by the Appellate Court would not in law be an enhancement of sentence if the aggregate period of imprisonment which the accused would have to undergo is to any extent less than the period of the original sentence; but where such an alteration of the sentence has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of a superior Court may be called for. AIR (V 24) 1937 Lah 195: 38 PLR 1051: 38 Cr LJ 428 : 167 Ind Cas 723.

——S. 423 — Detention in Borstal School.

Clause (b) (3) of S. 423 (1) does not cover an order for detention in a Borstal School for any period permitted by the provisions of the Burma Prevention of Crimes (Young Offenders) Act, 1930. AIR (V 23) 1936 Rang 227 : 14 Rang 119 : 37 Cr LJ 790 : 163 Ind Cas 74.

——S. 423 — Reduction of sentence.

Appeal and reference for confirmation of sentence of death. Delay in preparation of paper books and detention for six months under sentence of death:

Held, that these circumstances along with others were sufficient to reduce the death sentence to one of transportation for life. AIR (V 23) 1936 Cal 73: 40 CWN 432 : 37 Cr LJ 394 : 63 Cal 929 : 64 CLJ 154 : 161 Ind Cas 74 (DB).

**——S. 423 — On appeal fine substituted in lieu of imprisonment — Whether enhancement.**

A sentence of fine in lieu of imprisonment should not be considered as enhancement unless there be evidence to the effect that the accused is unable to pay the fine or regards the sentence passed on appeal as more severe than the original sentence. No general rule can be laid down to determine what is or what is not an enhancement of sentence in matters like these. AIR (V 21) 1934 All 1031: 36 Cr LJ 335 : 4 AWR 488 : 153 Ind Cas 411.

**——S. 423 —Notice to enhance sentence — Whether notice can be given when admitting appeal.**

Where the Court gives notice to show cause why the sentence should not be enhanced, it ought not to dispose of the appeal before the notice is heard. If the appeal is a jail appeal, it ought to be admitted. If the appeal has been argued before the Court comes to the conclusion that there is a case for enhancing the sentence, then the Court should refrain from passing any order on the appeal until the notice to enhance can be dealt with. AIR (V 21) 1934 Bom 198 : 36 Bom LR 382 : 58 Bom 392: 35 Cr LJ 1435 : 151 Ind Cas 865 (DB).

**——Ss. 423 (2), 439 (2) (6) — Appeal against conviction — Court considering that sentence should be enhanced — Fresh notice to accused, if necessary.**

Where the accused persons have appealed to the High Court and they are before the Court, it is open to the Court to give to the accused persons the opportunity referred to in sub-s. (2) of S. 439, Criminal P. C., of being heard upon the question whether the sentence ought to be enhanced or not by calling upon the accused in the person of their Advocate to show cause there and then why their sentences should not be enhanced. In such circumstances, it is not incumbent on the Court to issue a notice to them to bring them before the Court. If a question of enhancement of sentence is before the Court, then the convicted person has only the same rights as regards challenging the actual conviction as he would have had if he had come before the Court by way of a regular appeal preferred by himself or by proceedings in revision instituted by himself. Consequently, where a sentence has been passed after a verdict of guilty in a trial by jury, the arguments on behalf of the convicted person before the Appellate Court must be limited to the matters referred to in sub-s. (2) of S. 423. AIR (V 21) 1934 Cal 105 : 37 CWN 1122 : 35 Cr LJ 554 : 61 Cal 6: 147 Ind Cas 1124 (DB).

**——S. 423 — Alteration of sentence.**

The appellate Magistrate altering the sentence of rigorous imprisonment into fine, after the sentence was undergone — The proper course is to restore the order of the first Court. 1933 MWN 1268 (DB).

**——Ss. 423, 439 — Sentence found inadequate.**

The High Court's power merely as a Court of Appeal includes all its powers of revision when there is a question of giving relief to the appellant, but when it is a question of acting against the appellant in enhancing the sentence, that on the face of S. 439, Criminal P. C., has to be done under its revisional power as distinct from its power merely as a Court of Appeal. AIR (Vol 18) 1931 Cal 450: 35 CWN 184: 32 Cr LJ 890: 132 Ind Cas 247 (DB).

**——S. 423 — Enhancement of sentence — Capital sentence — Not to be passed — Exceptions.**

Ordinarily the Courts refrain from passing a capital sentence on a person who is convicted on an appeal against his acquittal, but where the accused was a party to an attack of a particularly ferocious nature and acted in a high-handed manner and with unusual cruelty in assaulting the opposite party consisting of the deceased and the latter have not been proved to have given any provocation, he may be sentenced to death. AIR (Vol 17) 1930 Lah 409: 127 Ind Cas 850: 1930 Cr C 469: 31 PLR 411 (DB).

**——S. 423 — Enhancement of sentence — Procedure — Notice of enhancement — Sending for record before issuing notice — Advisability.**

Although it is quite legal for High Court to issue notice of enhancement at the time of admitting an appeal, when an appeal comes up for admission by the appellate Court, it would be desirable if before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for. AIR (Vol 17) 1930 Mad 446: 127 Ind Cas 290: 53 Mad 585: 31 MLW 542: 1930 Cr C 498: 58 MLJ 490 (DB).

——S. 423 — It does not follow that if the conviction on one of the several charges in a trial is set aside while one or more others are affirmed there must necessarily be a reduction of sentence. It depends upon the particular circumstances of the case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of the sentence. AIR (Vol 17) 1930 Pat 79: 120 Ind Cas 764: 31 Cr LJ 173: 10 PLT 587: 1930 Cr C 38.

**——S. 423 — Appeal by convict and revision by High Court — Conviction for murder in place of conviction for lesser offence is justified.**

Where there is an appeal by a prisoner, and in addition the High Court takes seisin of the case under its revisional jurisdiction, the conviction for a lesser offence where the prisoner has been suitably charged, can be converted into one under S. 302, Penal Code and the sentence enhanced accordingly, under the combined provisions of Ss. 423 and 439. AIR (Vol 11) 1924 Rang 93: 76 Ind Cas 711: 1 Rang 436: 25 Cr LJ 247 (DB).

**——S. 423 — Order for security — Security cannot be enhanced under S. 423.**

Although the word "alter" in S. 423 (c) literally includes an alteration which increases the severity of the order, still the whole tenor of the section is that the appellate Court can make any necessary alteration in the terms of the order of the Court below but it has no power to increase the severity of the penalty imposed by the trial Court. AIR (Vol 10) 1923 Oudh 44: 64 Ind Cas 286: 9 OLJ 28: 24 OC 286.

——S. 423 — In the case of two separate convictions under Sections 147 and 325 I.P.C., with separate sentences, the Sessions Judge on appeal, cannot enhance the sentence under S. 147, I. P. C., while setting aside the sentence under S. 325. AIR (Vol 4) 1917 Lah 358: 31 PR 1916 Cr: 18 Cr LJ 372: 38 Ind Cas 756.

**——S. 423 (1) (b) — Acquittal of some offences in appeal — Reduction of sentence.**

Where the accused are acquitted in appeal of some of the offences charged, there must be a proportionate reduction in the sentence. AIR (Vol 3) 1916 Mad 788: 16 Cr LJ 446: 29 Ind Cas 78 (DB).

**——Ss. 423 (b) and 439 — Enhancement of sentence — Appeal against conviction.**

A High Court in hearing an appeal against a conviction may as a Court of Appeal under S. 422 (b) alter the finding and then as a Court of revision under S. 439 enhance the sentence so as to make it appropriate to the altered finding. AIR (Vol 1) 1914 Mad 258: 37 Mad 119: 15 Cr LJ 180: 22 Ind Cas 756 (DB).

**(b) When it amounts to.**

**——S. 423 — Substantial fine in place of sentence of imprisonment and increase of sentence of imprisonment in default of payment of fine.**

To impose a substantial fine in place of sentence of imprisonment and increase of sentence of imprisonment in default of payment of fine, does

amount to an enhancement. The question whether there has or has not been an enhancement of sentence will depend upon the circumstances of each case.

Where the trial Magistrate had convicted and sentenced the accused under S. 323, I. P. C., to one month's rigorous imprisonment and a fine of Rs. 10 and in default of payment of fine one week's further rigorous imprisonment and in appeal, the Appellate Court upheld the conviction but increased the fine from Rs. 10 to Rs. 30 each and increased the sentence in default of payment of fine to two months' rigorous imprisonment each:

Held, that the order amounted to an enhancement of sentence, which was not permitted by S. 423 (b), Criminal P. C., and which was, therefore, illegal. AIR (Vol 29) 1942 Oudh 399 (1): 1942 OWN 376: 1942 AWR 249: 18 Luck 252: 43 Cr LJ 719: 200 Ind Cas 809.

——S. 423 (1) (b) — **Accused convicted of offence punishable with fine only but bound over under S. 562 — Imposition of fine in appeal, whether enhancement of sentence.**

Where an accused is convicted under S. 14-25 of the Northern India Ferries Act, by the trying Magistrate but is bound over under S. 562, Criminal P. C., as a first offender and on an appeal, the Sessions Judge maintains the conviction but fines the accused on the ground that S. 562 does not apply to an offence punishable with fine only, although the imposition of fine in the circumstances of the case can hardly be said to be an enhancement of sentence, as no sentence was given to the applicant by the trying Magistrate, still the imposition of fine entails a greater burden on the accused than the execution of a bond under S. 562, Criminal P. C. AIR (Vol 25) 1938 Oudh 233: 1938 OWN 919: 39 Cr LJ 889: 177 Ind Cas 386 (DB).

——S. 423 — **Sentence of imprisonment, substituted by substantial payment of fine or in default, imprisonment for same period — Sentence, whether enhanced.**

On appeal to impose a substantial fine in place of a sentence of imprisonment passed by the trial Court and maintain the same sentence of imprisonment in default of payment does amount to enhancement. For, the accused may not be able to pay the fine, then they will have to undergo the imprisonment and their property is liable to attachment for payment of the fine as well. If the argument that the accused themselves asked the Magistrate to impose a fine in place of imprisonment were correct, an absolutely crushing fine might be imposed. The question depends upon the circumstances of each case:

Held, that in the circumstances of the case, there was enhancement of sentence in appeal and that, therefore, it was illegal. AIR (Vol 24) 1937 Oudh 462: 1937 OWN 754: 38 Cr LJ 935: 170 Ind Cas 538 (DB).

——S. 423 (1) (b) (3) — **Imprisonment and whipping for theft — Illegality — Substitution of further sentence of imprisonment in lieu of whipping.**

Theft is not an offence which is punishable with whipping in addition to imprisonment by S. 4 of the Whipping Act though it may, under S. 3 of that Act, be punished with whipping in lieu of imprisonment. The Appellate Court has power under S. 423 (1) (b) (3), Criminal P. C., to alter the nature of the sentence, but subject to the provision that the sentence be not enhanced. Where the sentence of imprisonment awarded by the trial Court is retained by the Appellate Court and a further sentence of imprisonment in lieu of the illegal sentence of whipping is substituted, the Court, in effect, enhances the sentence. The proper course to adopt for the Appellate Court is to set aside the illegal portion of the sentence and to refer the case for revision by the High Court. AIR (Vol 22) 1935 Rang 64: 12 Rang 607: 36 Cr LJ 366: 153 Ind Cas 516.

——S. 423 — **Conviction under Ss. 147 and 323 — Appeal — District Magistrate quashing conviction under S. 147 and altering that under S. 323 to one under S. 325 — Sentence maintained — Legality of.**

Where the accused was convicted under Ss. 147 and 323, Penal Code, and sentenced to six months' rigorous imprisonment for the first offence and a fine of Rs. 100 for the second, and though on appeal, the District Magistrate quashed the conviction under S. 147 and altered the conviction under S. 323 to one under S. 325, the whole sentence was retained:

Held, that his action had virtually the effect of enhancing the sentence and was, therefore, beyond his powers, and the order could not be maintained. AIR (Vol 20) 1933 Lah 933 (1): 35 Cr LJ 108: 146 Ind Cas 442 (DB).

——S. 423 — **Substitution of 30 stripes for 3 months' rigorous imprisonment is enhancement.**

Substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more or a substitution of a sentence of 25 stripes for a sentence of nine months' rigorous imprisonment or more or a substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more is not ordinarily an enhancement of sentence within the meaning of S. 423 (1) (b) and in the case of a person under 16 years of age the substitution of a sentence of 15 stripes for a sentence of imprisonment for six months or more or a substitution of a sentence of 10 stripes for a sentence of imprisonment for three months or more is not ordinarily an enhancement of sentence.

But the substitution of a sentence of 30 stripes for a sentence of three months' rigorous imprisonment is an enhancement and therefore an illegal sentence under S. 423 (1) (b). 2 Weir 487; 6 BLR Ap. 95; not Foll. AIR (Vol 16) 1929 Rang 177: 119 Ind Cas 209: 7 Rang 319: 30 Cr LJ 986: 1929 Cr C 169 (FB).

——S. 423 — The alteration by the appellate Court of a sentence of imprisonment to one of whipping is an enhancement of sentence and is not authorized by the provisions of S. 423, sub-S. (1), Cl. (b), sub-Cl. (3). AIR (Vol 15) 1928 Rang 265: 114 Ind Cas 523: 30 Cr LJ 328.

——S. 423 — Conviction under Ss. 384 and 420 of the Penal Code — Appellate Court setting aside conviction under S. 420 yet maintaining original aggregate sentence — Sentence is enhanced and so illegal. AIR (Vol 15) 1928 Bom 346: 112 Ind Cas 586: 30 Bom LR 967: 29 Cr LJ 1082 (DB).

——S. 423 — Where the accused was insolvent and unable to pay the fine imposed and the original sentence was for two months' rigorous imprisonment and Rs. 50 fine, or in default one month's rigorous imprisonment, and it was altered in appeal to one of rigorous imprisonment for six weeks and a fine of Rs. 200 or in default six weeks' further rigorous imprisonment.

Held, that it amounted to enhancement of sentence. AIR (Vol 13) 1926 Lah 543: 95 Ind Cas 476: 27 Cr LJ 812.

——S. 423 — **Sentence — Imprisonment in default of fine cannot be increased to exceed the aggregate punishment awarded in lower Court.**

Where the accused was sentenced to rigorous imprisonment for two months and to a fine of Rs. 50 or in default one month's rigorous imprisonment, and on appeal sentence was charged to one of one month's rigorous imprisonment and fine of Rs. 200 or in default to two months' rigorous imprisonment.

Held, that the latter sentence amounted to an enhancement of the sentence passed by the trial Court for if the fine was not paid the accused would have to undergo three months' rigorous imprison-

ment and still be liable to the fine. The imprisonment in default of payment of fine of Rs. 200 was reduced to rigorous imprisonment for one month in default. AIR (Vol 11) 1924 Pat 563: 82 Ind Cas 50: 3 Pat 638: 5 PLT 622: 25 Cr LJ 1186 (DB).

**——S. 423 (b) — Enhancement of sentence.**

If on an appeal from a sentence of one week's rigorous imprisonment (which had already been undergone) the sentence is altered into one of Rs. 50 fine or in default one week's rigorous imprisonment, the sentence is illegal as it amounts to an enhancement. AIR (Vol 3) 1916 Lah 130: 17 Cr LJ 212: 5 PWR Cr 1916: 34 Ind Cas 324.

**——S. 423 — Enhancement of sentence — Conviction set aside.**

An Appellate Court acquitted the accused of one charge while he was convicted of two charges by the Subordinate Magistrate but maintained the sentence. Held, the result was an enhancement of sentence and the conviction should be set aside. AIR (Vol 3) 1916 Mad 622: 16 Cr LJ 271: (1915) MWN 275: 28 Ind Cas 159.

**——S. 423 — Enhancement of sentence.**

In an appeal on conviction for offences under two sections of Penal Code, the Appellate Court set aside the conviction in one but confirmed the sentence in both as not being severe. The order amounted to an enhancement and hence illegal. (1910) 8 MLT 117: 11 Cr LJ 483: 7 Ind Cas 415.

**(c) When it does not amount to.**

**——S. 423 (1) (b) — Enhancement of sentence — Reduction of sentence of imprisonment and increase of fine — If amounts to.**

Where the appellate Court alters a sentence of six months' imprisonment and a fine of Rs. 100 or in default of payment a further term of six months imprisonment to a sentence of imprisonment for a day and a fine of Rs. 600 or in default a further term of six months imprisonment, there is no enhancement of sentence as the aggregate period of imprisonment which the accused may have to undergo is less than the period of original sentence. AIR (Vol 36) 1949 Nag 140: ILR (1949) Nag 396: 50 Cr LJ 343: 1949 NLJ 38.

**——S. 423 — Offender ordered to be whipped — Imposition of whipping in default of fine, whether enhancement of sentence.**

Where the offender is ordered to be whipped, the Appellate Court cannot be said to enhance the sentence where it gives the offender an opportunity to escape whipping by payment of fine and orders whipping only in default of fine. AIR (Vol 29) 1942 Sind 162: ILR (1942) Kar 288: 44 Cr LJ 127: 203 Ind Cas 646 (DB).

**——S. 423 — Addition of fine, whether amounts to enhancement.**

When the aggregate period of imprisonment which the accused may have to undergo is to any extent less than the period of the original sentence, the fact that a fine is imposed by the Appellate Court would not in law be an enhancement of the sentence.

Where a sentence of one year's rigorous imprisonment and Rs. 50 fine or six months' further imprisonment in default was altered by the Appellate Court to a sentence of six months' rigorous imprisonment and Rs. 500 fine or six months' further rigorous imprisonment in default:

Held, there was no enhancement of the sentence. AIR (Vol 18) 1931 Lah 159: 32 PLR 165: 12 Lah 449: 32 Cr LJ 1217: 134 Ind Cas 792.

**——S. 423 — Alteration of sentence of three months' rigorous imprisonment to one month and fine of Rs. 60 and in default two months is not enhancement.**

The accused was convicted and sentenced to undergo three months' rigorous imprisonment. He appealed and his conviction was affirmed but the sentence was altered into one of one month's rigorous imprisonment and a fine of Rs. 60 with a further two months' rigorous imprisonment in default of payment.

Held, that the appellate Court in effect reduced the sentence, the proper test being whether the accused really considers the fine as heavier sentence than imprisonment. AIR (Vol 17) 1930 Mad 193: 121 Ind Cas 125: 1930 Cr C 36: 31 Cr LJ 203: 1929 MWN 896: 3 M Cr C 24 (DB).

**——Ss. 423 (1) (b) and 106 — Enhancement of sentence.**

An Appellate Court binding the accused to keep peace in addition to the sentences passed by the Lower Court does not enhance the sentence. AIR (Vol 6) 1919 All 375: 1 UBLR (HC) 44: 20 Cr LJ 302: 50 Ind Cas 350.

**——S. 423 (b) — Enhancement of sentence — Altering a sentence of three months' imprisonment to one month's imprisonment and fine.**

Though an alteration by Appellate Court of a sentence of three months' imprisonment to one of one months' imprisonment and Rs. 100 may, in the case of a poor man, amount to an enhancement of the sentence, it did not amount to an enhancement in the present case where the fine had been paid and the convict did not wish to have the original sentence restored. AIR (Vol 1) 1914 Lah 539: 7 PR (Cr) 1915: 26 PLR 1916: 16 Cr LJ 603: 30 Ind Cas 155 (DB).

**——S. 423 — Enhancement of sentence.**

If an Appellate Court alters a sentence of punishment into a sentence of fine it cannot inflict a fine beyond the maximum which could have been imposed by the first Court. The altered sentence taken as a whole must be within the power of the Original Court to pass. The substitution of fine for imprisonment is a merciful commutation of punishment and is not an enhancement. (1911) 7 NLR 109: 12 Cr LJ 444: 11 Ind Cas 738.

**——S. 423 (1), (b) (2) — Alteration of sentence — "But not so as to enhance" — Alteration of sentence of imprisonment into fine — Enhancement of sentence — Revisional powers.**

Held, that where the aggregate period of imprisonment which the accused may have to undergo is to any extent diminished, the fact that a fine is imposed by the appellate court would not in law be an enhancement of the sentence. In a case where such as alteration of the sentence has the effect of rendering it, in the circumstances of the case, excessive or inappropriate, the interference in revision by a superior court may be called for.

Held, also, that the alteration of a sentence of imprisonment for one month into one for 5 days and a fine of Rs. 40 or 20 with imprisonment in default for a week is not illegal. (1906) 16 MLJ 560: 30 M 103 (105, 106) (FB).

**——S. 423 (b) (3) — 'Not so as to enhance the same' — Order directing the accused to pay complainant's costs — Court Fees Act, S. 31.**

An order by an appellate court under S. 31 of the Court Fees Act directing the accused to pay costs to complainant is not an order enhancing the sentence. 22 M 153 diss. from. (1906) 29 M 188 (189).

**——S. 423 (b), (d) — Excess court fee ordered to be paid on appeal — No enhancement of sentence.**

Process and court fees ordered to be paid by an accused, though recoverable as fines, are not part of fines. Consequently, an order by the appellate court that one of two accused shall pay the whole court and process fees which were originally ordered to be paid by both of them is no enhancement of sentence within the meaning of S. 423 (b), Cr. P.

C., but is legal under Cl. (d) of S. 423. (1903) 26 M 421 (422): 2 Weir 483 (DB).

9. Limitation.

——S. 423 — Powers of appellate Court — Appeal against acquittal — Accused convicted by trial Magistrate and acquitted by Sessions Judge under S. 292, I. P. Code — Passages regarding which accused was acquitted by trial Magistrate — Power of High Court to go into.

Where the accused was convicted by the trial Magistrate under S. 292, I. P. Code, and acquitted by the Sessions Judge, in an appeal against the acquittal by the Sessions Judge the High Court cannot go into those passages regarding which the accused was acquitted by the trial Court when the period of limitation for a Government appeal against the order of the trial Magistrate had expired. AIR (V 34) 1947 Lah 383 : 48 Cr L J 910 (DB).

——S. 423 — Appeal by Crown against acquittal — Delay, held was excusable.

An accused was charged for two offences but was acquitted on first of them and convicted for the second. He preferred an appeal against conviction in which he was acquitted of the charge for which he was convicted but the Court expressed opinion that he ought to have been convicted on the charge on which he was first acquitted. Thereupon, the Crown preferred an appeal against his acquittal on the first charge. It was preferred after three months and eight days after the original order of acquittal. There were executive instructions that appeals by the Crown should be filed not later than three months after the date of the order of acquittal:

Held, that although the appeal ought to have been filed within three months, yet the period exceeded being small one, under the circumstances of the case, the delay was not unreasonable. AIR (V 25) 1938 Rang 109 : 39 Cr LJ 490 : 174 Ind Cas 839.

10. New case or plea.

——S. 423 — Jurisdiction — Point as to, if can be taken for first time in Appellate Court.

A point that a person entitled to file complaint has not been so authorised, which has been taken in the lower Appellate Court, but not before the trial Magistrate, goes to jurisdiction, and hence it can be taken in any Court. AIR (V 30) 1943 Bom 314 : 45 Bom LR 572 : 45 Cr LJ 361 : 211 Ind Cas 273 (DB).

——S. 423 — Alternative case cannot be set up.

An appeal from an acquittal is not the proper time and place for setting up an alternative case against the accused which should have been raised in lower Court. AIR (V 30) 1943 Sind 130 : ILR (1943) Kar 3 : 44 Cr LJ 607 : 207 Ind Cas 446 (DB).

——S. 423 — Objection to admissibility of evidence.

Objections on the ground of admissibility of evidence are not entertained by Courts when they are taken for the first time in appeal. AIR (V 20) 1933 Cal 190 : 34 Cr LJ 430 : 142 Ind Cas 653 (DB).

——S. 423 — The charge cannot be so altered by an appellate Court as to make it necessary for the accused to meet an absolutely different case from that with which he is charged in the Court of the committing Magistrate. AIR (V 13) 1926 All 33 : 90 Ind Cas 150 : 23 ALJ 924 : 6 LRA Cr 159 : 26 Cr LJ 1494.

——S. 423 — New case — Appellate Court not to start one.

The powers of Appellate Court under Cr. P. Code are not intended to be used in such a way as to start a new case against the accused without giving him any notice of the charge he has to meet. AIR (V 2) 1915 All 357 : 16 Cr L J 599 : 30 Ind Cas 151.

11. Powers of Appellate Courts.

See also Cr. P. C., S. 439.

(a) High Court.
(b) Court of Revision.
(c) Sessions Judge — as a Court of Appeal.
(d) General.

(a) High Court.

——Ss. 423, 403 — Accused charged of murder and robbery — Sessions Judge holding charge of robbery not proved and convicting for murder — Appeal by accused — High Court is entitled to accept as corroboration of guilt of accused evidence of robbery — Plea of autrefois acquit is not available to accused.

In an appeal from a conviction of murder, the High Court is entitled to accept, as corroboration of the guilt of the accused, evidence (given in the Sessions Court where the charge was one of murder and robbery) which was material to both charges but failed to convince the Sessions Court of the guilt of the accused of the crime of robbery with the result that he was acquitted of that charge.

Even if the Sessions Judge had disbelieved the whole story of the recovery of the stolen property from the accused, his finding would not prevent the High Court from weighing its value and if they accepted its substantial truth, from taking it into consideration in determining whether another crime had been committed or no. The acquittal, no doubt, would have entitled the accused man to plead autrefois acquit if again charged with the same crime, but it would not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence. It could not be objected to as evidence in another case, criminal or civil, though no doubt its weight would be diminished. When before the Sessions Judge, the evidence as to recovery of the stolen property was given for two purposes — (1) as corroboration of the testimony given in the charge of murder and: (2) as direct evidence of robbery, before the High Court its use for the first purpose was in no way precluded even though no appeal was taken against the dismissal of the charge of robbery. AIR (Vol 33) 1946 PC 16: 1945 MWN 778: (1945) 2 MLJ 486: 12 BR 280: 59 MLW 9: 47 Cr LJ 489: 1946 ALJ 29 (2): 50 CWN 145: 72 IA 305: 222 Ind Cas 273.

——S. 423 — Interference by High Court.

No limitation should be placed upon the power of the High Court in appeal to interfere in a case of acquittal even upon the facts but there are certain considerations which must be weighed with and influence any consideration of the question; (these considerations indicated). AIR (Vol 31) 1944 Sind 124: 46 Cr LJ 759: 220 Ind Cas 452 (DB).

——S. 423 — Breach of rule of law — No reference under S. 307 — High Court can still interfere in appeal. AIR (Vol 30) 1943 Bom 74: 45 Bom LR 64: 44 Cr LJ 411: 205 Ind Cas 411 (DB).

——S. 423 — Powers of High Court.

Appeal against conviction and submission of case under S. 374 for confirmation of death sentence — Valuable material in favour of accused not brought on record due to inaptitude of Lawyers and lack of vigilance of Judge — High Court can make full use of these materials before it for purposes of doing justice. AIR (Vol 30) 1943 Cal 521: ILR (1943) 1 Cal 543: 47 CWN 336: 45 Cr LJ 99: 209 Ind Cas 206 (DB).

——S. 423 — Expunging remarks.

The High Court has no jurisdiction to expunge passages from the judgment of an inferior Court

which has not been brought before it in regular appeal or revision. AIR (Vol 27) 1940 Bom 266: ILR (1940) Bom 415: 42 Bom LR 478: 41 Cr LJ 855: 190 Ind Cas 205.

**——Ss. 423, 417 — Interference, when justified.**

Where, after consideration of the prosecution evidence, the trial Magistrate finds that the case against the accused is doubtful and acquits him, there is no justification for upsetting his decision in an appeal before the High Court. When the High Court is hearing a case as an appeal against an order of acquittal, certain points have to be kept in view. It cannot interfere unless it is satisfied that the view of the trial Magistrate is wrong and contrary to the weight of evidence. The fact that it might have taken a different view, if it had heard the case in the first instance, is no ground for interference in appeal. AIR (Vol 26) 1939 All 457: 40 Cr LJ 772: 1939 AWR 306: 183 Ind Cas 405 (DB).

**——S. 423 — Private complainant.**

Per Young C. J. and Blacker J. — It is open to the High Court to set aside an order of acquittal at the instance of any party other than Government coming to the High Court in appeal under S. 417, Criminal P. C., and a private complainant has locus standi in such proceedings. No distinction can be made between a petition for revision by a private complainant and a case reported by a Sessions Judge or a District Magistrate. Interference by High Court is not limited to cases where there has been an error of law or apparent injustice resulting in misappreciation or misapprehension of a legal principle except that the High Court cannot convert a finding of acquittal into one of conviction. AIR (Vol 26) 1939 Lah 406: 41 PLR 1 and 37: 40 Cr LJ 942: 184 Ind Cas 358 (DB).

——S. 423 — It is not open to the High Court, while rejecting the definite stories told in Court, to arrive at a conjectural theory as to what really happened, and to convict any of the accused on the basis of it. AIR (Vol 24) 1937 Oudh 72: 1936 OWN 928: 37 Cr LJ 1109: 12 Luck 488: 165 Ind Cas 237 (DB).

——S. 423 — Order making or refusing to make complaint under S. 195 — No second appeal lies — Section 195, no longer occurs in S. 439 and S. 476B has not been put in its place but under S. 423 (1) (c), the High Court has power to reverse the order of the Judge and under S. 423 (1) (d), the High Court has power to order the Magistrate's complaint which the Judge has ordered to be withdrawn to be restored to the file and to be disposed of according to law. AIR (Vol 24) 1937 Sind 116: 31 Sind LR 77: 38 Cr LJ 873: 170 Ind Cas 360 (DB).

——S. 423 — Powers of Appellate Court under S. 423 and of High Court under S. 439, explained and distinguished. AIR (Vol 22) 1935 PC 89: 1935 OWN 576: 1935 MWN 469: 39 CWN 626: 36 Cr LJ 838 (2): 41 LW 792: 68 MLJ 653: 37 PLR 314: 16 PLT 387: 61 CLJ 259: 62 IA 129: 1935 ALJ 802: 37 Bom LR 557: 1935 AWR 691: 62 Cal 983: 1 BR 487: 155 Ind Cas 386.

**——S. 423 — Record neither showing admission of previous conviction nor evidence adduced thereon — High Court, whether can take them into consideration.**

Where the record does not show either that the accused admitted the previous convictions or that any legal evidence of them was adduced, the High Court cannot take them into consideration. AIR (Vol 22) 1935 Bom 399: 37 Bom LR 656: 37 Cr LJ 43: 159 Ind Cas 176 (DB).

**——S. 423 — Power to pass new sentence within powers of Magistrate who tried case.**

Under the provisions of S. 423, Criminal P. C., the High Court in appeal is empowered to pass a new sentence within the powers of the Magistrate who tried the case. AIR (Vol 22) 1935 Nag 139: 36 Cr LJ 867: 31 Nag LR 312: 156 Ind Cas 184.

——S. 423 — The High Court has power, in view of the provisions of Ss. 423 and 561A, Criminal P. C., to direct separate sentences passed in separate trials to run concurrently. AIR (Vol 18) 1931 Bom 529 (1): 33 Bom LR 1163: 33 Cr LJ 77: 134 Ind Cas 1239 (DB).

——S. 423 — Where a man charged with murder has been convicted of a minor offence, the High Court can, while acting both as a Court of appeal and a Court of revision, convict the man of murder and sentence him to death, but if it is acting solely as a Court of revision, it cannot convert the acquittal of murder into conviction. 98 Ind Cas 705: 4 Rang 140: 5 Bur LJ 80: 27 Cr LJ 1393: AIR (Vol 13) 1926 Rang 154 (DB).

**(b) Court of revision.**

——S. 423 — There is nothing in the language of S. 439 (6), to suggest that the powers of a Court of Revision, dealing with a rule of enhancement are wider than the powers conferred by S. 423 on a Court of Appeal. AIR (Vol 31) 1944 Cal 17: 48 CWN 113: 45 Cr LJ 309: ILR (1944) 2 Cal 1: 211 Ind Cas 177 (FB).

**——S. 423 — Appeal against conviction — High Court finding conviction right but sentence rather too high — Procedure to be followed stated.**

In cases where in an appeal against a conviction, the High Court thinks that though on merits the conviction is right but the sentence is rather too severe, the correct procedure is that when the appeal first comes on for hearing, it should not be dismissed summarily, but should be directed to stand over, and at the same time, notice should be served on Government under the revisional powers conferred upon the Court by S. 439, Criminal P. C., to show cause why the sentence should not be reduced. At the same time it will be convenient to send for the record. The notice and the appeal will then be heard on the same day. If after hearing the Government Pleader, the Court comes to the conclusion that the sentence ought to be reduced, it can be reduced under the revisional powers. Having reduced the sentence, the Court can then, if so minded, say that it sees no ground for interfering with the conviction or sentence, and can dismiss the appeal summarily under S. 421, Criminal P. C. AIR (Vol 24) 1937 Bom 148: 39 Bom LR 74: 38 Cr LJ 572 (2): ILR (1937) Bom 365: 168 Ind Cas 504.

**——S. 423 — Power to order inquiry under S. 476.**

Sitting in revision, the High Court has jurisdiction make a complaint under S. 195. They have power, if they do not wish to inquire themselves under S. 476, to order the trial Court under S. 423 (d) as an "incidental order" or under S. 561. AIR (Vol 24) 1937 Sind 193: 38 Cr LJ 1002: 170 Ind Cas 891 (DB).

**——S. 423 — Jury trial — Revisional power of High Court.**

Where the defence had obtained a copy of statement of a prosecution witness which was in their support but they did not question that witness or any other on the point during the trial and the accused was declared guilty by the jury:

Held, that the statement cannot be made use of by the defence in revision for invoking High Court's power of revision to interfere with verdict of jury. AIR (Vol 23) 1936 Pat 46: 2 BR 233: 37 Cr LJ 320: 160 Ind Cas 675 (DB).

——Ss. 423 (1), cls. (b), (c), 439 — **Jurisdiction of High Court to alter or reverse order other than orders referred to in Cls. (b) and (a) of S. 423.**

Under S. 423 (1) cl. (b), it is competent to the High Court as a Revisional Court reading that section with S. 439, Criminal P. C., to alter or reverse an order other than the orders referred to in cls. (b) and (a). Where, therefore, a Sessions Judge makes a reference to the High Court recommending that a person who has been bound over in proceedings under Chap. VIII, Criminal P. C., and who has failed to give the required security, should be detained in prison with rigorous and not with simple imprisonment as had been ordered by the trial Magistrate, the person not being a convict, the High Court is not limited in the exercise of its revisional powers by the conditions imposed in cl. (b) sub-s. (1), S. 423, Criminal P. C. It can act under cl. (c) of that section and has jurisdiction to alter the order. AIR (Vol 23) 1936 Sind 188: 38 Cr LJ 168: 30 Sind LR 322: 166 Ind Cas 298 (DB).

——Ss. 423, 439 — **Powers under — Distinction — High Court having before it on appeal record of criminal proceedings — Revisional powers, if can be exercised.**

The powers relating to appeals under S. 423, Criminal P. C., are given to the Appellate Court, and the Appellate Court may include a Court subordinate to the High Court, and the Appellate Court as such has no power to enhance a sentence, differing from the provision which was in the old Criminal P. C. of 1872. On the other hand, the powers of revision are given to the High Court alone, and the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. When the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record had only come to its knowledge in the appellate proceeding, proceed to exercise its revisional powers if it chooses to do so. The fact that the notice which was actually served was headed in the criminal appeal is immaterial when it is plain that the subsequent proceedings were in fact in revision, and it was made plain that the Court was exercising its revisional power. AIR (Vol 22) 1935 PC 35: 1935 OWN 205: 1 BR 315: 1935 AWR 142: 41 LW 188: 68 MLJ 166: 36 Cr LJ 432: 1935 ALJ 602: 37 Bom LR 160: 1935 MWN 177: 16 PLT 181: 39 CWN 350: 60 CLJ 598: 57 All 156: 62 IA 36: 153 Ind Cas 936.

——Ss. 423, 429 — **Appeal withdrawn — Power of High Court to interfere in revision.**

The accused, an Advocate, was sentenced to two years' rigorous imprisonment under S. 124A, Penal Code. He signed a mukhtarnama in favour of his brother for filing an appeal but his Counsel produced a letter from him in which he asked that the appeal may be taken as having been withdrawn:

Held, that under the circumstances, the appeal must be treated to have been withdrawn, but as it was the duty of the High Court when a matter has been brought to its notice which it considers should be corrected, to deal with it, the appeal could be treated as though it were a revision.

(In this case a sentence of two years' rigorous imprisonment was held to be excessive and reduced to nine months' rigorous imprisonment). AIR (Vol 18) 1931 Lah 97: 31 PLR 990: 32 Cr LJ 732: 131 Ind Cas 375.

——S. 423 — **Revision — Appellate Court altering conviction into one for graver offence — Judicial Commissioner's Court can enhance in revision.**

Where the finding for lesser offence has been altered into a finding for graver offence by appellate Court, it is within the power of the Judicial Commissioner's Court, sitting as a Court of revision, to pass a sentence which will be a legal one in view of the conviction for graver offence. S. 439, sub-S. (4) refers only to cases where there has been a complete acquittal. 27 Cr LJ 339: 92 Ind Cas 851: AIR (Vol 13) 1926 Nag 323 (DB).

——S. 423 — Where a commitment is made by a magistrate under orders of the Sessions Judge under S. 423, S. 215 does not apply but the High Court will interfere in revision. 77 Ind Cas 982: 11 LBR 375: 1 Bur LJ 250: 25 Cr LJ 518: AIR (Vol 9) 1922 LB 40.

——Ss. 423 (c), 439, 514 and 515 — **Revision.**

The power of revision given to a District Magistrate under S. 515 does not take away the revisional powers of the High Court under Ss. 439 and 423 (c). (1911) 5 SLR 179: 13 Cr LJ 31: 13 Ind Cas 223 (DB).

——Ss. 423, 437, 439 — **Revisional powers of High Court — Presidency Magistrate's order of discharge.**

The High Court has full power under the Criminal Procedure Code to set aside an order of discharge passed by the Presidency Magistrate and to order a further enquiry. (1907) 6 CLJ 705: (1905) 33 C 1282, and (1899) 27 C 126, dissented from. (1910) 11 CLJ 50: 3 IC 861 (861, 864): 36 Cal 994: 13 CWN 1221 (DB).
Also (1903) 27 B 84 (88): 4 Bom LR 779.

——Ss. 423, 435, 437, 469 — **District Magistrate's powers of revision — Misappreciation of evidence by Sub-Magistrate and discharge — District Magistrate, functions of.**

Where a court competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a court competent to set aside such a finding of fact, i.e., by the High Court under S. 439, Cr. P. C., read with S. 423. The District Magistrate is not entitled to come to a conclusion on the evidence and hold that a prima facie case has been made out and order 'further inquiry' by another Magistrate. The proper course for the District Magistrate to take is to refer the matter to the High Court. It may be different when he exercises his powers for reasons other than mere misappreciation of evidence. The proper function of a District Magistrate is criticism. He ought to point out to the Subordinate Magistrate the reasons which may have led him to an incorrect conclusion, i.e., reasons which have been held to justify the High Court in interfering with findings of fact, to enable the Magistrate to come to a right conclusion and not dictate to him the decision to be pronounced. (1908) 18 MLJ 57: 31 M 133 (137): 3 MLT 230.

**(c) Sessions Judge — as a Court of appeal**

——S. 423 — **Sessions Judge dealing under S. 423 and S. 437 — Whether can act under S. 423 when trial Court is competent to try the case.**

A Sessions Judge dealing with a case under S. 423, Criminal P.C., as well as on revision, can exercise any of the powers conferred on an Appellate Court by S. 423, and he may act under the section even where the trial Court was competent to try the case. AIR (V 20) 1933 Lah. 128 : 34 Cr LJ 640 (1) : 143 Ind Cas 649 (1).

——S. 423 (1) (d) does not permit a Sessions Judge to review a wrong order by his predecessor, the only proper course for him, in such case being to refer the case to the High Court. AIR (V 16) 1929 Bom 309 : 121 Ind Cas 588 : 31 Cr LJ 309 : 53 Bom 578 : 31 Bom LR 593 : 1929 Cr C 130 (DB).

——S. 423 — **Appeal from conviction under S. 376, Penal Code — Appellate Court framing a charge**

**under S. 366 holding that S. 376 had no application and the trying the case itself — Proceedings are beyond the scope of S. 423.**

The trial Court had convicted the accused under S. 376 for rape. On appeal by the accused the Sessions Court held that the charge of rape had no application by reason of the fact that the girl was over twelve and that the act could not be said to have been without her consent or against her will and therefore proceeded to frame a fresh charge under S. 366 against the appellant, of kidnapping a woman that she might be forced or seduced to illicit intercourse. To this charge he called on the appellant to plead, and examined him upon it and allowed him to call one witness in defence.

Held, that in so trying the case himself the Sessions Judge exceeded the powers conferred on an Appellate Court by S. 423. A charge under S. 366 is triable by a Court of Sessions only under S. 193 only on commitment: therefore the Sessions Judge should, after setting aside the conviction, have ordered the accused to be committed for trial, when he would have been tried before a Court of Session with the aid of assessors. AIR (V 12) 1925 Rang 230:88 Ind Cas 287:26 Cr LJ 1119 : 3 Rang 68: 4 Bur LJ 29.

**(d) General**

**(i) Procedural matters.**

**(ii) Consequential and incidental orders.**

**(iii) Fresh enquiry**

**(iv) Jury trials.**

**(v) Restrictions**

**(i) Procedural matters.**

**——S. 423 — Powers of appellate Court — Decision of lower Court as to credibility of witnesses —Interference.**

It is for the trial Court in the first instance to decide whether witnesses who deposed before him should be believed or not. If he decides one way, the appellate Court which has to rely upon the mere written word ought not to decide contrarywise without good reasons therefor. AIR (V 37) 1950 Kut 52: 51 Cr LJ 1139.

**——Ss. 423 and 528 — Power of appellate Court to transfer case to itself for retrial — I. P. Code, S. 471 — Offence under — Mere possession of forged document — If enough.**

The petitioner was convicted by the Court of the Sub-Magistrate for an offence under S. 417 read with S. 511, I. P. Code. On appeal, the first class Magistrate found that the offence committed on the facts and circumstances placed before the Court was, not one of attempt to cheat, but one of using as genuine a forged document under S. 471, I. P. Code. On this finding, the appellate Court holding that the trial Court was not competent to try the offence under S. 471, ordered that the petitioner should be retried by the appellate Court itself as a First Class Magistrate. On a contention in revision that it was not open to the appellate Court to direct the trial of the case by itself,

Held, that there was nothing wrong in the lower appellate Court holding that the petitioner should be tried by itself, as under S. 423 read with S. 528, Cr. P. Code, the superior Court is empowered to transfer the case to itself for trial.

The mere fact that a person is found in possession of a forged document would not show that he knew it was a forged document or had reason to believe so. AIR (V 36) 1949 Mad 434 : 50 Cr LJ 581 : (1948) 2 MLJ 646 : 1949 MWN 16 : 61 LW 845.

**——S. 423 — If can rely on evidence rejected by trial Court.**

A Court of criminal appeal is justified in reversing the Court of first instance by placing reliance on the very evidence which had been entirely rejected by the Court of first instance. AIR (V 32) 1945 PC 151 : 47 Cr LJ 1 : 50 CWN 1 : 27 PLT 5 : 1945 MWN 560 (1) : 58 MLW 481 : (1945) 2 MLJ 362: 1945 Pesh LJ (PC) 151: 48 Bom LR 287: 221 Ind Cas 56.

**——S. 423 — Appellate Court ordering commitment —Discretion of the Magistrate in matter of procedure or evidence.**

There is nothing in S. 423 (1) (b), Criminal P. C., which enables the Appellate Court, while ordering a commitment, to lay down what the Advocates of the parties may or may not do at the trial. Hence, where the Appellate Judge observed while directing the commitment that the Assistant Public Prosecutor will inform the accused or their Advocate within the next two weeks what evidence he proposes to lead or to leave out at the trial, and also furnish the accused with the particulars of any further documents he may wish to prove and a gist of the evidence of any witnesses who have not been examined before the Magistrate, whom he may propose to examine the observations cannot in any way fetter the discretion of the trial Court in the matter of procedure or evidence. AIR (V 32) 1945 Sind 125 : ILR (1945) Kar 109 : 47 Cr LJ 37 : 221 Ind Cas 31 (DB).

**——S. 423 — Committal by Appellate Court — Practice.**

An Appellate Court under S. 423 (1) (b), Criminal P.C., has power to commit the accused for trial to the Court of Session, though it is not necessary for it to repeat the inquiry or write a long committal order, where the alleged facts are set out clearly in the judgment of the trying Magistrate and the evidence is very full upon the record. AIR (V 28) 1941 Sind 36 : 42 Cr LJ 460 : 193 Ind Cas 454.

——S. 423 — Further evidence.

Section 423 is not exhaustive of the powers of the Court of Appeal. Under S. 428, it can call for further evidence before the appeal is disposed of; a fortiori, it can direct that the accused may be given a chance of adducing further evidence. AIR (V 24) 1937 Nag 225 : 38 Cr LJ 1058 : ILR (1937) Nag 541 : 171 Ind Cas 262.

**——S. 423 — Bail pending appeal.**

Section 423 (1) (d) deals with the order to be passed after the appeal has been heard and does not apply to a release on bail pending the decision of the appeal. AIR (V 21) 1934 All 845 : 4 AWR 76 : 57 All 264 : 36 Cr LJ 177 : 152 Ind Cas 785.

——S. 423 — Rectification of error.

It is open to the appellate Court to rectify the error made by the trial Court. 1934 MWN 890.

——S. 423 —Section 423 which defines powers of Appellate Court does not authorise it to direct trial to be resumed at any particular point, or to frame particular charge. 1932 MWN 114.

**——S. 423 — Stay of proceedings.**

An order to stay criminal proceedings cannot be passed in an appeal under S. 423 from a complaint which has been actually made by a subordinate revenue authority to a competent Magistrate and which is being investigated by the latter. AIR (V 18) 1931 Pat 411: 12 PLT 671: 33 Cr LJ 147: 135 Ind Cas 513 (DB).

**——S. 423 — Powers of Court, in England — Court in India may invoke in principle if not repugnant to the Code.**

If a rule is recognised under the English Law which is not a mere rule of practice and proce-

dure but as embodying a principie of natural or substantial justice, and there is nothing in the C.P. Code militating against its application in India. the powers conferred by S. 423, Cr. P. Code would be large enough to invoke its application. AIR (V 12) 1925 Cal 501 : 86 Ind Cas 38 : 41 CLJ 87: 29 CWN 260: 26 Cr LJ 662 (DB).

——S. 423 — It is only when an appeal has been properly admitted under S. 421 that S. 423 becomes applicable and hence the power to excuse delay in filing an appeal cannot be regarded as incidental to the exercise of powers conferred on an Appellate Court by S. 423. AIR (V 10) 1923 Mad 95 : 43 MLJ 561: 71 Ind Cas 217: 16 MLW 764: 24 Cr LJ 89 (DB).

**——Ss. 423, 422 — Criminal appeal — Admission—Subsequent dealing with question, whether appeal lay.**

The mere fact of admission of appeal would not preclude a criminal court from afterwards dealing with the question whether an appeal lay. (1913) 40 Cal 631: 14 Cr LJ 254: 17 CWN 825: 19 Ind Cas 510 (DB).

——S. 423 (1) (d) —Magistrate specially empowered to hear appeal — Jurisdiction to hear appeals against order under S. 522, Cr. P. C.

A magistrate specially empowered to hear appeals under S. 423 (1) (d) of the Criminal Procedure Code has jurisdiction to hear appeals against orders under S. 522 of the Code. 25 C. 630 dissented from. (1902) 6 CWN 713 (714) : 29 Cal 724 (DB).

**(ii) Consequential and incidental orders.**

**——Ss. 423, 514, 515 — Appellate Court, if can increase amount of security forfeited.**

In an appeal from an order under S. 514, forfeiting part of the amount of the security bond, the Appellate Court under S. 423, has powers to alter or reverse the order. The word "alter" in S. 423 does not imply the power only to reduce the amount of security forfeited. The Appellate Court can raise the amount of the security forfeited. AIR (V 30 ) 1943 Pesh 6 : 44 Cr. LJ 381 : 205 Ind Cas 325.

**——S. 423 — Order under S. 471.**

An order under S. 471 can be passed by an Appellate Court, such order being consequential within the meaning of S. 423. AIR (V 28) 1941 Rang 352: 1941 Rang LR 544: 43 Cr LJ 228: 197 Ind Cas 654.

**——S. 423, 439 — Power to award compensation under S. 250.**

The High Court cannot under S. 439, read with S. 423 (1) (d) make an order for compensation even if upon the judgment and even if cause had been shown, High Court were of opinion that an order of compensation should be made. An order directing compensation to be paid is not a consequential or incidental order within the meaning of S. 423 (1) (d), nor can it be said that in revision the High Court makes an order consequential or incidental to an order of a Magistrate calling upon a complainant to show cause why he should not pay compensation if it orders compensation to be paid. AIR (Vol 26) 1939 Sind 321 : 41 Cr LJ 53: ILR (1940) Kar 119: 184 Ind Cas 595 (DB)

——S. 423 — The Appellate Court can only alter or reverse the order under S. 423 (1) (c) and (d) and any consequential order that might be just and proper may be passed. AIR (V 21) 1934 Mad 202 : 1933 MWN 241 : 34 Cr LJ 947 : 145 Ind Cas 306.

**——S. 423 — Order under S. 520.**

An Appellate Court has jurisdiction to pass an order regarding the disposal of moveable property even when the trial Court has not passed any such order. 1934 MWN 956.

**——S. 423 — Trial Court omitting to pass an order under S. 517 — Appellate Court can do so under S. 520 or 423 (1) (d).**

Under S. 520 as well as under S. 423 (1) (d) the appellate Court has the power to pass appropriate orders for the disposal of the property produced at the trial in a case under S. 411, Penal Code, even though the trial Magistrate has omitted to do so. AIR (V 15) 1928 Lah 567 : 111 Ind Cas 314 : 10 Lah 187:11 AI Cr R 18 : 29 Cr LJ 810 (DB).

——S. 423 — It is doubtful whether an appellate Court can, under S. 423 (1) (b), pass an order which would make the position of the appellants worse. AIR (V 14) 1927 Lah 733:102 Ind Cas 511: 28 PLR 166 : 7 AI Cr. R. 342 : 8 AI Cr R. 214 : 28 Cr LJ 575.

**(iii) Fresh enquiry.**

**——Ss. 423 (1) (c) and (d), 403, 110, 107 — Appellate Court, if can direct fresh inquiry — S. 403, applicability of, to order under S. 110 or S. 107.**

In the case of an appeal from an order under S. 110, Criminal P. C., the Appellate Court, while reversing the order under S. 423 (1) (c), can order a fresh inquiry under S. 423 (1) (d), such order being incidental within S. 423 (1) (d). Section 403, which embodies the principle of autrefois acquit, would not apply to proceedings for taking security either under S. 107, or S. 110, as there is no conviction of any offence. Therefore, in such a case there would be no legal bar to a Magistrate proceeding again against the same person even if his first order had been reversed. It would, of course, on this view be possible for him to do so even if the order had been reversed on the merits. But no Magistrate would take such action. AIR (V 29) 1942 Lah 84:44 PLR 71:43 Cr LJ 564:ILR (1943) Lah 365 : 199 Ind Cas 532 (DB).

**(Overrules AIR (V 16) 1929 Lah 28 (1) 115 Ind Cas 544.)**

**——Ss. 423 (a) (b), 210, 211 — Appellate Court ordering commitment — Magistrate, if can hold enquiry under Chap. XVIII.**

The Appellate Court under S. 423, Criminal P. C., may either itself commit the accused for trial before the Sessions Court or it may direct a Magistrate to do so. But where it adopts the latter course, it does not give the Magistrate any jurisdiction to make any further enquiry and the enquiry already held is sufficient for the purpose of Chap. XVIII. The Magistrate then frames a charge or amends the charge under S. 210, Criminal P. C. and under S. 211 requires the accused to give in his list of witnesses and the Magistrate makes a formal order of Commitment. AIR (V22) 1935 All 579 : 1935 ALJ 618 : 36 Cr LJ 1013 : 1935 AWR 777 : 58 All 23 : 156 Ind Cas 849 (DB).

——S. 423 — In an appeal from a conviction the Appellate Court has no power to direct an enquiry but may take further evidence. AIR (V 8) 1921 All 158 : 67 Ind Cas 498 : 19 ALJ 961.

**(iv) Jury trials.**

**——S. 423 (2) — Powers of appellate Court — Interference with verdict of jury.**

Under S. 423 (2), Cr. P. Code, the appellate Court will not interfere with the verdict of the jury unless there is such a misdirection in the charge to the jury as leads to an erroneous verdict. For this purpose the charge has to be considered as a whole and if the charge is a fair and proper one, the appellate Court will not interfere. 1950 ALJ 660 (DB).

**——S. 423 (2) — Powers of High Court — Inadmissible evidence admitted in jury trial — Evidence Act, S. 167.**

Where inadmissible evidence has been admitted at a trial by jury, the High Court may, after excluding such evidence, maintain the conviction, provided the admissible evidence remaining is in the opinion of the Court sufficient clearly to establish the guilt of the appellant. (1950) 2 DR 276.

**——S. 423 (2) — Powers of appellate Court — Misdirection by Judge in charge to jury — Effect of— Interference — Test.**

Chakravartti J. — A misdirection is an error of law; and once the appellate Court finds that there has been misdirection, it must consider whether it may and ought to interfere with the verdict of the jury. The appellate Court must consider whether the verdict is "erroneous" and erroneous owing to the misdirection, or whether the misdirection has in fact occasioned a failure of justice. If either consequence has occurred, a case for interference arises, and the Court, in considering whether there has been a failure of justice, is entitled to go into the facts. The form of interference must depend on the facts of each case; there is no absolute rule that there must be a retrial or an acquittal. AIR (V 35) 1948 Cal 278: ILR (1948) 2 Cal 364:52 CWN 401:49 Cr LJ 469 (DB).

**——Ss. 423 (2) and 537 (d) — Powers of High Court — Form of interference — Misdirection to jury — High Court, if can consider evidence.**

The guidance given to the High Court by S. 423 (2) and S. 537 (d), Cr. P. Code, in the case of a misdirection to a jury, is in each case negative & not positive. While these injunctions are expressed negatively they may be said to be pregnant negatives implying that there is a case for reversing or altering the verdict of the jury when the Court is of opinion either that the verdict is erroneous owing to the judge's misdirection or the jury's misunderstanding of the law laid down by him or that the misdirection has in fact occasioned a failure of justice. The primary duty of the Court on an appeal is indicated in S. 423 (1). It is to consider with the record before it whether there is "sufficient ground for interfering". That there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. If the Court so finds then it has a plain justification for interfering and indeed a duty to do so. What form the interference shall take is left to the Court which is given a wide discretion. It need not order a re-trial. The Court is entitled to examine the evidence for itself in order to see whether it justifies the verdicts pronounced or whether there has in fact been a failure of justice. This power of the Court is not limited to appeals arising under S. 449, Cr. P. Code, which provides for an appeal both on fact and on law. The circumstance that in some instances the appellant may appeal both on fact and on law while in others the appellant may appeal only on law, is not a determining feature, and much importance cannot be attached to this distinction. AIR (V 33) 1946 PC 82 : 1947 AWR (PC) 3 : 1947 OA (PC) 3 : 1947 OWN 320 : 1947 ALW 307 : (1946) 2 MLJ 1 : 73 IA 77 : ILR (1946) Lah 119 : 224 Ind Cas 426 : 50 CWN 692 : 12 BR 574 : 1946 PWN 197: 47 Cr LJ 616: 59 LW 415: 1946 MWN 474 (2): 48 Bom LR 473.

**——Ss. 423 (2) and 537 — Trial by jury — Misdirection or admission or inadmissible evidence— Appeal from sentences — Power of appellate Court to order retrial — Case can be disposed of on merits — Evidence Act (1872), S. 167.**

In cases of trial by jury, the appellate Court has power, in the event of any misdirection or admission of inadmissible evidence, to deal with the whole case on merits and dispose of the case finally. A retrial need not necessarily follow.

Held that admission of inadmissible evidence could have made no difference in the verdict of jury. AIR (V 33) 1946 Sind 132 (DB).

**——S. 423 — Appellate Court, powers of.**

In the case of a trial by jury, the Appellate Court has power, in the event of any misdirection or admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction or where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered. AIR (V 31) 1944 Bom 338: 46 Bom LR 589 (DB).

**——S. 423 — Jury trial — Appeal by accused — Power of Appellate Court to go into the facts — Application by Crown to enhance sentence.**

Under S. 423, Criminal P. C., where in the case of a conviction by a jury, the Appellate Court is not authorised to alter or reverse the verdict of the jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him and the Appellate Court cannot, accordingly go into the facts of the case except to see whether there has been any misdirection by the Judge.

The Appellate Court is not entitled in such a case to go into the facts and reverse the finding of the jury even though a criminal revision case has been filed by the Crown for enhancement of sentence calling upon the High Court to exercise its powers of revision under S. 439, Criminal P. C. AIR (V 23) 1936 Mad 516 : 1936 MWN 459 : 44 MLW 155 : 71 MLJ 231 : 37 Cr LJ 909: 59 Mad 904 : 164 Ind Cas 243 (DB).

**——S. 423— Trial by jury— Appellate Court having all materials before it can deal the case itself — It is not necessary to send it for retrial.**

There is nothing in the language of the Code to differentiate the way in which the powers of the appellate Courts are to be exercised, according as it is a jury trial or not. The language is wide enough to enable the Court to deal with the matter itself on an appeal even in a jury trial. No doubt the action which the appellate Court should take depends upon the circumstances of the particular case but when all the materials are before the appellate Court & the case has been prolonged for nearly two years and the verdict of the jury is erroneous owing to the misdirection by the presiding Judge it is in the interests of justice that the appellate Court should deal with the matter itself. AIR (V 17) 1930 Cal 370 : 127 Ind Cas 657 : 1930 Cr C 634 (DB).

**——S. 423 — Jury trial and trial with assessors — Considerations.**

The considerations governing the appeal from the trial held with the aid of assessors differ greatly from those governing an appeal from the trial by a jury. In the latter case the appeal is restricted by the provisions of Ss. 423(2) and 537, Cr. P. Code, whereas in the former case the whole case is before the appellate Court. AIR (V 15) 1928 Pat 326 : 9 AI Cr R 545 : 108 Ind Cas 81 : 29 Cr L J 325 (DB).

**——S. 423 — High Court's powers of interference in.**

The High Court is not entitled to interfere with the verdict of the jury in jury trials unless there has been a miscarriage of justice. AIR (V 14) 1927

Cal 398 : 101 Ind Cas 661 : 31 CWN 410 : 28 Cr LJ 485 : 8 AI Cr R 134 (DB).

——S. 423 — **Appellate Court setting aside a verdict should order a re-trial except under special circumstances when it should order acquittal.**

It is open to the appellate Court to acquit the accused if it sets aside a verdict on the ground of misdirection, but as a matter of practice the proper course in such cases as these is to direct a re-trial. It is only in special circumstances, as where the accused have been harassed by repeated trials or where the evidence is so clearly insufficient or incredible that no jury could reasonably convict, that an appellate Court would be justified in acquitting. AIR (V 13) 1926 All 429 : 24 ALJ 506 : 7 LRA Cr 123 : 27 Cr LJ 785 : 95 Ind Cas 385.

——Ss. 423, Cl. (1), (2), 537 (b) — **Jurisdiction of High Court to enter into evidence—When misdirection to jury is established.**

When a misdirection is established, the High Court is not bound in all cases to order a retrial, except where it thinks that a different verdict is possible on any view of the evidence. The High Court can go into the evidence to satisfy itself whether a different verdict is possible on any view of the case. (1903) 26 M 1 (8): 2 Weir 521 (DB).

**(v) Restrictions.**

——S. 423 (1) — **Powers of appellate Court — Exercise of — Limits—Appellate Court exercising powers under one sub-clause — If bar to exercise of powers under other sub-clauses.**

The powers conferred upon an appellate Court by all the sub-clauses of Cl. (1) of S. 423, Cr. P. Code, are clearly all powers which that Court may in so far as they are applicable, exercise in the same appeal. There is nothing in the section to preclude the Court, when it has exercised the powers under one of the sub-clauses, from exercising its powers under the other sub-clauses. The other sub-clauses do not cease to have application merely because one of the sub-clauses had been resorted to. AIR (V 37) 1950 Sind 14 : 51 Cr LJ 901.

——S. 423 — Clause (d) of sub-s. (1) of S. 423, Criminal P. C., does amplify the powers of Appellate Court. AIR (V 27) 1940 Rang 278 : 1940 Rang LR 502 : 42 Cr LJ 218 : 191 Ind Cas 694.

——Ss. 423, 236, 237, 238 — **Powers of Appellate Court under S. 423, if limited by Ss. 236, 237 and 238.**

Section 423, Criminal P. C., is to be read with Ss. 236, 237 and 238. The powers conferred upon the Appellate Court by S. 423, Criminal P. C., are limited by the provisions of Ss. 236, 237 and 238. AIR (V 26) 1939 All 710 : 1939 AWR 661 : 1939 A LJ 941 : 41 Cr LJ 111 : 185 Ind Cas 151.

——S. 423 — **Limitation.**

Powers of High Court under S. 307 (3) are not limited by S. 423 (2). (Extent of power in case of reference under S. 307 indicated.) AIR (V 25) 1938 All 227 : 1938 ALJ 282 : 1938 AWR 217 : 39 Cr LJ 559 : ILR (1938) All 483 : 175 Ind Cas 130 (DB).

——S. 423 — **Appeal confined to questions of law only.**

Where the trial is by jury, appeal is limited to questions of law and the Appellate Court is also limited by the provisions of Ss. 423 (2) and 537, Criminal P. C. AIR (V 21) 1934 Pat 309 : 15 PLT 264 : 35 Cr LJ 1104 : 13 Pat 529 : 150 Ind Cas 687 (DB).

——S. 423 — The proposition that the Court of Appeal has all the powers of the original trial Court is not in all its universality true in the Criminal Law. AIR (V 20) 1933 Cal 364 : 34 Cr LJ 320 : 37 CWN 481 : 60 Cal 814 : 142 Ind Cas 310 (DB).

——S. 423 — **There is no restriction on the powers of the Appellate Court to deal with a case of which it has complete seisin in any of the manners provided by S. 423, Cr. P. C.** 21 Cal 945, Diss. from. AIR (V 13) 1926 Nag 53 : 88 Ind Cas 178 : 26 Cr LJ 1090.

——S. 423 — Appellate Court cannot decide legality of previous convictions. AIR (V 11) 1924 Rang 295 : 82 Ind Cas 471 : 3 Bur LJ 27 : 25 Cr LJ 1303.

**12. Remand.**

——S. 423 — **Independent evidence on record — Court basing conviction mainly on presumption — Case ought to be remanded.**

Where there is an independent evidence on record on which the conviction of the accused can be based, but the Court bases its conviction mainly on the presumption arising under the provisions of law which, under the circumstances of the case, does not arise, the decision of the Court ought to be set aside and the case remanded for further hearing in accordance with law. AIR (Vol 28) 1941 Cal 413: ILR (1941) 1 Cal 58: 45 CWN 24: 42 Cr LJ 643: 195 Ind Cas 7.

——S. 423 — **Absence of sufficient evidence.**

Where the case originally made out against an accused has failed through the absence of sufficient evidence, the accused should be acquitted and no order of remand for the purpose of allowing the prosecution to supply deficiencies in their original case should be passed. AIR (Vol 25) 1938 Cal 782: 40 Cr LJ 56 (1): 178 Ind Cas 415 (DB).

——S. 423 — **Appeal — Judge acquitting accused in case — Reversal of findings in counter case — Evidence not discussed — Finding in other appeal referred to.**

The disputes as to the rights of the parties to surplus water resulted in the trials of people of two villages on charges of rioting and other offences. The trial Court convicted the accused in both cases. In appeals by both parties, the Judge acquitted the accused in one case and in the other he reversed the finding of the trial Court with regard to the right of irrigation, but he did not discuss the evidence in the case and only referred to his finding in the other appeal.

Held, that convenient as that course may have been for the Sessions Judge to adopt in dealing with the two appeals in counter-cases, it would raise a difficulty when the case comes before the High Court in revision, for there would be no materials to enable the High Court to be satisfied in reversing the decision of the trial Court on the question of fact, and hence the appeal should be remanded to him to be disposed of in accordance with law. AIR (Vol 22) 1935 Pat 494: 36 Cr LJ 1349: 1 BR 871: 158 Ind Cas 281 (DB).

——S. 423 — **Appeal before Sessions Judge — Order on preliminary point of misjoinder — Setting aside conviction — Other points argued — Later order setting aside conviction and ordering re-trial — Validity.**

The Sessions Judge at the commencement of the hearing of the appeal heard arguments on the only question as to whether there was misjoinder of charges and holding that the trial was vitiated owing to misjoinder wrote and signed the order "I must set aside the conviction." Then at the next hearing he heard arguments on other points and then passed another order "I set aside the convictions and sentences and direct that the accused be retried." He called this second order as judgment.

Held, that the first order of the Sessions Judge was not a final order but was mere expression of opinion on the point of misjoinder. Hence after

signing that order he did not become functus officio, and so he did not commit any illegality of procedure when he passed his second order remanding the case for retrial, though the procedure adopted was rather unusual. AIR (Vol 16) 1929 Lah 692: 126 Ind Cas 69: 31 Cr LJ 975: 1929 Cr C 219.

**——S. 423 — Case may be remanded from the stage it becomes irregular.**

Where the Sessions Judge held that the accused had been seriously prejudiced by a mistake in drawing up of the charge and also by inadequate attention paid to the evidence on record and remanded the case under S. 423 for trial from the stage it became irregular, namely, from the drawing up of the charge.

Held, that inasmuch as the proceedings are to be taken up from after the drawing up of the charge and no opportunity is to be afforded to the prosecution to improve their case, the order is fair. AIR (Vol 15) 1928 Pat 50: 104 Ind Cas 909: 28 Cr LJ 893:: 9 AI Cr C 40.

**——S. 423 — Remand — Bench — Judgment — Appellate Court sending back the judgment for the signature of Magistrates.**

A case was tried by a Bench of Honorary Magistrates. The judgment in the case was signed by one of them only. The District Magistrate on appeal sent back the case so that judgment might be signed by the other Magistrates. Held, the procedure was not contrary to S. 423. AIR (Vol 6) 1919 All 308: 41 All 217: 17 ALJ 193: 1 UPLR (HC) 86: 20 Cr LJ 214: 49 Ind Cas 774.

**——Ss. 423, 428 and 537 — Remand.**

On appeal against a conviction under Ss. 147 and 148 Penal Code the Sessions Judge while ordering a retrial directed that fresh evidence may be taken and decision given based on both original and fresh evidence. The Magistrate did accordingly and passed the same sentence. On appeal against the second conviction the Sessions Judge by the consent of both parties discarded the fresh evidence and confirmed the conviction on the original evidence recorded. Held, even if the order of the Sessions Judge be illegal and the proper course be to require the Sessions Judge to record his decision on the original evidence alone discarding all proceedings subsequent to the illegal order, as this had been done by the consent of both parties and the accused had not been prejudiced by such order, a retrial was unnecessary. AIR (Vol 3) 1916 Pat 219: 1 PLJ 99: 17 Cr LJ 332: 3 PLW 175: 35 Ind Cas 508 (DB).

**——S. 423 — Jurisdiction of appellate Court — Lower court's judgment unsatisfactory — Remand — Criminal case.**

When the Sessions Judge finds that the lower court's judgment is unsatisfactory he should go into the case himself and deliver his own judgment and not remand the case to the lower court. (1905) 32 C 1069 (1071) (DB).

### 13. Re-trial.

See also Cri. P. C., S. 439.

(a) Order for.
(b) When may be made.
(c) When may not be made.
(d) Procedure in re-trials.
(e) Against acquittals.
(f) Of appeals.

### (a) Order for.

**——S. 423 — Powers of Appellate Court — Order for re-trial — Case under S. 107.**

It is competent to a Court hearing in appeal from an order passed under S. 107, Cr. P. Code, to order a re-trial, as the order for re-trial is an incidental order following on the reversal of the order for security. 33 Cal 8; AIR 1934 Mad 202 (1) and AIR 1942 Oudh 416 not foll. AIR (V 36) 1949 Nag 222 : ILR (1949) Nag 261 : 50 Cr LJ 549 : 1949 NLJ 88.

**——Ss. 423 and 439 — Power of High Court to deal with case of non-appealing accused and order re-trial — Accused A convicted of conspiracy to commit murder and accused B and C convicted of murder and conspiracy — Appeal by B and C — Convictions set aside and re-trial ordered — Conviction of A should also be set aside — Order for re-trial, if can be made in absence of A.**

The accused B and C were convicted of murder and also of conspiracy to commit murder while the accused A was convicted of conspiracy with B and C to commit murder. A did not prefer any appeal but B and C did and their convictions were set aside and a re-trial was ordered :

Held, that the conviction of A should also be set aside. As soon as the finding of murder was set aside, the foundation of the conviction of conspiracy in the circumstances disappeared. It would not be right to maintain the conviction of A for conspiracy while setting aside the convictions of his co-conspirators B and C for conspiracy. The High Court under its revisional powers under S. 439 had power to set aside the conviction of the non-appealing accused A :

Held further, that as the order for retrial might be to A's prejudice if he did not wish to be retried and so would contravene S. 439 (2) if made without giving him an opportunity of being heard, the proper procedure would be to issue a rule on A and the Crown to show cause why the conviction should not be set aside and retrial ordered. AIR (Vol 33) 1946 Cal 452 (DB).

——S. 423 — Quaere. — It is doubtful whether the order of retrial passed by the Appellate Court in appeal against an order under S. 107 can be considered to be an incidental order falling under S. 423 (1) (d). AIR (Vol 29) 1942 Oudh 416 : 1942 AWR 251 : 1942 OWN 387 : 43 Cr LJ 729 : 201 Ind Cas 60.

**——S. 423 — Acquittal — Reference under S. 307, Criminal P. C. — Sessions Judge finding whole trial illegal — Whether can acquit accused — Order** of acquittal set aside — Order for re-trial declined **— Whether bars fresh trial.**

In the course of recording his reasons for reference under S. 307, Criminal P. C., it occurred to the Sessions Judge that on account of wrong joinder of charges the whole trial was illegal and he, therefore, acquitted the accused :

Held, on appeal that as the whole trial was illegal, the Judge could neither convict nor acquit, and that the High Court was bound to set aside orders of acquittal:

Held, further, that not ordering a re-trial did not mean that there could not be a new trial and, therefore, the prosecution could prosecute the accused for the same offence for which they have never been effectively tried. AIR (Vol 24) 1937 Bom 152 : 39 Bom LR 76 : 38 Cr LJ 571 : 168 Ind Cas 479.

——S. 423 — An appellate Court cannot direct a partial re-trial. It can either direct a complete re-trial or call for further evidence to be placed before itself. AIR (Vol 24) 1937 Pat 246 : 3 BR 508 : 38 Cr LJ 657 : 18 PLT 483 : 168 Ind Cas 979.

**——S. 423 — Power of Appellate Court.**

An Appellate Court has a power to order a retrial but it can pass such an order only upon proper grounds such as the ground that the ori-

ginal trial has been vitiated by some irregularity. The Appellate Court is not entitled to order a re-trial merely because it disagrees with the finding of the lower Court that the accused had not committed the more serious offence but a lesser one. AIR (Vol 23) 1936 All 758 : 1936 AWR 921 : 1936 ALJ 1083 : 38 Cr LJ 71 : 165 Ind Cas 734.

——S. 423 — All that the Judge has done on appeal is that he has set aside the conviction and the sentence which he had to do before directing the commitment of the accused for trial to the Court of Session under Cl. (b) of S. 423, Criminal P. C. :

Held, that S. 403 does not bar the order for retrial. (1935) 36 Cr LJ 1333 : 1935 ALJ 1077 : 1935 AWR 1070 : 158 Ind Cas 200.

**——S. 423 — Re-trial by another Court ordered — Order, if under S. 526.**

Additional Judicial Commissioner (Sind) trying accused with jury — Appeal to Judicial Commissioner — Appeal heard by Judicial Commissioner and Additional Judicial Commissioner — Difference of opinion — Case referred to another Additional Judicial Commissioner — Conviction set aside — Case transferred to Sessions Judge not having power to try with aid of jury — In appeal to Privy Council :

Held, (1) the order of transfer could not be considered as one under S. 526 but one under S. 423 (b).

(2) The order transferring case to Sessions Judge not having power to try with jury was not good. AIR (Vol 22) 1935 PC 122 : 1 BR 633 : 1935 AWR 808 : 36 Cr LJ 978 : 1935 OWN 744 : 39 CWN 929 : 1935 MWN 689 : 16 PLT 513 : 37 PLR 542 : 69 MLJ 128 : 42 LW 162 : 37 Bom LR 634 : 62 CLJ 1 : 59 Bom 496 : 62 IA 174 : 1935 ALJ 1154 : 156 Ind Cas 3.

**——S. 423 — Order for re-trial — Duty to formulate charge — When re-trial should not be ordered.**

After reversing a conviction and sentence, an Appellate Court cannot order an innocent man to be re-tried without formulating a charge.

Further, though in certain circumstances, the Appellate Court can order a re-trial under S. 423, Criminal P. C., it cannot do so where the prosecution has hopelessly broken in every respect, so as to enable the prosecutor to substantiate some new charge against the accused or to produce evidence which might easily have been produced at the first trial. AIR (Vol 18) 1931 Mad 227 : 1930 MWN 1215 : 32 Cr LJ 749 : 131 Ind Cas 454.

**——S. 423 — Appeal from order under S. 107 — Re-trial can be ordered apart from S. 423.**

In the case of an appeal under S. 406 from the order under S. 107, the appeal is not one from conviction and, therefore, apart from the provisions of S. 423, appellate Court can order re-trial. AIR (Vol 13) 1926 All 403 : 48 All 501 : 24 ALJ 566 : 7 LRA Cr 121 : 27 Cr LJ 945 : 96 Ind Cas 497 (DB).

——Ss. 423 and 437 — **Retrial — Cognizance of compiaint.**

Under S. 423 an Appellate Court can set aside the previous order of dismissal and order a further enquiry under S. 437. The Appellate Court having held the complaint which resulted in a conviction to be ultra vires had no jurisdiction to order retrial. AIR (Vol 7) 1920 Pat 523 : 1 Pat LT 293 : 21 Cr LJ 660 : 57 Ind Cas 820.

**——S. 423 — Retrial — Order of — Notice to accused.**

An order of retrial is bad in the absence of notice to the accused giving him an opportunity of urging his objections to the same. 49 PLR 1918 : 6 PWR (Cr) 1918.

**——Ss. 423 and 428 — Retrial — Evidence on record treated as evidence in the case — Legality of.**

On appeal from a conviction the Sessions Judge not being satisfied with the trial of the case set aside the conviction and ordered a retrial, but at the same time directed that the evidence already on the record should be treated as evidence in the case. Held, that the order of the Sessions Judge ordering the retrial with this direction was irregular and the said order and all subsequent proceedings must be set aside. The High Court did not in this case direct further proceedings to be taken and set aside the conviction. AIR (Vol 5) 1918 Pat 582 : 3 Pat LW 224 : (1917) Pat HCC 87 : 19 Cr LJ 77 : 43 Ind Cas 109 (DB).

**——Ss. 423 and 403 — Effect of setting aside conviction — Retrial — Procedure.**

Where a conviction is set aside and a retrial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed. Having regard to S. 423, S. 403 cannot apply. (1913) 40 Cal 163 : 13 Cr LJ 497 : 15 Ind Cas 641 (DB).

**——S. 423 (1) (b) — Retrial — Appellate Court setting aside conviction and ordering a retrial.**

An Appellate Court can order a retrial in a warrant case on a fresh charge framed on the evidence on record. (1913) 9 NLR 42 : 14 Cr LJ 230 : 19 Ind Cas 326.

**——Ss. 423, 428 — Re-trial and recording further evidence, difference between.**

When an appellate court passes an order of remand under S. 423, Cr. P. C., it cannot restrict the evidence to be taken to that mentioned in its order, but it should order the case to be retried in view of the instructions contained in its order. In such a case it is open to the accused person to adduce such additional evidence as he may desire. (1906) 3 CLJ 303 (305) (DB).

**——Ss. 423 (b), 528 — "Order him to be tried by court ° * subordinate" — Jurisdiction of appellate court to try the case itself.**

The words "order him to be retried by a court ° ° subordinate to such appellate court', in S. 423 (b), Cr. P. C., are not words of limitation, and do not exclude the appellate court from itself trying the offender, if the offence is one within the ordinary jurisdiction of the appellate Magistrate. (1906) 16 MLJ 546 : 30 Mad 228 (229) : 2 MLT 46.

**——S. 423 — Setting aside conviction for want of jurisdiction — No order of re-trial, how far a decision that no re-trial should take place.**

The fact that the appellate court did not order a fresh trial in positive terms is no ground for inferring that the court had decided that such trial should not be held. (1902) 6 CWN 640 : 29 Cal 412 (414) (DB).

**(b) When may be made.**

**(i) Records lost or destroyed.**
**(ii) Irregularity in procedure.**
**(iii) Same or altered charge.**
**(iv) Juror giving opinion outside.**
**(v) Verdict vitiated.**

**(i) Record lost or destroyed.**

**——S. 423 — Appeal from conviction — Records lost in transit — Proper order by Appellate Court — Acquittal or re-trial.**

Where after the filing of an appeal from a conviction, the entire record of the proceeding of the trial is lost in transit while being carried to the Appellate Court, and no copies of the record

are available, the Appellate Court should order a re-trial and not acquit the accused. (1949) 1 DR 92 (DB).

——S. 423 — High Court setting aside order of acquittal and directing re-hearing of case — In meantime records of case burnt — All papers necessary for rehearing destroyed :

Held, that de novo trial should take place. AIR (Vol 31) 1944 Mad 414 : (1944) 1 MLJ 458 : 1944 MWN 685 : 46 Cr LJ 263 : 217 Ind Cas 225.

**——S. 423 — Records destroyed by fire.**

Where after the filing of an appeal, the records are destroyed by fire and no copies are available for the Appellate Court, the only course open to the Appellate Court is to order a re-trial. AIR (Vol 30) 1943 Mad 391 : (1943) 1 MLJ 129 : 56 MLW 76 : 1943 MWN 72 (2) : 44 Cr LJ 611 : 207 Ind Cas 60.

**(ii) Irregularity in procedure.**

**——S. 423 (1) (b) — Order for retrial — When may be made.**

If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witnesses who should have been heard. A re-trial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case. The fact that the case is serious is also no ground for ordering a retrial. AIR (Vol 38) 1951 Cal 305.

**——S. 423 — Powers of Appellate Court — Order for re-trial — When may be made.**

If in the opinion of the Court in appeal the prosecution case is not established against an appellant and there are also formal defects in the proceedings of the trial Court, no re-trial should be ordered, because that would give an opportunity to the prosecution to fill in the gaps. If, however, the case appears to be proved on facts and there are formal defects only in the proceedings, then it is open to the Appellate Court to direct a re-trial. AIR (Vol 36) 1949 All 222 : ILR (1949) All 395 : 50 Cr LJ 333.

**——S. 423 — Powers of Appellate Court — Jury trial — Further charge under S. 23 (b), Criminal Tribes Act — Irregularity in procedure under S. 310 — Order for retrial of this matter alone is improper.**

Where an accused being convicted under Ss. 380 and 457, I. P. C., along with S. 23 (b) of Criminal Tribes Act, the conviction under Indian Penal Code was proper but that under the latter Act could not stand owing to defects in procedure, a retrial cannot be ordered merely with regard to this separate matter. If there is to be a re-trial. it would have to be a re-trial of the whole case. It would not be possible to maintain a conviction under S. 380/457, I. P. C., by one jury and then send the case back for re-trial by another jury for trial under S. 23 (b) of Criminal Tribes Act. AIR (Vol 34) 1947 Cal 158 : 224 Ind Cas 580 (DB).

**——Ss. 423 (1) (b) and (d), 107 — Order under S. 107 — Appeal allowed — Appellate Court, if can order retrial.**

The reason why where an applicant has been convicted, power is given to the Appellate Court under S. 423 (1) (b) to order a re-trial, is that otherwise a re-trial would be barred by S. 403. In a case where an order has been passed under S. 107, there is no bar under S. 403 to a re-trial and consequently, it is not competent to a Court hearing an appeal in a case under S. 107 to direct that the case be retried, after allowing the appeal. AIR (Vol 29) 1942 Oudh 416 : 1942 AWR 251 : 1942 OWN 387 : 43 Cr LJ 729 : 201 Ind Cas 60.

**——Ss. 423, 232 — Restriction — There must be finding that error in charge misled accused in his defence.**

There is no doubt that an Appellate Court has power to order a re-trial under Ss. 423 and 232, Criminal P. C., but the Judge, before ordering a re-trial, should come to a clear finding as to whether the supposed error in the charge had misled the accused in his defence, or occasioned a failure of justice. The power conferred upon the Court must in all cases be judiciously exercised and, therefore, the sections have imposed certain restrictions upon the powers of an Appellate Court. AIR (Vol 29) 1942 Pat 143 : 8 BR 171 : 43 Cr LJ 134 : 197 Ind Cas 213.

**——S. 423 — Eye-witnesses not examined.**

Trial for murder — Evidence of eye-witnesses who were present, not given—Accused should not be sentenced to be hanged — Re-trial should be ordered—On failure of prosecution to call those witnesses, the Court should call them under S. 540. AIR (Vol 24) 1937 Rang 139 : 38 Cr LJ 1040 : 171 Ind Cas 129 (DB).

——S. 423 — Appellate Court finding documents were not proved and examination under S. 342 not satisfactory :

Held, that the Appellate Court can either proceed under S. 428, Criminal P. C. or it can under S. 423 set aside the conviction and order the accused to be re-tried by a Court of competent jurisdiction. AIR (Vol 23) 1936 Pat 438 : 17 PLT 444 : 2 BR 715 : 37 Cr LJ 906 : 164 Ind Cas 184 (1).

**——S. 423 — Perfunctory cross-examination of prosecution witness good ground.**

Where cross-examination of prosecution witnesses was perfunctory owing to Counsel's inaptitude and facts were not ascertained before the sentence for an offence under S. 302 read wtih S. 34 was determined.

Held, that re-trial should be ordered. AIR (Vol 11) 1924 Cal 257 : 81 Ind Cas 353 : 28 CWN 170 : 38 CLJ 411 : 25 Cr LJ 817 (FB).

——S. 423 — Where a Sessions Judge by his order reversed the conviction and sentence on the ground of non-compliance with the provisions of S. 360 and left the question of re-trial to the District Magistrate, without discussing the evidence or recording any finding on the merits of the case.

Held, that the order is not one acquitting the accused and a re-trial of the accused is competent. AIR (Vol 13) 1926 Cal 585 : 53 Cal 192 : 27 Cr LJ 733 : 95 Ind Cas 61 (DB).

**——Ss. 423 (1) (b), 232 — Re-trial, power of Sessions Court to order — Defective framing of charges — Penal Code, Ss. 154, 155.**

There is nothing in the language of S. 423 (b), Cr. P. C., to limit the power of an appellate court to direct a re-trial of cases in which the trying Magistrate had no jurisdiction. Apart from the general power given to an appellate court to order retrial under S. 423 (1) (b), Cr. P. C., a Sessions Judge is empowered by S. 232, Cr. P. C., to direct a retrial to be had upon a charge, framed in whatever manner he thinks fit, on the ground that the accused had been misled in his

defence by the absence of a charge or a defect in the charge. Certain owners of land were convicted under S. 154, or S. 155, I. P. C., for acts or omissions on the part of their agents. The charges framed by the Magistrate against them, however, referred only to the knowledge and belief and acts and omissions of the accused themselves. The Sessions Judge, on appeal, held that by reason of the omission to insert the words "other agents or managers" in the charges, the accused had been seriously prejudiced in their defence and directed a new trial upon charges so amended as to have reference to the acts and omissions of the agents.

Held, that the order for retrial was legally made by the Sessions Judge. (1903) 7 CWN 301 (304, 305) (DB).

——S. 423 — **Powers of appellate court — Discharge on the ground of misjoinder — Duty of court ordering re-trial to see that there is evidence on which a re-trial could take place.**

Where a Sessions Judge in ordering discharge of prisoners wrongly tried together as to some of the charges found the evidence on each of the charges so mixed up together that it was impossible to distinguish it in respect of any particular charge, and ordered a re-trial.

Held, he was competent to pass such order. (1901) 28 C 104 (108) (DB).

**(iii) Same or altered charge.**

——S. 423 — **Accused re-tried on same charge — Third trial, when can be ordered.**

The fact that the accused has been re-tried on the same charge is no reason for refusing to order a third trial in a proper case, if the evidence is of such a nature as to make another trial desirable for the ends of justice. AIR (V 30) 1943 Cal 521 : 47 CWN 336 : ILR (1943) 1 Cal 543 : 45 Cr LJ 99 : 209 Ind Cas 206 (DB).

——S. 423 — A re-trial on the altered charge is not necessary where the appellate Court alters the conviction into one of an offence which is graver than that charged and found in the lower Court, provided that the accused is not prejudiced by such a course. AIR (V 12) 1925 Sind 105 : 19 SLR 183 : 25 Cr LJ 1057 : 81 Ind Cas 881 (DB).

——S. 423 — **Acquittal — Re-trial on amended charge — If desirable.**

It would be undesirable to remit a case for re-trial on an amended charge after acquitting the accused on the original charge owing to the Court holding the prosecution evidence to be false because it would mean the re-entertaining of the evidence of the same witnesses by the lower Court. AIR (V 11) 1924 All 766 : 5 LRA Cr 133 : 25 Cr LJ 1292 : 82 Ind Cas 364.

**(iv) Juror giving opinion outside.**

——S. 423 — **Trial by jury — Juror giving out his opinion outside Court before conclusion of trial — Re-trial was ordered.**

Where, while the trial was proceeding and after the conclusion of the prosecution evidence and the address by the Public Prosecutor one of the jurors expressed outside the Court his opinion as to the guilt of the accused and this fact was brought to the notice of the Judge.

Held, that there should be a de novo trial. AIR (V 8) 1921 Cal 631 : 33 CLJ 122 : 25 CWN 240 : 22 Cr LJ 510 : 62 Ind Cas 334 (DB).

**(v) Verdict vitiated.**

——S. 423 — **Trial by jury — Charge on record, not the charge delivered to jury — Re-trial, if to be ordered.**

If the charge on record is not the charge which was delivered to the jury, there is no alternative for the appellate Court but to set aside the verdict and order a re-trial, as in such circumstances the appellate Court cannot possibly know what charge was, in fact, delivered to the jury and cannot say whether the jury were properly charged in order to enable them to return a verdict. AIR (V 36) 1949 Dacca 12 : 50 Cr LJ 812 : 1 DR 10.

——S. 423 — **Verdict of Jury vitiated by inadmissible evidence and misdirection — Remaining evidence sufficient to support conviction if believed by jury — Re-trial ordered.**

The High Court in appeal set aside the conviction of the accused on the ground that the verdict of the jury was vitiated by inadmissible evidence and misdirection:

Held, that although the High Court in appeal was ordinarily hesitant to order a re-trial, the accused should be ordered to be re-tried as even excluding the inadmissible evidence there still remained sufficient evidence on which the jury, if they believed it, might reasonably convict the accused. AIR (V 33) 1946 Cal 452 (DB).

——S. 423 — **Sufficient evidence on record — Fact that jury might also come to contrary conclusion.**

Where there is a sufficient material on record on which a jury could reasonably come to a conclusion that the accused were guilty, the mere fact that the jury might reasonably come to a contrary conclusion is not a sufficient reason for the Court of the Judicial Commissioner to take upon itself the duty of acquitting them. It should order a re-trial when in its opinion there is sufficient evidence on record to justify the re-trial & it is in the interest of justice to make such an order. AIR (V 26) 1939 Sind 209 : 41 Cr LJ 28 : ILR 1940 Kar 249 : 184 Ind Cas 474 (DB).

——S. 423 — **Powers of Sind Judicial Commissioner's Court.**

No doubt the Judicial Commissioner's Court has power in a case of misdirection to order a re-trial of the accused or to enter into the merits of the case and dispose of it. Where, however, a case is essentially one where the guilt or innocence of the accused should be determined by a Judge and jury who have seen the witnesses and heard them give their evidence, who have seen the accused & who have heard them give their statements, there should be a re-trial which should be before another Judge and jury and Judicial Commissioner's Court should not proceed to decide the case finally upon the paper record before it. AIR (V 26) 1939 Sind 209 :41 Cr LJ 28 : ILR (1940) Kar 249 : 184 Ind Cas 474 (DB).

——S. 423 — **Trial by jury — High Court's power to order re-trial — Right of accused to address jury.**

The power of setting aside convictions and ordering a new trial for an error or defect in the Judge's charge to the jury will be exercised by the High Court only when the Court is satisfied that the accused has been prejudiced by error or defect or that a failure of justice has been occasioned thereby.

Although it cannot be denied that for the proper administration of justice, the parties should be allowed a full and unrestricted right of addressing the jury, yet it cannot be overlooked that the summing up of the case by the Judge in his charge to the jury plays a very important part in a jury trial. In those cases where the accused is undefended or where he is defended by an incompetent Counsel or is too poor to engage the services of a competent lawyer, his case cannot generally be adequately placed before the jury by means of argument. If, however, in such cases the Judge has properly charged the jury, the mere fact that the case has not been

adequately argued on behalf of the accused cannot by itself be a good ground for ordering a re-trial. On the same principle, a re-trial should not be ordered, unless it can be shown that matters which Counsel would have placed have not been placed before the jury or that the charge of the Judge is defective and erroneous in material particulars. AIR (V 24) 1937 Pat 263 : 15 Pat 817 : 38 Cr LJ 673 : 3 BR 514 : 18 PLT 535 : 169 Ind Cas 48 (DB).

**——S. 423 — Verdict of Jury.**

Where there are misdirection and non-direction to the jury and the accused have been prejudiced, the case must be re-tried under S. 423, Criminal P. C. 1935 MWN 643 (2).

**——S. 423 — Jury trial.**

In a case of trial by jury, the Appellate Court has power, in the event of any misdirection or admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction or where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered. AIR (V 20) 1933 Bom 153 : 35 Bom LR 174 : 35 Cr LJ 747 : 148 Ind Cas 553 (DB).

**——Ss. 423, 439 and 537 — Re-trial — Misdirection.**

If in the opinion of the Court, there is a reasonable possibility that a jury might either acquit or convict, the only proper course would be to order re-trial. AIR (V 5) 1918 Low Bur 104 : 9 LBR 60 : 10 Bur LT 123 : 18 Cr LJ 929 : 42 Ind Cas 161.

**(c) When may not be made.**

**(i) Inadequate or defective evidence.**

**(ii) Superficial or defective enquiry.**

**(i) Inadequate or defective evidence**

**——S. 423 — Grounds.**

The marking of an irrelevant document in evidence is not a ground for ordering re-trial. AIR (Vol 27) 1940 Mad 685: 1940 MWN 386: 51 LW 542 (1): 41 Cr LJ 897: 190 Ind Cas 317.

**——S. 423 — Court doubtful as to value of evidence adduced upon re-hearing.**

When there is enmity between the parties in the case, and the Court is doubtful as to the value of any evidence adduced upon a re-hearing of the case, it would be dangerous to order a re-hearing. AIR (Vol 27) 1940 Pat 295: 21 PLT 731: 6 BR 307: 41 Cr LJ 267: 186 Ind Cas 227 (DB).

**——S. 423 — Prosecution evidence not sufficient for conviction.**

It is an established principle of criminal law that if the evidence actually adduced by the prosecution is insufficient to support a conviction, a re-trial cannot be ordered simply to give the prosecution another chance of producing further and better evidence. AIR (Vol 25) 1938 Cal 361: 39 Cr LJ 604: 42 CWN 812: 175 Ind Cas 514 (DB).

**——S. 423 — Verdict of jury.**

The Court should not send back a case for a re-trial by the jury upon a proper summing up, if it is of opinion that the evidence is not sufficient to support a conviction. AIR (Vol 19) 1932 Oudh 23: 8 OWN 1215: 33 Cr LJ 167: 7 Luck 390: 135 Ind Cas 392.

**——S. 423 — Another view of case possible — No ground for.**

Where the trial Magistrate after coming to the conclusion that the prosecution story is doubtful, discharges the accused, the mere circumstances that another view may be taken of the case than that which the trial Magistrate takes would not justify a re-trial. AIR (Vol 17) 1930 Lah 543: 1930 Cr C 691: 31 PLR 729.

——S. 423 — The appellate Court can no doubt order a re-trial under S. 423, Cr. P. Code, but hardly where the prosecution has hopelessly broken down in every respect, so as to enable the prosecutor to substantiate some new charge against the accused, or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders re-trial. AIR (Vol 17) 1930 Mad 189: 122 Ind Cas 497: 1930 Cr C 189: 31 Cr LJ 422: 1930 MWN 191: 3 M Cr C 92.

**——S. 423 — Reasons for rejecting prosecution evidence, not satisfactory — If ground for.**

The ground that the reasons given by the trying Magistrate in rejecting the prosecution evidence are open to objection is not sufficient for ordering a re-trial. AIR (Vol 14) 1927 All 727: 8 LRA Cr 138: 8 AI Cr R 335: 28 Cr LJ 946: 105 Ind Cas 658: 26 ALJ 76.

**——S. 423 — No reasonable probability of conviction — Re-trial — If proper.**

Re-trial should not be ordered unless there is a reasonable probability of the accused being convicted on the evidence known to be available against them. AIR (Vol 13) 1926 Mad 638: 50 Mad 274: 27 Cr LJ 394: 93 Ind Cas 42.

——S. 423 — Where there was no evidence on the record to warrant a conviction for the offence charged an order for a re-trial is not justified. AIR (Vol 13) 1926 Nag 53: 26 Cr LJ 1090: 88 Ind Cas 178.

**——S. 423 — Record of lower Court full but some evidence inadmissible — Order for re-trial is bad.**

The appellate Court cannot remand a case for re-trial on the ground that inadmissible and irrelevant evidence has been admitted. Where the trial is regular and the record of the lower Court is as full as the law requires it to be, and there is evidence on the record to enable the Court to decide the appeal on its merits, there are no grounds for ordering a retrial. If inadmissible and irrelevant evidence has been admitted the same should be separated. AIR (Vol 10) 1923 Rang 65: 74 Ind Cas 72: 1 Bur LJ 32: 24 Cr LJ 744.

**——S. 423 — Conviction doubtful — Re-trial unnecessary.**

Re-trial is not necessary where a conviction on the evidence is doubtful. AIR (Vol 8) 1921 Mad 687: 69 Ind Cas 380: 14 MLW 588: 30 MLT 18.

**——S. 423 Cl. (b) — Retrial — Evidence — Omission to put on record.**

When the only defect in the procedure of the lower Court was the omission to bring on record certain evidence, it can be cured by letting in evidence which was omitted. A retrial of the whole case is unnecessary. AIR (Vol 5) 1918 All 133: 16 ALJ 325: 19 Cr LJ 485: 45 Ind Cas 149.

**——S. 423 — Retrial — No evidence — Appellate Court.**

The Appellate Court has no power to order a retrial when there is no evidence against the accused but it ought to acquit the accused. AIR (Vol 3) 1916 Mad 1108 (1): 9 Cr LR 263.

**(ii) Superficial or defective enquiry.**

**——S. 423—Prosecution launched not to vindicate law but to humiliate accused.**

Where the prosecution is launched not with any desire to vindicate the law in the public interest but only with a view to humiliate the accused who has been sufficiently punished for the offence committed by him by having had to undergo the trial, it is not fair or advisable for the Court to play into the hands of a party in order to enable him to satisfy

his grudge. Such a case is not a fit one in which re-trial should be ordered. AIR (V 27) 1940 All 19 : 1939 AWR 794 : 1939 ALJ 1034 : 41 Cr LJ 281 : 186 Ind Cas 261.

——S. 423 — **Murder and conspiracy to commit dacoity — Conviction for murder set aside — Re-trial for murder.**

In a conviction for murder and conspiracy to commit dacoity, the conviction on the murder count was set aside as the charge to the jury was defective. It appeared that the murder took place two years before and the witnesses would be liable to confuse what they had heard since the occurrence with what they had seen. The accused was sentenced to transportation on being convicted for conspiracy to commit dacoities:

Held, that under the circumstances, the case should not be sent back for re-trial on the charge of murder. AIR (V 24) 1937 Cal 269 : 38 Cr LJ 1018 : 171 Ind Cas 183 (DB).

——S. 423 — **Conviction set aside — Re-trial must be ordered — Re-trial when unnecessary.**

Where a conviction is set aside on the ground of a material irregularity of procedure, a re-trial should ordinarily be ordered. But where the complainant's story is so grotesque that it is on the face of it improbable, and the accused has already served out more than half the sentence, re-trial should not be ordered if the trial is vitiated by material irregularity prejudicing his case. AIR (V 17) 1930 Nag 255 : 124 Ind Cas 619 : 31 Cr LJ 705 : 1930 Cr C 831.

——S. 423 — **Non-examination of witness.**

Order of a re-trial on the ground of a superficial enquiry and non-examination of certain witness is not proper. 1934 MWN 402 (1).

——S. 423 — **Appeal from order under S. 110 — No re-trial can be ordered.**

An order of re-trial can be passed only in cases of appeal against a conviction. In an appeal from any other order the appellate Court can only alter or reverse such an order. A District Magistrate, therefore, while setting aside, on appeal, an order requiring a person to furnish security under S. 110, cannot remand the case for a de novo trial, i. e., for fresh enquiry. AIR (V 16) 1929 Lah 28 : 115 Ind Cas 544 : 30 PLR 416 : 30 Cr LJ 491 : 12 A I Cr R 273.

——S. 423— Where the prosecution came into Court with an incomplete case which, so far as it went confirmed the defence,

Held, that they were not entitled to a re-trial. AIR (V 15) 1928 Pat 293 : 107 Ind Cas 529: 9 PLT 723 : 29 Cr LJ 258 (DB).

——Ss. 423 (1), 438 and 439 — **Retrial — Sessions Judge — Appeal — Reference — Enhancement of sentence.**

Where in an appeal by an accused, the Sessions Judge thinks that the accused should be acquitted, he should acquit him and not refer his case to the High Court; where however in an appeal by some other accused, the Sessions Judge thinks that the sentence is too lenient and that the case should have been tried by a Court of Session instead of by a 1st class Magistrate, he should himself set aside the conviction and order retrial under S. 423 (1) (b). But the power of ordering a new trial merely for the purpose of enhancing the punishment should be very sparingly used. AIR (V 2) 1915 All 185: 13 ALJ 477: 16 Cr LJ 433: 29 Ind Cas 65 (DB).

——Ss. 423 (1) (b), 435 and 437 — **Retrial after conviction — Want of jurisdiction — Misjoinder — Superficial inquiry.**

Sections 435 and 437 do not empower a Court to order a retrial in an appeal from conviction. The power of ordering a retrial may be exercised where the original trial is void for want of jurisdiction or for misjoinder or when the inquiry has been obviously superficial and material witnesses have not been examined but it should not be exercised with the object of enabling the prosecution to fill up deficiencies in the evidence of the prosecution. (1910) 3 Bur LT 9 : 11 Cr LJ 684 : 8 Ind Cas 594.

——S. 423 — **Misdirection to jury — Quashing of conviction.**

Where a conviction is quashed on account of a material misdirection to the jury, a re-trial should not be ordered if the court considers that the accused could not be convicted on any proper view of the evidence. (1902) 29 C 782 (791) : 6 CWN 553 (DB).

——S. 423 — **Discharged for want of jurisdiction in the lower court.**

Where an appellate court finds the lower court to have had no jurisdiction and discharges the accused, there has been no legal trial and there is therefore no question of a re-trial. (1902) 29 C 412 (414) : 6 CWN 640 (DB).

### (d) Procedure in retrials.

——S. 423 — **Re-trial, from stage at which error was committed in trial.**

The words in S. 423 (1) (b), Criminal P. C., authorizing a Court to order a re-trial are sufficiently wide to authorize a re-trial from the point at which the error in the trial has been committed, provided that the accused was not otherwise prejudiced. AIR (V 28) 1941 Sind 144 : ILR (1941) Kar 167 : 42 Cr LJ 837 : 196 Ind Cas 275 (DB).

——S. 423 — **Procedure.**

Before an Appellate Court passes an order for re-trial or commitment of the accused for trial, the conviction and sentence already passed have to be reversed. This reversal of the conviction and sentence does not amount to an acquittal such as is referred to in S. 403, Criminal P. C. S. 403 does not bar a re-trial ordered by an Appellate Court under cl. (b) of S. 423. (1935) 36 Cr LJ 1333 : 1935 AWR 1070 : 1935 ALJ 1077 : 158 Ind Cas 200.

### (e) Against acquittals.

——S. 423 (1) (b) — Retrial ordered in appeal — Acquittal by jury on some of the charges — Accused, if can be tried again on those charges. See (1948) 52 CWN 561.

——S. 423 — Conviction on some charges and acquittal on others — Re-trial ordered on appeal — Accused cannot be retried on acquitted charges. (1936) 63 Cal 1112: 40 CWN 666: 63 CLJ 124 (DB).

——S. 423 — **Appellate order of acquittal.**

The words "that the accused be re-tried" in S. 423 (1), Criminal P. C., do not apply to a case where the order of acquittal is passed on appeal. AIR (Vol 23) 1936 Rang 369: 37 Cr LJ 1008: 164 Ind Cas 769.

——S. 423 — **Appellate Court, if can order re-trial on all charges including one of which accused was acquitted.**

The petitioners were on the unanimous verdict of the jury, before whom their trial was held, convicted by the Assistant Sessions Judge under S. 120B, I. P. C. and were sentenced to rigorous imprisonment for one year each. The jury found the petitioners not guilty under two charges for which the petitioners were tried under Ss. 379 and 477, I.P.C. and the Judge, accepting the verdict of jury, acquitted the petitioners of these charges. The sentences passed on the petitioners were appealable ones, and as such, there was an appeal by the petitioners to the Sessions Judge. The Sessions Judge by his judgment allowed the appeal. The Sessions Judge's judgment, however, contained a direction for retrial of the petitioners. There was, after the

delivery of the judgment of the Sessions Judge, an order recorded by him containing direction as to the effect of the order for re-trial. In that order the Sessions Judge gave the direction that the effect of his order setting aside the verdict of the jury and ordering a re-trial was to order a re-trial of the appellants before him, on all the charges which were before the jury, including the charges in regard to which there was an order of acquittal by the Assistant Sessions Judge, in accordance with the unanimous verdict of the jury :

Held, that the Sessions Judge could not direct a re-trial of the petitioners, under the law, in respect of the offences of which they were acquitted by the Assistant Sessions Judge. AIR (Vol 22) 1935 Cal 120: 38 CWN 1128: 36 Cr LJ 553: 154 Ind Cas 609 (DB).

——S. 423 — Charges under Ss. 420 and 465, I.P.C. — Conviction under S. 420 and acquittal under S. 465, by Magistrate not having powers under S. 30, Criminal P. C. — Appeal against conviction under S. 420 — Sessions Judge not going into merits, setting aside conviction and ordering re-trial:

Held, the order was of doubtful legality and re-trial should have been ordered only on charge under S. 420. AIR (Vol 22) 1935 Lah 945: 37 PLR 564: 37 Cr LJ 303: 160 Ind Cas 363.

——S. 423 — Where there is an appeal against an acquittal in a case tried by the jury, High Court has jurisdiction to decide the case itself instead of ordering a new trial. (1894) AC 57, not Foll.; AIR (Vol 14) 1927 Sind 104: 21 SLR 356: 7 AI Cr R 181: 28 Cr LJ 66: 99 Ind Cas 98 (DB).

### (f) Of appeals.

**——S. 423 — Appellate judgment based on irrelevant matters and entirely on Police report — Appeal, held should be re-heard.**

Where the judgment of the Appellate Magistrate was based almost entirely on the ground that the Sub-Divisional Magistrate had no business to find that there was a prima facie case under S. 354, I. P. C., and that he should have dismissed the complaint entirely on the Police report, and the appellate Magistrate had quoted a considerable portion of this report almost verbatim in support of his opinion :

Held, that as a criticism of the finding of the trial Court, in which Court a fully considered judgment was written, it was entirely irrelevant, and the appeal should have been heard on the evidence adduced and the reasons advanced in the trial Court alone. The conclusion that was reached by the Police Officer who made the inquiry was irrelevant for the purpose of the District Magistrate's consideration, as was also the fact that persons were called as witnesses for the prosecution who were not examined by the Police Officer. If the criticism was intended to apply to the trying Magistrate, it was improper, as the trying Magistrate had no business whatever to look at the case diary. The District Magistrate was further in error in holding that the lower Court should take into consideration the evidence of the complainant, which was entirely hearsay. There was no ground whatever for the assumption that the husband must have reproduced what his wife told him and that, therefore, the statement was very material. Neither did it necessarily follow that, if the woman's complaint under S. 392 was false, her complaint under S. 354 was also false. There was no discussion of the case at all, and the Appellate Court had been entirely led away by the fact that the Police came to the conclusion that there was no more than a preparation to commit an offence under S. 354 of the I. P. C. Taking all these considerations into account, the appeal should be re-heard. AIR (Vol 24) 1937 Nag 394: ILR (1938) Nag 157: 39 Cr LJ 75: 172 Ind Cas 177.

**——S. 423 (a) — Retrial — Of an appeal.**

The fact that the Lower Appellate Court obviously failed to apply its mind to the determination of questions and declined to adjudicate because of a misconception of the duties of the police or the Courts, is sufficient cause for directing retrial of an appeal under S. 423. (1912) 13 Cr LJ 737: 7 PLR 1913: 43 PWR 1912 Cr: 2 PR 1913 Cr: 17 Ind Cas 49 (DB).

### 14. Reversal of finding.

**——S. 423 — Unanimous opinion of Judge and assessors as to credibility of witness.**

The High Court always differs with reluctance from the unanimous opinion of the trial Judge and the assessors as to the credibility of witness. AIR (Vol 28) 1941 Bom 146: 43 Bom LR 157: ILR (1941) Bom 333: 42 Cr LJ 519: 194 Ind Cas 122.

——S. 423 — Under S. 423 (b), Criminal P. C., if the Appellate Court reverses the finding and sentence, it must order either (a) acquittal or discharge of the accused or (b) re-trial. In absence of such course, the judgment must be held to be one of acquittal and further trial would be barred under S. 403, Criminal P. C. 1933 MWN 224.

——S. 423 — The High Court will refuse to interfere where the finding of the lower Appellate Court is neither perverse nor unreasonable. AIR (Vol 20) 1933 Oudh 85: 9 OWN 1198: 34 Cr LJ 545 (2): 143 Ind Cas 152 (DB).

**——S. 423 — Findings of trial Court — Interference.**

Courts are always reluctant to interfere with the findings of a trial Court unless strong grounds are made out for so doing. AIR (Vol 19) 1932 Sind 143: 33 Cr LJ 900: 140 Ind Cas 23 (DB).

——S. 423 — A Court of appeal would not be justified in disturbing the finding of a Judge or of a jury on a simple issue of fact unless the verdict arrived at seems to be opposed to the entire weight of evidence. AIR (Vol 17) 1930 Cal 199: 1930 Cr C 231: 124 Ind Cas 818: 31 Cr LJ 737 (DB).

**——S. 423 — Appellate Court can reverse finding and sentence of death if there is no evidence to justify conclusion that there has been murder.**

Where the body of the person said to have been murdered is missing and the identity of the person with the person who is reported to have been assaulted in the house of the accused is not established, the charge of murder against the accused must fall. It is impossible for a Court in a matter of life and death to leap a gap in the prosecution evidence and to arrive by a process of speculation at a conclusion which there is no evidence to justify. The Court can in such a case reverse the finding and the sentence. AIR (Vol 16) 1929 All 710: 121 Ind Cas 248: 31 Cr LJ 230: 10 LRA Cr 108: 1929 Cr C 294: 12 AI Cr R 118 (DB).

**——Ss. 423 and 367 — Reversal of finding — Trial not satisfactory — Procedure.**

An Appellate Court cannot under S. 403 retain the case on its own file and ask for findings, which the Subordinate Court has failed to record under S. 367. It should reverse the order appealed against and remand the case for a hearing de novo. AIR (Vol 7) 1920 Mad 171: (1920) MWN 120: 11 LW 308: 21 Cr LJ 52: 54 Ind Cas 404 (DB).

**——Ss. 423 and 424 — Revision — Judgment — Inconsistent findings.**

A Judge while upholding a conviction of rioting on appeal drew several inferences which were inconsistent with its final findings of fact that the accused were guilty and there was no reason to interfere with the sentence which was passed by the Court below on an acceptance of the whole case for the prosecution ; Held, that the judgment was bad and must be set aside. (1912) 13 Cr LJ 595: 16 Ind Cas 163 (Cal) (DB).

——S. 423, Cl. 1 (b) — "Reverse the finding and sentence" — Jurisdiction of appellate Magistrate to reverse acquittal — Acquittal on charge of theft — Charge of dacoity — High Court, power of.

The words "reverse the finding and sentence" in Cl. (b) in S. 423 mean reverse the finding upon which a conviction is based and do not empower Appellate Magistrates (especially other than a High Court) to reverse an acquittal. So long as there is an acquittal on a charge of theft subsisting, there can be no commitment by an appellate Magistrate for the graver offence of dacoity which includes as one of its ingredients the offence of theft. (1903) 13 MLJ 263: 26 M 478 (479, 480): 2 Weir 48.

### 15. Right to be heard and to reply.

——S. 423 — Construction — "His pleader" — Pleader employed by Court on behalf of accused.

A pleader employed by the Court to give legal assistance to the accused at the hearing of the appeal is not "his pleader" within the meaning of S. 423, Cr. P. Code. AIR (Vol 36) 1949 EP 321: 50 Cr LJ 834: 51 PLR 274.

——S. 423 — Though the section is not exhaustive, it clearly indicates that by necessary implication, the Legislature has excluded the appearance in appeal of an Advocate for the complainant. AIR (Vol 29) 1942 Sind 5: ILR (1941) Kar 451: 43 Cr LJ 345: 198 Ind Cas 281.

——S. 423 — Complainant, if entitled to be heard by an Advocate.

The strict rule is that in an appeal against a conviction, only the Crown is entitled to be served with notice and heard. Nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction. But the true rule, which should be followed in all Courts, is that in private prosecutions, the Court in its discretion may allow the complainant to appear by an Advocate, but it is not in any case bound to do so. AIR (Vol 27) 1940 Bom 14: 41 Bom LR 1231: 41 Cr LJ 245: 185 Ind Cas 795.

——S. 423 — Appeal admitted on question of sentence only, if can be argued on merits.

Per Din Muhammad, J.—The mere fact that the appeal has been admitted on a question of sentence does not preclude the same being argued on merits and if it is found on merits that no offence has been committed by the accused in the eye of the law, he is entitled to be acquitted. AIR (Vol 26) 1939 Lah 295: ILR (1939) Lah 148: 41 PLR 487: 40 Cr LJ 760: 183 Ind Cas 318 (DB).

——S. 423 — Per Grille J., (in Final Order)—There is no provision in the Criminal P. C., for allowing the complainant to be heard when the Crown does not wish to argue the case. It is, however, open to the Appellate Court to hear the complainant in suitable cases, and a discretion in this matter is left to the Appellate Court. AIR (Vol 24) 1937 Nag 394: 39 Cr LJ 75: ILR (1938) Nag 157: 172 Ind Cas 177.

——S. 423 — Special tribunal — Opinion of accused — Weight of.

The only persons capable of weighing the respective advantages or disadvantages of trial before different types of tribunals are the accused persons themselves and it is only their opinion in the matter which is entitled to any serious consideration. AIR (Vol 23) 1936 Cal 529: 40 CWN 959: 37 Cr LJ 1092: ILR (1937) 1 Cal 169: 64 CLJ 421: 165 Ind Cas 162 (DB).

——S. 423 — Express terms of S. 423 are not overridden by S. 439. In showing cause against conviction under S. 439 (6), the accused has the same rights as he has when he comes before the Court under S. 423. AIR (Vol 23) 1936 Mad 516: 1936 MWN 459: 44 MLW 155: 71 MLJ 231: 37 Cr LJ 909: 59 Mad 904: 164 Ind Cas 243 (DB).

——S. 423 — Offence impliedly accepted as correct but sought to be explained away — Facts, if can be re-opened.

Where in the written statement of the principal accused in a case of abduction, there was an unequivocal assertion that the alleged abduction was a pre-arranged affair and the evidence for the prosecution which prima facie established the offence of abduction was impliedly accepted as correct but was sought to be explained away on the ground that the removal of the girl by force was a mere show :

Held, that the accused were not entitled in law to re-open facts not only impliedly accepted in the written statement but expressly admitted before the Sessions Judge on behalf of the accused. (1936) 160 IC 255: 18 NLJ 49: 37 Cr LJ 270.

——S. 423 — Advocate not arguing case on merits — Court examining evidence — Appeal, if properly heard.

Where the Advocate appearing for the accused in an appeal was not prepared to and did not argue the case on the merits after he had failed to persuade the Court that his client was entitled to a postponement of the hearing until an investigation had been made into the allegations which he then made and the judgment showed that without the assistance of the appellant's Counsel, the Judge himself examined the evidence against the appellant and satisfied himself that the convictions were well-founded :

Held, that it could not be said that there had been no hearing of the appeal against the conviction within the meaning of S. 422, Criminal P. C. AIR (Vol 22) 1935 Pat 515: 1 BR 872: 16 PLT 693: 36 Cr LJ 1354: 15 Pat 69: 158 Ind Cas 324 (DB).

——S. 423 — Practice.

Under S. 423, Criminal P. C., the practice of the Court is that if the parties are to be heard at all, they must be heard in each other's presence, and if the respondent is heard, the appellant should have a right to reply. AIR (Vol 19) 1932 Cal 856: 36 CWN 699: 33 Cr LJ 775 (1): 132 Ind Cas 436 (1).

——S. 423 — Private prosecutor.

Under S. 423, Criminal P. C., the only persons who have got a right to be heard in a criminal appeal are the appellant or his Pleader and the Public Prosecutor, if he appears and in certain cases the accused if he appears. A private prosecutor has no right to be heard, though the Court may, in its discretion, hear him and an acquittal in appeal without hearing the complainant's Vakil is not bad in law. AIR (Vol 19) 1932 Cal 61: 35 CWN 976: 33 Cr LJ 305 (1): 54 CLJ 144: 136 Ind Cas 474 (DB).

——S. 423 — Right to reply.

In a criminal appeal counsel for the appellant cannot claim as a matter of right, to reply to the arguments put forward by the opposite party, but the Court should not ordinarily refuse him the privilege of permission to do so. AIR (Vol 12) 1925 Oudh 65: 82 Ind Cas 33: 11 OLJ 693: 25 Cr LJ 1169: 1 OWN 473.

——S. 423 — There is no right of reply vouchsafed to an accused under S. 423 but permission to reply is a privilege which should never be refused by an appellate Court. AIR (Vol 12) 1925 Oudh 50: 82 Ind Cas 37: 25 Cr LJ 1173.

——S. 423 — Right of reply in appeals.

S. 423 does not preclude an appellant or his pleader from replying to the arguments of the Public Prosecutor in an appeal. As a matter of principle such right of reply should be conceded to him. AIR (Vol 3) 1916 Lah 74: 21 PR (Cr) 1917: 18 Cr LJ 3: 36 Ind Cas 835 (DB).

### 16. Verdict of Jury.

See also Cr. P. C., Ss. 297 and 307.

**(a) Meaning and effect of.**
**(b) When it may be interfered.**
**(c) When it need not be interfered.**
**(d) Misdirection to jury.**
**(e) Misunderstanding by jury, error of law etc.**

#### (a) Meaning and effect of.

**——Ss. 423 (2) and 537 — Erroneous verdict — Verdict must be erroneous in appellate Court's opinion — Trial by jury — Misdirection — Appellate Court can convict accused if evidence is sufficient — Else new trial may be ordered.**

The provisions of S. 537 require the High Court, when exercising its powers of appeal under S. 423, to be satisfied that the misdirection has in fact occasioned a failure of justice. That being so, there can be little doubt that the words "such verdict is erroneous" occurring in S. 423 (2) mean that such verdict is erroneous in the opinion of the appellate Court :

Hence, where in the case of a trial by jury the summing up of the Sessions Judge suffers from a misdirection in telling the jury that the fact that an important eye-witness had not been examined need not give rise to an adverse inference, the High Court in appeal has to consider whether the evidence in the case is or is not sufficient to sustain the conviction, taking into consideration the fact that an important eye-witness has not been examined for the prosecution. If the evidence is sufficient to sustain the conviction, the appeal of the accused has to be dismissed; but if the High Court finds the evidence more or less inconclusive, i.e., such as no decisive pronouncement can be made in the absence of the eye-witness, the proper course would be to order retrial. AIR (Vol 33) 1946 Bom 446 (DB).

**——S. 423 — Effect of acquittal stated.**

Per Biswas, J.— It is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. AIR (Vol 25) 1938 Cal 51: 66 CLJ 225: 42 CWN 129: 39 Cr LJ 161: 173 Ind Cas 65: ILR (1938) 1 Cal 290 (DB).

**——S. 423 — Verdict of Jury — Appeal — Trial by jury — Verdict set aside — Retrial.**

On appeal to the High Court the verdict of the jury was set aside with the remark that it would be open to the Crown to proceed further with the case if it be so advised and that the accused be enlarged on bail till a fresh trial, if any. Held, the order of the High Court was an order for retrial subject to the right of the Crown, if it thought fit to withdraw the proceeding. AIR (Vol 6) 1919 Cal 115: 46 Cal 212: 23 CWN 94: 29 CLJ 34: 20 Cr LJ 225: 49 Ind Cas 849 (DB).

#### (b) When it may be interfered.

**——S. 423 (2) — Misdirection — Interference with jury's verdict — Power of Court.**

S. 423 (2), Cr. P. Code, should not be interpreted as an impediment to the power of the Court to alter or reverse the verdict of a jury unless it is of opinion that the verdict in fact, is erroneous, irrespective of the fact whether there has been a misdirection or not. AIR (Vol 36) 1949 Assam 46: 50 Cr LJ 779 (DB).

**——S. 423 — Unanimous verdict of not guilty — Appeal against — Grounds on which appellate Court will interfere stated.**

The appellate Court must always be reluctant to interfere with the verdict of not guilty by the jury especially when it is a unanimous verdict. The Court must be satisfied that it is a perverse verdict, and the line of demarcation between a perverse verdict and an erroneous application of evidence must be clearly and sharply drawn. The Court must be satisfied that no reasonable body of men could have arrived at the verdict at which the jury arrived. It is not sufficient that the appellate Court reading the evidence might have come to a conclusion different from the one that the jury arrived at. The Court must be satisfied that the only possible view on the evidence was the view that the accused was guilty and that the jury were manifestly perverse in the decision at which they arrived. AIR (Vol 33) 1946 Bom 38: 47 Bom LR 998: 223 Ind Cas 195 (FB).

**——S. 423 — Verdict erroneous on one of the charges only.**

Where the verdict of the jury on one of the charges only is found by the High Court to be erroneous, it can set aside that verdict and uphold conviction on other charges on which the verdict is not found to be erroneous. It need not set aside the whole trial. AIR (Vol 27) 1940 Lah 87: 41 Cr LJ 482: 187 Ind Cas 456.

**——S. 423 — Misdirection.**

There is nothing in the words of S. 423 (2) of the Criminal P. C., to suggest that an erroneous verdict against the accused but not one in his favour can be set aside. AIR (Vol 28) 1941 Nag 324: 1941 NLJ 441: 43 Cr LJ 129: ILR (1942) Nag 510: 197 Ind Cas 138.

——S. 423 — It is not for the High Court to adjudicate on the merits of the verdict of the jury. Unless it finds a misdirection or a material non-direction which has vitiated the trial, the jury's verdict ought not to be disturbed. AIR (Vol 25) 1938 Cal 460: 39 Cr LJ 674: 176 Ind Cas 104 (DB).

——S. 423 — The combined effect of S. 439 (6) and S. 423 (2) is to entitle the accused to question his conviction by showing that there was misdirection to the jury or that the jury misunderstood the law laid down by the Judge. To hold that S. 439 (6) confers an unlimited right of impugning the conviction would be to introduce the anomaly that a person convicted on the verdict of a jury can question the conviction only within the narrow limits laid down in S. 423 (2) but if he has to show cause against a notice for enhancement of sentence, his right to question conviction is very materially enlarged. AIR (Vol 23) 1936 All 850: 1936 ALJ 1287: 38 Cr LJ 137: ILR (1937) All 308: 166 Ind Cas 176 (DB).

**——S. 423 — Verdict, when will be set aside.**

In order to justify the Appellate Court to set aside the verdict of the jury, the finding that there are certain omissions or non-directions is not enough. The Court of Appeal must be satisfied on a perusal of the charge and the material evidence in the case that the omissions are so important that it may be reasonably said that they have led to an erroneous verdict. AIR (Vol 22) 1935 Cal 31: 60 CLJ 45: 36 Cr LJ 480: 154 Ind Cas 110 (DB).

**——S. 423 — Valuation on evidence by jury.**

When the jury's verdict as to valuation on evidence is challenged, the Court of Appeal is not to consider only whether the Court would adopt the view of the jury if the decision rested with them but they have also to see if there was evidence before the jury on which they would have reached the conclusion they arrived at. AIR (Vol 21) 1934 PC 196: 40 MLW 180: 151 Ind Cas 600.

**——S. 423 — Verdicts of Jury.**

Although it is desirable that the record of heads of charges should indicate far more fully than mere enumeration of the numbers of the sections, in order to entitle the High Court to interfere with the verdict of the jury and set it aside, it must be affirmatively proved that there has been misdirection and misunderstanding and the verdict is erroneous owing to misdirection by Judge and mis-

understanding on the part of the jury of the law as laid down by him. AIR (Vol 17) 1930 Cal 712: 1930 Cr C 1112 (DB).

——S. 423 — Court of revision like an appellate Court cannot alter or reverse the verdict of jury, until it is of opinion that such verdict is erroneous, owing to misdirection by the Judge or to misunderstanding of the Jury regarding law as laid down by him. AIR (Vol 16) 1929 All 364: 116 Ind Cas 297: 10 LRA Cr 83: 11 AI Cr R 576: 30 Cr LJ 622 (DB).

——S. 423 — It is imperative that in every case of trial by jury and specially in murder cases, the High Court in appeal should be satisfied that the Judge's charge to the jury was adequate. AIR (Vol 16) 1929 Cal 742: 34 CWN 164: 1929 Cr C 390: 124 Ind Cas 494: 31 Cr LJ 673 (DB).

——S. 423 — Under S. 423 (2) the High Court is not authorised to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. AIR (Vol 16) 1929 Pat 313: 8 Pat 344: 10 PLT 409: 117 Ind Cas 173: 30 Cr LJ 721: 1929 Cr C 99 (DB).

——S. 423 — Verdict of jury will not be set aside unless failure of justice has been caused. AIR (Vol 14) 1927 Cal 680: 103 Ind Cas 545: 54 Cal 539: 8 AI Cr R 309: 28 Cr LJ 689 (DB).

**——S. 423 (2) — Verdict of Jury, when can be interfered with.**

The High Court can interfere with the verdict of the Jury, under S. 423 (2) Cr. P. C., only on being satisfied that the verdict is erroneous, and if so, that it is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him. (1909) 32 M 179 (180, 181): 5 MLT 100: 2 Ind Cas 307 (DB).

**(c) When it need not be interfered.**

**——S. 423 — Wrong use of Police statement by Judge — Ample other material on record to justify conclusion of jury — Conviction should not be set aside.**

Where there is ample material on which the jury could find that the story of the complainant and her husband was true, and the use which the Judge made of the Police statement, though undoubtedly wrong, had no influence whatever on the verdict of the jury the conviction of the accused should not be set aside. AIR (Vol 29) 1942 Bom 71: 44 Bom LR 27: 43 Cr LJ 529: ILR (1942) Bom 384: 199 Ind Cas 202 (FB).

**——S. 423 — There was held no admission of evidence complained of and consequent miscarriage of justice.**

The only questions in the case requiring detailed consideration by the jury were those as to the contributory negligence of the plaintiff and the jury was well aware of this. Moreover, although the evidence which was objected to was heard by the jury, it was ruled to be inadmissible upon the facts as they emerged. Counsel did not deal with this matter in his address or ask that it be dealt with in the summing up by the trial Judge. New trial was sought on the ground that this evidence was wrongfully admitted :

Held, that there was no admission of the evidence complained of, that when it was conditionally taken subject to proof of other matters, there was a sufficient direction that unless those conditions were fulfilled, it was not evidence in the case and that having regard to the course of the trial, the trial Judge was not wrong and was probably wise in not again reminding the jury of matters which Counsel in their concluding speeches had thought it right to ignore. In any event, no substantial wrong or miscarriage of justice could, in those circumstances, be said to have occurred. AIR (Vol 27) 1940 PC 128: 41 Cr LJ 730: 6 BR 845: 189 Ind Cas 321.

**——S. 423 — Interference.**

No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce. AIR (V 26) 1939 Bom 457 : 41 Bom LR 965 : 41 Cr L J 176 : ILR (1939) Bom 648 : 185 Ind Cas 382 (DB).

**——S. 423 — Misdirection — Interference.**

It is not in every case when the charge to the jury is open to criticism in matters of detail that the High Court will interfere in appeal. Language may be used too broadly or not happy in its expression; but the essential point for consideration is whether the case against the accused has been fairly brought to their notice which may appropriately guide them in deciding whether the accused is guilty or innocent. When there are more than one accused, it is in the first degree essential both that the jury should be asked for a separate finding regarding each of the accused and that the particulars of the evidence affecting each person should be placed in a manner which may enable the jury to distinguish the cases of accused as against whom the evidence is not of the same degree of cogency. AIR (V 25) 1938 Pat 579 : 5 B R 185 : 40 Cr L J 147 : 20 PLT 51 : 178 Ind Cas 934 (DB).

——Ss. 423, 307 — Where there has neither been a misdirection by the Judge nor a misunderstanding on the part of the jury of the law as laid by the Judge, the Appellate Court has no power to alter or reverse the verdict of the jury. The word 'reverse' in S. 423 (2) includes the setting aside of the verdict or making it null and void. Where, therefore, the jury returns a verdict of guilty and the Judge feels some doubt about the guilt of the accused and that he has no power to refer the case to the High Court and hence agrees with the jury, in an appeal by the accused, the Appellate Court cannot set aside the verdict and order a re-trial as the effect of a de novo trial would be to reverse the verdict of the jury. It can only set aside the conviction and send the case back to the lower Court leaving it to consider whether it would express disagreement with the verdict or not and, if so, make a reference under S. 307 to the High Court or uphold the verdict and convict the accused and pass suitable sentences. AIR (V 24) 1937 All 195 : 1937 ALJ 43 : 38 Cr LJ 465 : ILR (1937) All 419 : 1936 AWR 1284 : 167 Ind Cas 802 (DB).

**——S. 423 — Showing cause against conviction.**

Though S. 439 (b) provides that a convicted person, in showing cause against enhancement of sentence is entitled to show cause against his conviction, the accused is not entitled to go behind the jury's verdict and show upon the evidence that the conviction was wrong. In showing cause against conviction, the accused must proceed according to the provisions of S. 423 (2). (1936) 163 Ind Cas 768 : 62 Cal 952 : 37 Cr LJ 859 (DB).

**——Ss. 423, 439 — Right of accused in challenging conviction — Extent of.**

Sub-section (6) of S. 439 gives the accused person no more right than that when he is asked to show cause why the sentence should not be enhanced; he might also show cause against his conviction and this section does not operate so as to reduce the effect of S. 423, cl. (2). The Counsel for the accused is not entitled to go behind the verdict of the jury and argue on the evidence. AIR (V 21) 1934 Cal 105 : 37 CWN 1122 : 35 Cr LJ 554 : 61 Cal 6 : 147 Ind Cas 1124 (DB).

——Ss. 423, 418 — Appeal against acquittal — Interference — Perversity of order under appeal — Whether necessary for interference.

Where a Sessions Judge, who differs from the verdict of acquittal of the jury, makes a reference, the High Court has to see whether the verdict of the jury is perverse. But no such condition applies to S. 418, Criminal P. C., as amended by Act 18 of 1923. All that the High Court has to see is whether the offence charged is proved against each of the accused persons and for this purpose, the High Court has to take the definition of "proved" given in the Evidence Act. AIR (V 20) 1933 All 535 : 55 All 689 : 35 Cr LJ 364 : 147 Ind Cas 15 (DB).

——S. 423 — Appeal against acquittal.

One of the grounds against the verdict was that another Judge might have put the case against accused more strongly than the Judge actually did and that the Judge in his charge to jury omitted to refer to facts or inferences which would have more highly coloured the case in favour of accused:

Held, that this was not a sufficient reason for reversal of the order of acquittal. AIR (V 18) 1931 Cal 533 : 32 Cr LJ 1101 : 134 Ind Cas 71 (SB).

——S. 423 — Facts which happened after the verdict of the jury had been given, and which are not found on the Sessions record, will not induce the High Court to alter or reduce sentence in appeal. AIR (V 16) 1929 Cal 92 : 32 CWN 1172 : 115 Ind Cas 522 : 30 Cr LJ 484 : 12 AI Cr R 262 (DB).

——S. 423 — Jury accurately directed in matters of law — High Court will not interfere with verdict.

High Court as an appellate Court will not interfere with a verdict, whether it is a verdict of acquittal or conviction, if it is a verdict which could be reasonably arrived at by honest men, and they had been guided by an accurate direction in matters of law. Where the accused are charged for robbery with murder under circumstances that the murder and robbery have been committed by the same persons and constitute one offence, the appellate Court must consider the case of murder separately and if there is any reasonable doubt, it must give the benefit of doubt to the accused. AIR (V 14) 1927 All 108 : 98 Ind Cas 475 : 27 Cr LJ 1355 (DB).

——S. 423 — Charge to jury fair and accurate — Jury's verdict reasonable — Conviction is proper.

Where a Judge complied with all the requisitions of the law, i. e., where he stated the law correctly and placed the case before the jury both as it stood against as well as in favour of the prisoners, and left the jury to decide upon evidence which was admissible and relevant and where the jury arrived at a verdict which was very reasonable.

Held, that there was no justification for interfering with the conviction based upon such verdict. AIR (V 14) 1927 Oudh 549: 105 Ind Cas 457: 4 OWN 901:28 Cr LJ 937.

——S. 423 — Contravention of law by the Judge on an unimportant matter and having a remote bearing on the question in issue does not justify reversal of verdict of jury. AIR (V 13) 1926 Cal 147 : 42 CLJ 528 : 27 Cr LJ 277 : 92 Ind Cas 453 (DB).

——S. 423 — No interference by High Court unless the omission by Judge to read some portion of evidence to jury has prejudiced the accused.

An objection that in delivering his charge to the Jury, the Sessions Judge did not read material portions of the evidence is not itself sufficient for the reversal of the verdict of the jury. In each case it must be a question whether the omission to read the material portion of the evidence was such as to mislead the jury and the Court of appeal will not interfere, if it has not prejudiced the accused. AIR (V 12) 1925 Nag 154 : 92 Ind Cas 169 : 7 NLJ 208: 27 Cr LJ 217.

——S. 423 — Jury verdict — Appellate Court's function.

A Court of appeal will not interfere with the verdict of the jury if it has not prejudiced the accused. (1903) 5 Bom LR 207 (208) (DB).

(d) Misdirection to jury.

——Ss. 423, 408 — Scope — Trial by Assistant Sessions Judge with aid of jury — Accused sentenced with imprisonment for less than four years — Appellate Court finding verdict erroneous owing to misdirection — Powers of Appellate Court to acquit or discharge accused.

There is no warrant whatever for restricting the meaning of the expression "Appellate Court" used in S. 423, Criminal P. C., to a High Court only. Section 408 empowers any person convicted at a trial held by an Assistant Sessions Judge to appeal to the Court of Session where the sentence of imprisonment is less than four years and to the High Court where it exceeds four years. If, therefore, in a case, the sentence passed by the Assistant Sessions Judge is only three years, an appeal will lie to the Sessions Judge, whose powers to dispose of the appeal must be found within the four corners of S. 423, Criminal P. C. The only restriction under S. 423 (2) upon the power of the Appellate Court hearing the appeal is that the verdict of the jury is not to be altered or reversed unless in the opinion of the Appellate Court such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. Subject to this restriction, it is perfectly open to the Appellate Court to reverse the finding and sentence and acquit or discharge the accused. The Appellate Court is not bound in the event of reversing the finding and sentence to order the accused to be re-tried. Section 408 uses the word "trial" and does not confine it to a trial with the aid of assessors only. It applies to trial either with the assessors or with the aid of a jury. AIR (V 30) 1943 Oudh 322 : 1943 AWR (CC) 52 : 1943 OWN 207 : 44 Cr LJ 604 : 207 Ind Cas 427.

——Ss. 423 (2), 297 — Appellate Court, when can interfere with.

However perverse and difficult to understand the verdict of the jury may be, the Appellate Court has no power to interfere unless there has been a failure of justice due to any misdirection or non-direction to the jury. AIR (V 30) 1943 Pat 163: 21 Pat 865: 44 Cr LJ 507: 9 BR 305: 206 Ind Cas 365 (DB).

——S. 423 — Erroneous verdict.

If the High Court after examining the evidence finds, that if the misdirection had not occurred the jury could not reasonably have come to any other decision it will not interfere. AIR (V 28) 1941 Nag 324 : 1941 NLJ 441 : 43 Cr LJ 129 : ILR (1942) Nag 510 : 197 Ind Cas 138.

——S. 423 — Misdirection — Interference.

If the High Court finds in a case of trial by jury that there is a misdirection, it has to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice. If it cannot so find, it cannot interfere. One meaning of word 'erroneous' in S. 423 (2), Criminal P. C., is that if the Court, after examining the evidence, finds that even if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision, it will not interfere. It is, however, clear from S. 423 (2), that even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict or verdicts unless these verdict or verdicts are "erroneous" by reason of such misdirection and before the High Court interferes

it must also find that there has been a failure of justice under S. 537. AIR (V27) 1940 Lah 87: 41 Cr LJ 482 : 187 Ind Cas 456.

——S. 423 (2) — **Conviction on approver's evidence — Proper direction — Interference — Judge explaining general principles of law as to corroboration but not directly applying to state of evidence — Misdirection.**

Where a jury, on a proper direction, thinks fit to act on the evidence of an approver, it commits no illegality and the High Court has no right to interfere with the verdict.

But where the judge explains the general law on the point of corroboration of evidence of an approver but does not directly and particularly apply the law on the point to the state of evidence against the accused, the direction to the jury cannot be said to be proper. AIR (V 20) 1933 Cal 509 : 37 CWN 290: 34 Cr LJ 841: 144 Ind Cas 879 (DB).

——S. 423 — Where there is misdirection the verdict of the jury cannot be set aside on the ground of misdirection unless it has occasioned a failure of justice. 1933 MWN 320.

——S. 423 (2) — **Interference with verdict.**

Before the High Court interferes with the verdict of a jury it should be satisfied not only that the Judge has misdirected the jury, but also that his misdirection caused them to come to a conclusion which was in fact wrong. AIR (V 19) 1932 Cal 474: 55 CLJ 439: 33 Cr LJ 854: 59 Cal 1361: 139 Ind Cas 873 (DB).

——S. 423 — The High Court's powers of interference in an appeal from the verdict of the jury are strictly limited and can only arise if the accused succeed in showing that there are misdirections in the Judge's charge to the jury. AIR (V 17) 1930 Cal 437: 1930 Cr C 745: 51 CLJ 352 (DB).

——S. 423 — Before interfering with the verdict of a jury, by which miscarriage of justice has resulted, it must be established that that such failure of justice was the result of misdirection of the Judge in his charge to the jury. AIR (V 15) 1928 Pat 326: 9 AI Cr R 544: 108 Ind Cas 81: 29 Cr LJ 325 (DB).

——S. 422 (2) only applies if it becomes necessary to consider whether the verdict of the jury was erroneous owing to a misdirection by the Judge. It does not narrow down S. 418 which allows an appeal in a jury trial on a question of law. AIR (V 13) 1926 Lah 193 : 27 Cr LJ 793 : 95 Ind Cas 393.

——S. 423 (2) — **Verdict of Jury — Jury —Unanimous verdict.**

High Court cannot on an appeal from the verdict of the jury interfere with it in the absence of a misdirection by the Judge especially when there is some circumstantial evidence of a guilt such as a finger print of the accused. AIR (V 7) 1920 Cal 271 : 46 Cal 635 : 21 Cr LJ 8 : 54 Ind Cas 56 (DB).

——S. 423 — **Jurisdiction of High Court to alter or reverse the verdict of the Jury.**

The High Court is not authorized by S. 423, Cr. P. C., to alter or reverse the verdict of the jury unless it is of opinion that this verdict is erroneous owing to a misdirection by the judge. If it comes to that opinion, then it has the power to reverse the verdict, but that power ought not to be lightly exercised. It is mainfest by the intention of the legislature that the power of interference conferred on the High Court should be exercised only occasionally. (1908) 10 Bom LR 565 (566) (DB).

**(e) Misunderstanding by jury, error of law etc.**

——S. 423 — Where, in his charge to the jury, the Sessions Judge does not adequately bring out the difference between common knowledge, and the existence of grounds for belief or suspicion and at any rate the jury fails to understand the importance of the difference between those two things for the purposes of a conviction under S. 368, I. P. C., the verdict of the jury should be considered erroneous within the meaning of S. 423 (2). AIR (Vol 28) 1941 Oudh 567 : 1941 OWN 874 : 42 Cr LJ 728 : 1941 AWR (CC) 260 : 17 Luck 128 : 195 Ind Cas 371.

——S. 423 — Omission by Government to take a ground that the Sessions Judge omitted to explain the law to the jury would not debar the prosecution from urging it in the appeal. AIR (Vol 26) 1939 Bom 457 : 41 Bom LR 965 : ILR (1939) Bom 648 : 41 Cr LJ 176 : 185 Ind Cas 382 (DB).

——S. 423 — **Conviction of some accused — Subsequent conviction of foreman of jury for having taken bribe in the trial — Verdict and conviction, if can be sustained.**

Where in a trial by jury, some of the accused were acquitted and some convicted, and it appeared that the foreman of the jury was subsequently convicted of having taken bribe in connection with this trial :

Held, that the verdict of the jury could not be sustained and that the conviction should be set aside. AIR (Vol 20) 1933 Cal 639 : 60 Cal 751 : 34 Cr LJ 1072 : 145 Ind Cas 816 (DB).

——S. 423 — **Admission of improper evidence — Reversal of verdict.**

Where evidence was let in improperly before the jury and the circumstances of the case were such that it was unsafe to say that the effect of the evidence so let in had no effect on the minds of the jury, the High Court set aside the verdict. AIR (Vol 18) 1931 Bom 311 : 33 Bom LR 305 : 55 Bom 435 : 32 Cr LJ 1077 : 133 Ind Cas 748 (DB).

——S. 423 — Where the Appellate Court is called upon to say whether or not the Judge has done his duty in addressing the jury on the facts, it should look to the summing up as a whole and see that the case has been fairly laid before them. AIR (Vol 18) 1931 Oudh 171 : 8 OWN 344 : 32 Cr LJ 858 : 6 Luck 706 : 132 Ind Cas 232.

——S. 423 — **Jury not properly constituted — Ground not taken in appeal — Powers of High Court.**

The jury which was empanelled to try a person was not constituted in the manner provided by law, i.e., in accordance with principles laid down in AIR 1928 Cal 83 (FB). This fact was not, however, made a ground in the appeal.

Held, that the High Court was bound to interfere and remand the case for re-trial since the Court constituted to try the case was, though not illegal, certainly irregular. AIR (Vol 16) 1929 Cal 92 : 32 CWN 1172 : 115 Ind Cas 522 : 30 Cr LJ 484 : 12 AI Cr R 262 (DB).

——S. 423 — **Provisions are imperative — No misdirection to jury — Verdict cannot be altered.**

The terms of S. 423 (2) are imperative and where there is no misdirection by the Sessions Judge it is not competent to the High Court to alter or reverse the verdict of the jury. In such a case where the High Court was of opinion that the accused should have been acquitted and that the verdict was against the weight of the evidence they directed a copy of the judgment to be sent to the Local Government for necessary action. AIR (Vol 14) 1927 Pat 370 : 8 PLT 691 : 103 Ind Cas 548 : 28 Cr LJ 692 : 7 Pat 15 : 8 AI Cr R 369 (DB).

——S. 423 — Where the defence case was not adequately put before the jury and evidence was admitted which should have been excluded, the verdict of guilty must be set aside. AIR (Vol 13) 1926 Mad 370 : 23 MLW 90 : 27 Cr LJ 176 : 91 Ind Cas 960 (DB).

**17. Withdrawal of appeal.**

**——S. 423 — Appeal admitted — If can be withdrawn — Duty of Court.**

Per Full Bench.—The Legislature have never contemplated any withdrawal of an appeal once lodged whether by the accused or by the Crown and that once the appeal has been lodged and admitted, it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound, once the appeal is admitted, to proceed under S. 421 or under Ss. 422 and 423 to decide the appeal on the merits. AIR (Vol 29) 1942 Lah 296 : ILR (1942) Lah 241 : 44 Cr LJ 14 : 203 Ind Cas 501 (FB).

**——S. 423 — Withdrawal of, refusal by Division Bench — Another Division Bench, if can, at instance of party, come to contrary decision.**

A Division Bench having decided that permission to withdraw an appeal could not be granted and the appeal should be heard on the merits, another Division Bench cannot come to a contrary conclusion at the instance of the party adversely affected by the first order but neither present nor represented when the order refusing withdrawal was made. AIR (V 29) 1942 Lah 296 : ILR (1942) Lah 241 : 44 Cr LJ 14 : 203 Ind Cas 501 (FB).

**18. Admission of inadmissible and additional evidence.**

**——S. 423 (2) — Verdict of jury — Interference — Admission of inadmissible evidence in Sessions Court — Order for fresh trial — Propriety.**

Where the admission of inadmissible evidence in the Court of Session might have influenced the jury in arriving at their verdict, the High Court on appeal is not bound to go into the facts and decide the matter for itself. The proper course to adopt is to direct a fresh trial, if the case is in its opinion pre-eminently fitted for a decision by a jury. AIR (Vol 36) 1949 Cal 629 : 54 CWN 8 : 51 Cr LJ 157 (DB).

**——Ss. 423 (2), 376 and 537 — Powers of High Court — Inadmissible evidence admitted in jury trial — High Court, if bound to order re-trial — Evidence Act, S. 167.**

When in a murder reference and appeal it is found that inadmissible evidence has been admitted in a jury trial, the High Court may, after excluding such evidence, maintain a conviction provided the admissible evidence remaining is in its opinion sufficient clearly to establish the guilt of the accused. This power of the High Court is not limited to a murder reference and appeal under S. 449, Cr. P. Code. The High Court is not compelled in such cases to order a re-trial. Under S. 167 of the Evidence Act, the improper admission of evidence is expressly declared not to be a ground of itself for a new trial. If the mis-reception of evidence is an irregularity within the meaning of S. 537, Cr. P. Code, it does not occasion a failure of justice where the Court obeying the injunction contained in S. 167 of the Evidence Act finds that there is sufficient admissible evidence to justify the verdict. AIR (Vol 33) 1946 PC 82 : 73 IA 77 : ILR (1946) Lah 119 : 224 Ind Cas 426 : 50 CWN 692 : 1946 PWN 197 : 47 Cr LJ 616 : 12 BR 574 : 1946 MWN 474 (2) : 59 LW 415 : 48 Bom LR 473 : 1947 AWR (PC) 3 : 1947 OA (PC) 3 : 1947 OWN 320 : 1947 ALW 307 : (1946) 2 MLJ 1.

**——S. 423 (2) — Powers of High Court — Jury trial — Improper admission of inadmissible evidence — Interference with verdict of jury — S. 537 (d) — Evidence Act, S. 167.**

The High Court will not, ordinarily, in appeals from convictions based on the verdict of a jury, interfere in appeal; its powers are limited by S. 423 (2) and S. 537 (d), Cr. P. Code and S. 167, Evidence Act. It cannot be said that in a case of misdirection to the jury or admission of improper evidence in a jury trial there must necessarily follow a re-trial. Where in a case tried by a jury, inadmissible evidence is admitted in evidence and placed before the jury, it is open to the High Court to go into the facts and decide for itself whether the decision of the lower Court is right on the merits or whether the illegal admission of inadmissible evidence has occasioned a failure of justice. If the High Court is satisfied that the admission of inadmissible evidence could have made no real difference to the verdict of the jury, it can uphold the verdict of the jury upon a consideration of the other evidence in the case. AIR (Vol 33) 1946 Sind 132 : ILR (1946) Kar 69 : 226 Ind Cas 511 : 47 Cr LJ 971 (DB).

**——S. 423 — Additional evidence — When taken.**

Appellate Court should not rely upon matters not in evidence before it and should not admit additional evidence without conforming to the provisions of S. 428, Cr. P. C. (1910) 8 MLT 428 : (1910) MWN 829 : 11 Cr LJ 734 : 8 Ind Cas 943.

**19. Alteration of finding.**

**——S. 423 (1) — Powers of appellate Court — Conviction in place of acquittal — Power of appellate Court to substitute — "Alter the finding" — Meaning of — Conviction under S. 426, I. P. Code — Appeal — Conviction under S. 379, I. P. Code — Legality.**

Section 423 (1), Cr. P. Code, provides for appeals both against orders of conviction and orders of acquittal. The powers of the appellate Court in an appeal from an order of acquittal and those in an appeal from an order of conviction have to be kept distinct and separate as they are mutually exclusive. An order of acquittal for purposes of appeal need not necessarily be in respect of all the charges on which the accused was tried in one trial.

The words "alter the finding" in S. 423 (1) (b) (2) cannot refer to a finding to which no sentence is attached. The finding and the sentence go hand in hand, and the appellate Court is given the power to alter the finding, but maintain the sentence, or reduce the same; the word "alter" cannot include "reverse". Hence the appellate Court cannot substitute a finding of conviction for one of acquittal. A conviction under S. 379, I. P. Code, cannot in appeal be substituted for a conviction under S. 426, I. P. Code, on the same facts, in view of the provisions of Ss. 237 and 238, Cr. P. Code. AIR (V 35) 1948 Pat 435 : 14 Cut LT 14 : 49 Cr LJ 589.

**——S. 423 — Alteration of finding — Conviction for rioting with common object of dispossessing complainant from land — Alteration of common object into one of causing hurt to complainant's party — Permissibility.**

Where the accused were convicted under S. 147, I. P. Code, for rioting with the common object of dispossessing the complainant, the appellate Court, while upholding the conviction, cannot sub-

stitute a totally different common object of causing hurt to members of the complainant's party put forward for the first time in its judgment. 47 Cr LJ 943: AIR (Vol 33) 1946 Cal 305.

——S. 423 (1) (b) — **Words "may alter the finding" — How to be construed.**

The words "may alter the finding" in S. 423 (1) (b) are very general and they must be construed in harmony with other provisions of the Code and not as overriding them. AIR (Vol 32) 1945 Pat 376.

——Ss. 423 (1) (b) and 439 — **Power under S. 423 (1) (b) to alter finding to any other which Court considers proper on findings of fact arrived at by it — Appellate Court, if can alter conviction — Sentence, if can be enhanced to transportation or one of death as the merits require.**

The words "alter the finding" in Cl. (1) (b) (2) of S. 423, Criminal P. C., mean that the finding can be altered to any other finding that the Court considers proper on the findings of fact at which it arrives in appeal.

In the case contemplated in S. 423 (1) (b), it is obvious that there is no question of a complete acquittal for the appeal is against a conviction and, therefore, there is no necessity to annul or set aside any finding that the man is innocent or not guilty of anything at all. All that is necessary is to find the proper offence of which he could be held to be guilty on the findings of the Appellate Court. All that is taken away from the Appellate Court is the power of enhancing the sentence, but no restriction is placed on the power of the Appellate Court to change the finding to any that it considers suitable to the purpose.

As regards the High Court, the matter stands on a different footing. In its appellate jurisdiction, the High Court can alter the finding to any that it considers suitable. As soon as it has done so, it can, under the provisions of S. 439, Cl. (1), in its revisional jurisdiction enhance the sentence to any sentence it considers suitable.

Hence, in an appeal from a conviction by a convict who had been charged, say for example, under S. 302, Penal Code, but convicted under S. 304, Part I, the High Court is competent in its appellate jurisdiction to alter the finding from S. 304, Part I, to finding that the conviction should be under S. 302, and in exercise of its revisional jurisdiction under S. 439 (1), Criminal P. C., it may then pass a sentence of death or transportation for life as the merits of the case may require. AIR (Vol 28) 1941 Lah 465: 43 Cr LJ 235: 44 PLR 59 : ILR (1942) Lah 129: 197 Ind Cas 669 (FB).

——S. 423 — Where the Sessions Judge holds that the offence falls under exception 1 to S. 300 of Penal Code and convicts the accused under S. 304 and not under S. 302, the High Court will not go behind that finding when no appeal is preferred by the Crown. (1940) 42 PLR 88.

——S. 423 (a) — **Accused found guilty under Ss. 363 and 498, Penal Code and sentenced — No separate sentence under S. 498 — On appeal accused found guilty under S. 498, and not under S. 363 — Sentence under S. 498.**

Under S. 423 (a), Criminal P. C., in an appeal from conviction, the Appellate Court may alter the finding maintaining the sentence or with or without altering the finding reduce the sentence.

The accused were tried by a Magistrate who convicted them under Ss. 363 and 498, Penal Code, and sentenced them under S. 363 to rigorous imprisonment for one year and six months each and awarded no separate sentence under S. 498. In appeal, the Sessions Judge found the accused not guilty under S. 363, but guilty under S. 498, He upheld the conviction under S. 498, but felt that he had no authority to pass a proper sentence as the Magistrate had not passed any sentence under that section:

Held, that the Sessions Judge had jurisdiction to pass appropriate sentence under S. 498 subject to the limit of one year and six months which the Magistrate had imposed. AIR (Vol 25) 1938 Cal 439: 39 Cr LJ 684 (1): 42 CWN 1040: 175 Ind Cas 799 (1) (DB).

——S. 423 — Accused acquitted of an offence under S. 402, Penal Code, and convicted on same evidence of graver offence under S. 399 — Appeal against conviction — Whole case brought before High Court:

Held that under S. 423(b), High Court could alter finding (which power was not limited) and could find appellants guilty of an offence which it considered established, even though they were acquitted of that offence and found guilty of some other offence by lower Court:

Held, also that since the power to enhance sentence had been taken away by S. 423, no such alteration in the finding could prejudice the accused materially:

Held, further that the appeal not being a fresh trial, S. 403 did not apply. AIR (Vol 21) 1934 Oudh 200: 11 OWN 534: 35 Cr LJ 973: 9 Luck 607: 149 Ind Cas 533.

——S. 423 (b) — **Alteration of finding — Meaning of.**

Where a person was charged under Ss. 376 and 354, Penal Code, but was convicted only under S. 354:

Held, that it was open to the High Court to alter the finding and convict the accused under Ss. 376, 511.

Per Remfry, J. — The words 'alter the finding' in S. 423 (b) include a finding of acquittal. The Court ought not to alter a finding and convict the accused of an offence unless the defence in the original trial was directed to meet a charge of that offence. If the accused had not had an opportunity to meet the charge, a new trial could be directed, and where the accused was committed under a charge in respect of S. 376, a charge under S. 354 having been added in the Sessions Court, the accused could be convicted of an attempt to rape. AIR (V 19) 1932 Cal 723 : 36 CWN 1152 : 34 Cr LJ 177 : 60 Cal 179 : 141 Ind Cas 622 (DB).

——S. 423 — Sessions Judge can alter finding under Ss. 205 and 109 to one under S. 419, Penal Code, maintaining the sentence. AIR (V 14) 1927 Pat 199 : 28 Cr LJ 529 : 8 AI Cr R 117 : 102 Ind Cas 337 (DB).

——S. 423 — **Alteration of finding while maintaining the sentence — Limits of.**

The Appellate Court ought not to use its power of altering the finding of a lower Court while maintaining the sentence, if the accused would thereby be prejudiced by the omission to prove the altered charge and if the defence might have been of a different character had the altered charge been framed in the first Court. AIR (V 6) 1919 Mad 188 : 20 Cr LJ 780 : 53 Ind Cas 620.

——S. 423 — **Alteration of finding — Appellate Court — Powers of.**

An Appellate Court can alter the finding of the trying Magistrate while maintaining the sentence. The word finding is confined to a finding on a point of law. AIR (V 5) 1918 Pat 257 : 3 PLJ 565 : 19 Cr LJ 735 : (1918) Pat HCC 192 : 46 Ind Cas 415 (DB).

——S. 423 — **Alteration of finding — Appellate Court — Power to alter finding.**

An Appellate Court has power to alter finding while keeping conviction and omission to frame a charge is not illegality. AIR (V 4) 1917 Mad 687 : (1916) 2 MWN 267 : 4 LW 373 : 17 Cr LJ 384 : 35 Ind Cas 816.

**——Ss. 423 (1) (b), 237 and 238 — Alteration of finding — Appellate Court — Competency of.**

The finding which an Appellate Court may alter under S. 423, cl. (1) (b) may relate either to an offence with which the accused was separately charged in the lower Court or to an offence of which he might be convicted without a distinct charge. In cases not falling within Ss. 237 and 238, Cr. P. C., the Appellate Court cannot convict a person of an offence with which he was not charged by the first Court, but where he has been charged with a particular offence, and the first Court has recorded a finding on that charge, the Appellate Court can alter that finding. (1912) 35 Mad 243 : 21 MLJ 805 : 10 MLT 66 : (1911) 2 MWN 106 : 12 Cr LJ 269 : 10 Ind Cas 372 (DB).

**——S. 423 (1) (b) — Alteration of finding.**

The Appellate Court can alter the finding maintaining the sentence and there is nothing to restrict the finding, which may be altered to a finding of conviction. (1911) 34 Mad 545 : 1910 MWN 474 : 8 MLT 313 : 11 Cr LJ 534 : 7 Ind Cas 861 (DB).

**——S. 423 — "Alter a finding" — Powers of Appellate Court to reverse a conviction for an offence and find the accused guilty of abetment of the offence.**

It is not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. Section 423 has to be read with Ss. 237 and 238, Cr. P. C. The Appellate Court, while reversing a conviction for an offence, is not competent to convict the accused of abetment thereof. (1910) 20 MLJ 84 (85, 86) : 33 Mad 264 : 7 MLT 79 : 5 Ind Cas 145 (DB).

**——S. 423 — Appellate Courts, power of — Alteration of finding, scope of — Prejudice to accused — Penal Code, Ss. 182, 500.**

The power of an Appellate Court in altering a finding under S. 423, Cr. P. C., is not limited by any preliminaries imposed upon the first Court before it takes cognizance of the offence involved in the altered finding. Where an Appellate Court alters a conviction under S. 182 into one under S. 500, such an alteration is not ultra vires even though there was no complaint by the person aggrieved — a necessary preliminary if it were a conviction by the first Court. Such an altered conviction will be upheld unless the accused were prejudiced by such alteration by way of the shifting of the onus, etc. (1903) AWN 100 : 25 A 534 (535, 536).

### 20. Award of costs.

**——S. 423 — Power to award costs.**

Section 423, cl. (d), Criminal P. C., read with S. 439, does not authorise the High Court in revision, to award costs of the proceedings before it. AIR (V 20) 1933 All 264 : 1933 ALJ 188 : 34 Cr LJ 414 : 55 All 301 : 142 Ind Cas 537 (FB).

——S. 423 — The award of costs cannot be treated as incidental or consequential to the disposal of a revision petition within the meaning of S. 423 (1) (d) for it does not necessarily follow from an order passed in revision. AIR (V 12) 1925 Mad 438 : 48 MLJ 106 : 48 Mad 262 : 26 Cr LJ 707 : 21 MLW 688 : 86 Ind Cas 147 (FB).

### 21. Co-accused.

——S. 423 — In an appeal by one of the accused against his conviction, the Appellate Court cannot disturb the order of acquittal of the lower Court against his co-accused. As regards appeal from a conviction and one from acquittal, the powers of the Appellate Court under S. 423 are distinct and different. (1911) 8 ALJ 1129 : 12 Cr LJ 575 : 12 Ind Cas 839.

### 22. Compounding of offence.

**——S. 423 (d) — Order for composition.**

An order for composition is not a consequential or incidental order within S. 423 (d). AIR (V 4) 1917 Cal 705 : 43 Cal 1143 : 20 CWN 1071 : 17 Cr LJ 339 : 35 Ind Cas 515 (DB).

**——S. 423 — Compounding of offence — Composition permitting order not an "incidental order".**

Section 423, Criminal P. C., does not treat an order permitting composition as an "incidental order". AIR (V 3) 1916 Mad 483 : 39 Mad 604 : 29 MLJ 621 : 18 MLT 381 : 16 Cr LJ 750 : 31 Ind Cas 350 (DB).

### 23. Dismissal for default.

——S. 423 — A Sessions Judge should not dismiss an appeal for default under the provisions of S. 423, but should enquire into the merits of the case and see if there is any force in it. AIR (Vol 17) 1930 Oudh 334 : 125 Ind Cas 848 : 31 Cr LJ 939 : 7 OWN 208 : 1930 Cr C 460.

——S. 423 — An appellate Court cannot dismiss the appeal owing to the absence of the appellant and his pleader. Under S. 423 the Court of appeal has to peruse the record and to form an opinion as to whether there is or is not sufficient ground for interference. AIR (Vol 13) 1926 Bom 548 : 97 Ind Cas 751 : 50 Bom 673 : 28 Bom LR 1022 : 27 Cr LJ 1167 (DB).

**——S. 423 — Criminal appeal cannot be dismissed for default.**

After an appeal had been presented, the records were called for; after the records had arrived the appeal was taken up for hearing. On that date no one appeared in support of the appeal on behalf of the appellant and no application for adjournment was filed. The Magistrate thereupon dismissed the appeal.

Held, that it was incumbent upon the Magistrate to go through the record and to dispose of the appeal on the merits. AIR (Vol 11) 1924 Cal 95 : 81 Ind Cas 974 : 50 Cal 972 : 27 CWN 947 : 39 CLJ 278 : 25 Cr LJ 1150 (DB).

**——S. 423 — Dismissal of appeal for default — Illegality.**

The Appellate Court is bound in all cases where the appellant is not represented personally or by pleader, to peruse the petition of appeal and the copy of the judgment accompanying it, and determine upon such perusal, whether the appeal should be admitted or summarily rejected. If the appeal is admitted it is to consider whether there is any ground for interfering with the conviction or sentence. It is illegal to record an order of dismissing an appeal "in default," as such an order is not contemplated by S. 423. AIR (Vol 6) 1919 Oudh 323 : 6 OLJ 370 : 20 Cr LJ 744 : 53 Ind Cas 152.

——S. 423 — A criminal appeal should not be dismissed for default but must be considered on its merits, though it can be summarily dismissed if no sufficient ground for interfering is seen. (1911) 12 Cr LJ 481 : 12 Ind Cas 89.

### 24. Order restoring property.

**——Ss. 423 (1) (4) and 522 — Order restoring property.**

An order under S. 592 directing the restoration of immoveable property to the person entitled thereto is not a consequential or incidental order within S. 423 (1) (4). AIR (Vol 6) 1919 Lah 399 : 20 Cr LJ 30 : 1 PWR 1919 Cr : 33 PLR 1919 : 14 PR 1919 Cr : 48 Ind Cas 510.

——Ss. 423 (1) and 250 — Order of compensation — Appellate Court — Power of, to order.

Per Full Bench (Jenkins, C.J., Diss.) — An Appellate Court cannot order compensation under S. 250 which does not confer the requisite power on the Appellate Court nor does S. 423 (1) (d) because an order for compensation is not 'consequential or incidental' to an order of discharge or acquittal. (1912) 39 Cal 157 : 16 CWN 10 : 14 CLJ 437 : 12 Cr LJ 529 : 12 Ind Cas 297 (FB).

(Overruling 14 CWN 212 : 5 Ind Cas 72 (FB).)

——Ss. 423 (1) (d) and 250 — Order of compensation.

The Court can pass an order of compensation in favour of the accused under S. 250 if the case against him is found to be frivolous and vexatious. Court may make any just and proper consequential order under S. 423 (1) (d). (1910) 11 Cr LJ 46 : 14 CWN 212 : 5 Ind Cas 72 (DB).

(Overruled by (1912) 39 Cal 157 : 12 Cri LJ 529.)

——Ss. 423 (b), 517 — Order for restoration of property — Powers of appellate court — Revision.

It is competent to a Court in the exercise of appellate or revisional powers to cancel or modify an order passed by a lower court under S. 517, Cr. P. C., and even to extend such order to property which it did not previously include. (1906) AWN 256 (256) : 3 ALJ 770.

25. Revision and reference.

——S. 423 — Under the Cr. P. Code no applications for revision lie in cases in which an appeal lies, and therefore it is impossible for an appeal filed beyond limitation to be treated as an application for revision as far as criminal procedure goes. AIR (Vol 13) 1926 Sind 215 : 20 SLR 90 : 27 Cr LJ 780 : 95 Ind Cas 316 (DB).

——Ss. 423 and 438 — Reference to High Court.

When an appeal is not dismissed summarily the Court must dispose of it under S. 423 and has no power to refer a question of law arising in the appeal to the High Court. AIR (Vol 1) 1914 Low Bur 226 : 7 LBR 251 : 15 Cr LJ 667 : 25 Ind Cas 995.

26. Summary dismissal.

——S. 423 — Dismissal — Appeal admitted — Bail granted — Order dismissing appeal without notice of hearing to advocate is a grave irregularity.

A Criminal appeal once admitted cannot be summarily dismissed. An opportunity must be given to appellant's pleader to be heard fully. AIR (Vol 11) 1924 Rang 294 : 3 Bur LJ 18 : 25 Cr LJ 933 : 81 Ind Cas 549.

——S. 423 — After an appeal from conviction was admitted the appellate Court dismissed the appeal making a note in the order sheet that it had gone through the record.

Held, that an appeal having once been admitted, it could not be disposed of summarily without considering the whole evidence in the case and writing out a judgment. AIR (Vol 10) 1923 Pat 368 : 4 PLT 552 : 24 Cr LJ 453 : 72 Ind Cas 613.

——S. 423 — An appellant must be given a notice of the adjourned hearing. He has a right to be heard before the appeal is summarily dismissed. Even in his absence the Court must go through the record and dispose it of, on merits. AIR (Vol 5) 1918 Pat 54 : 20 Cr LJ 271 : 50 Ind Cas 31.

——S. 424.

See also Criminal P. C., Ss. 366, 367 and 265..

1. Contents of Judgment — General.
2. Points for determination.
3. Reasons for determination.
4. Appreciation of evidence.
5. "Dated and signed."
6. Non-compliance.
7. Summary disposal.
8. "Other than High Court."

1. Contents of judgment — General.

——S. 424 — Contents of judgment of appellate Court — Duty of appellate Judge — Judgment not setting out prosecution and defence cases or showing how prosecution case was established — Effect — If vitiated.

The judgment of a Court of appeal cannot be said to be a good judgment or a proper judgment, if it does not point out what the prosecution case is, what the defence is and how the prosecution case has been established, but merely confirms the judgment of the Court below. But if the appellate Court has really applied its mind to the evidence and comes to the necessary findings, it cannot be set aside or interfered with in spite of the defects or its unsatisfactory character. AIR (Vol 35) 1948 Cal 6 : 48 Cr LJ 389 : 51 CWN 534 : 229 Ind Cas 454.

——S. 424 — Contents of.

Judgment purporting to dispose of an appeal under S. 423 must contain the requirements of Ss. 367 and 424. AIR (Vol 32) 1945 Nag 116 : 1945 NLJ 87 : 46 Cr LJ 595 : ILR (1945) Nag 441 : 219 Ind Cas 320.

——S. 424 — The effect of S. 424 read with S. 369, Criminal P. C., is that the Appellate Court becomes functus officio after pronouncing its judgment and it has no power to revise or review its previous order. If it does so, the subsequent order is clearly ultra vires and, therefore, illegal. AIR (Vol 32) 1945 Oudh 52 : 1944 OWN 393 : 1944 AWR (CC) 256 : 46 Cr LJ 684 : 220 Ind Cas 430.

——Ss. 424, 367 — Judgment of Appellate Court — Contents.

Where the judgment of the Appellate Court gives the case of the accused and the prosecution and deals with the evidence, it contains all what an appellate judgment should contain and it is a legal judgment. AIR (Vol 29) 1942 Oudh 444 : 1942 OWN 440 : 43 Cr LJ 781 : 1942 AWR (CC) 286 : 201 Ind Cas 791.

——S. 424 — Provisions should be complied with.

Appellate Court should take care to write judgments which are in consonance with the provisions of the Code because by failing to do so they encourage persons convicted, to waste their money and the time of the High Court by making applications in revision. AIR (Vol 27) 1940 All 80 : 1939 AWR 836 : 1939 ALJ 1146 : 41 Cr LJ 249 : 186 Ind Cas 97.

——Ss. 424, 367 — Appellate Court differing from lower Court — Nature of Judgment to be written.

It is the duty of the Appellate Court not merely to consider whether there are reasons for differing from the judgment of the trial Court, but to apply its mind afresh to the evidence and to form its own conclusion and to embody its conclusions and the reasons on which they are based, in a considered judgment which will, if necessary, bear the scrutiny of the High Court. Where the judgment does not set forth the points for determination, the decision thereon and the reasons for these decisions, it does not comply with the provisions of S. 367, read with S. 424,

Criminal P. C. AIR (Vol 25) 1938 Cal 522 : 39 Cr LJ 791 (2) : 176 Ind Cas 677.

**——Ss. 424, 367 — Judgment 'appeal rejected' not according to law.**

An appellate judgment must contain the point or points for determination, the decision thereon and the reasons for the decision. The Appellate Court is not required to write a long and elaborate judgment but it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. An Appellate Court, which writes a judgment which the High Court is unable to follow without reference to the judgment of the trial Court, obviously fails in the discharge of the duty imposed upon it by the law. AIR (Vol 24) 1937 Pesh 88 : 39 Cr LJ 337 : 173 Ind Cas 672.

**——S. 424 — Application of Chap. XXVI, and S. 367, to appellate judgment.**

Section 424 provides that Ch. XXVI shall apply to appellate judgments and S. 367 lays down that the judgment shall contain the points for determination, the decision thereon, and the reasons for the decision. ('31) 1931 MWN 119.

**——S. 424 — Appellate Court's judgment must conform to the provisions of S. 367.**

In view of the provisions of S. 424 an appellate Court's judgment must comply with the provisions of S. 367. AIR (Vol 12) 1925 Cal 266 : 25 Cr LJ 901 : 81 Ind Cas 437.

**——S. 424 — Appellate Court's judgment is not a mere supplement to the trial Court's judgment.**

The provisions of S. 424, read with S. 367 are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the trial Court, but should, without being a long and elaborate one, be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record. AIR (Vol 10) 1923 Rang 188 : 1 Rang 301 : 2 Bur LJ 101 : 24 Cr LJ 920 : 75 Ind Cas 296.

**——S. 424 — Appellate judgment must contain materials indicating that appeal has been properly tried.**

An appellate judgment must contain the point or points for determination, the decision thereon and the reasons for the decision. An appellate Court is not required to write a long and elaborate judgment, but it is clearly its duty, not only to examine the evidence, but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. An appellate Court, which writes a judgment which the High Court is unable to follow without reference to the judgment of the trial court, obviously fails in the discharge of the duty imposed upon it by the law. AIR (Vol 8) 1921 Lah 102 : 2 Lah 308 : 23 Cr LJ 9 : 24 PLR 1922 : 64 Ind Cas 377.

**——Ss. 424 and 367 — Appellate judgment — Contents of.**

Section 367, Cr. P. Code, is applicable to appellate judgment by S. 424 and the duty of an Appellate Court is to decide the points raised in appeal and to write a judgment in accordance with law. AIR (Vol 7) 1920 Lah 335 : 2 UPLR (L) 44 : 54 Ind Cas 1007.

**——Ss. 424 and 367 — Appellate judgment — Contents of.**

Where the judge of the Appellate Court merely says that he adopts the reasons given by the trial Court to support the conviction of an accused person, the judgment is erroneous in form, and it cannot be read as supplementary or additional to, or to be explained and deciphered by, the aid of the judgment of the trial Court. AIR (Vol 6) 1919 Pat 529 : 20 Cr LJ 645 : 52 Ind Cas 421.

**——Ss. 424 and 367 — Contents of Judgment of Appellate Court.**

Section 367 is mandatory and cannot be violated though no serious inconvenience, harm or injustice has resulted from violation. No judgment of an Appellate Court (except High Court) is legal unless it contains the points for determination, the decision thereon and the reasons therefor. A judgment in the following terms is no judgment in law. 'There appears no sufficient reasons to doubt the evidence for prosecution. The sentence is not too heavy. The appeal is dismissed.' (1912) 8 NLR 84 : 13 Cr LJ 559 : 15 Ind Cas 975.

(See a'so 14 Cr LJ 570 : 1 UBR (1913) 169 : 21 Ind Cas 170.)

**——Ss. 424, 367 — Appellate judgment, contents of.**

A judgment of an appellate court (other than the High Court) must contain, among other things, the point or points for determination, the decision thereon, and the reasons for the decision. (1909) 11 CLJ 410 : 11 CLJ 348 : 37 Cal 194 (195) (DB).

2. Points for determination.

**——Ss. 424 and 367 — Essentials of judgment.**

In a case under S. 379, I.P.C. the lower Appellate Court should find whether there was any dishonest intention on the part of the accused especially when he puts forth a bona fide claim of right. (1910) 37 Cal 194 : 11 Cr LJ 348 : 11 CLJ 410 : 5 Ind Cas 999 (DB).

3. Reasons for determination.

**——Ss. 424, 367 — Appellate Court must give reasons for its order.**

It is even more essential that an Appellate Court should give reasons for its orders than that the trial Court should do so; for, in the latter case, the accused has a remedy by way of appeal before a tribunal which has to consider questions of fact as well as of law. In revision, on the other hand, findings of fact are ordinarily accepted. The Court of revision must be satisfied that the appeal was properly disposed of as well as heard. AIR (V 30) 1943 Mad 66 : 1942 MLJ 580 : 55 MLW 720 : 44 Cr LJ 287 : 1942 MWN 818 (1) : 204 Ind Cas 369.

**——Ss. 424, 421, 367(1)—On date of hearing neither accused, nor their Counsel present — Appellate Court upholding trial Court's judgment and dismissing appeal — Dismissal, held not under S. 421 but under S. 424 — Failure to give reasons — Effect.**

In an appeal by the accused against their conviction, notice was sent to the Public Prosecutor and the accused were released on bail pending the appeal. On the date of the hearing of the appeal, the Court delivered the following judgment :"Both the appellants are absent when called. Their Vakil too is absent and has not even submitted an application for adjournment. I have carefully perused the case record, and do not find any ground to interfere with the judgment of the lower Court. The appeal is dismissed."

Held, that the appeal could not be said to have been dismissed in limine under S. 421, Criminal P. C. It must be taken to have been disposed of under S. 424. It was, therefore, necessary for the Appellate Court to give reasons as required by S. 367 for coming to the conclusion it did. Failure to give reasons rendered the order invalid. AIR (V 30) 1943 Mad 9 : 1942-2 MLJ 579 : 55 MLW 712 (1) : 1942 MWN 746 : 44 Cr LJ 185 : 204 IC 298.

——**S. 424 — Appellate judgment must contain materials to show that appeal was properly decided.**

Where the appellant's pleader fails to make out a case for the issue of notice to the Public Prosecutor and the appellate Court thinks fit to decide the case without such notice, a formal order or judgment giving reasons is necessary to dispose of the appellate judgment itself to show that the appeal has been properly tried. The judgment or order must bear marks of such intelligent appreciation on the part of the appellate Court of the necessary facts and materials as would warrant the High Court to infer that the conclusions were properly arrived at by the lower appellate Court. AIR (V 14) 1927 Nag 88 : 98 Ind Cas 716 : 27 Cr LJ 1404 : 7 AI Cr R 471.

——**S. 424 — Judgment of Appellate Court.**

Where the order of the Appellate Court is liable to revision by the High Court, the former Court should give reasons for dismissing an appeal so as to show that the points raised in it were properly considered. A I R (V 4) 1917 Pat 336 : 2 PLW 49 : 18 Cr LJ 750 : 40 Ind Cas 750.

4. Appreciation of evidence.

——**S. 424 — Contents of appellate judgment — Duty of Court to consider reliability of prosecution witnesses and their evidence — S. 367.**

Where the important point raised in an appeal is that the prosecution witnesses were not reliable and that their evidence was not sufficient for the proof of the prosecution version, it is the duty of the appellate Court to go into the evidence and to hold in so many words whether or not the prosecution witnesses spoke the truth and whether or not their testimony could be relied upon. Where the appellate Court does not do this, but merely comments on the failure of the prosecution to produce medical evidence relating to the injuries of the accused and acquits the accused, it must be held that the appellate Judge does not satisfy the requirements of Ss. 424 and 367, Cr. P. Code : (1947) 48 Cr LJ 473 : 229 Ind Cas 620. (Lah)

——**S. 424 — Duty of Appellate Court.**

It is the duty of the Appellate Court to consider the defence evidence for what it may be worth with as much care and attention as the prosecution evidence. Unless this is done, the judgment is no judgment in law. ('39) 1939 OWN 1105 : 1939 AWR 319.

——**S. 424 — Appreciation of evidence.**

The Court of Appeal should discuss the evidence and probabilities arising from the circumstances of the case. A mere statement that the Appellate Court has gone carefully through the whole evidence and that there are many discrepancies in the depositions of witnesses is no discussion of the evidence at all. AIR V 24) 1937 Nag 394 : 39 Cr LJ 75 : ILR (1938) Nag 157 : 172 Ind Cas 177.

——**S. 424 — Discussion of evidence.**

A judgment of the lower Appellate Court without properly discussing the evidence on the record is not proper judgment. ('35) 1935 MWN 1061.

——S. 424 — Where there were injuries on both sides and the evidence showed that there was a free fight between the parties.

Held, the Sessions Judge was bound to examine the evidence carefully so as to show that he was fully convinced upon the consideration of the pros and cons of the case and the criticisms advanced on behalf of the defence that the account given by the prosecution was true and that the accused were the aggressors. AIR (Vol 11) 1924 Pat 380: 27 Ind Cas 519: 4 PLT 502: 1 Pat LR (Cr) 55: 24 Cr LJ 407 (DB).

——**Ss. 424 and 367 — Appellate Judgment — Contents of — Discussion of evidence.**

The judgment of the Appellate Court confirming the judgment of the trial Court, does not become defective though it does not set out again in detail the whole of the evidence and the reasons for believing the prosecution witness, if it appears from that judgment that the Appellate Court appreciated the points for its decision and considered the evidence and appreciated the arguments advanced against the credibility of the prosecution witnesses and still believed them. AIR (Vol 5) 1918 Cal 668: 20 Cr LJ 238: 49 Ind Cas 862 (DB).

——**Ss. 424 and 367 — Judgment — Contents.**

The judgment of a Criminal Appellate Court must show that the Court has fully considered the evidence on both sides and the pleas raised in appeal. It must also show that its findings are supported by reasons. AIR (Vol 4) 1917 Oudh 323: 4 O LJ 80: 18 Cr LJ 689 : 40 Ind Cas 689.

——**S. 424 — Rioting — Evidence insufficient.**

A magistrate's conviction in a case of rioting without considering whether each accused is, on sufficient evidence, proved to be participator in the act is liable to be quashed. AIR (Vol 3) 1916 Mad 732 : 2LW 958 : 16 Cr LJ 735 : 31 IC 175

5. "Dated and signed".

——**S. 424 — Judgment delivered in open Court and taken down by judgment writer — Omission to initial — Validity of judgment.**

There is no provision in the Criminal P. C., requiring that the High Court, after pronouncing a judgment in open Court, should date and sign the same.

Where certain Criminal Appeals were disposed of by a Judge of the High Court by the delivery of judgments in open Court which were taken down by the judgment-writer but, owing to the death of the Judge, remained unsigned.

Held, that the appeals should be deemed to have been finally disposed of by him and that the omission to initial the fair copy of the judgments was in no way a serious defect. AIR (V 20) 1933 All 40 : 1933 ALJ 13 : 34 Cr LJ 703 : 55 All 132 : 144 Ind Cas 149.

6. Non-compliance.

——**Ss. 424 and 367 — Appellate judgment not complying with requirements — When liable to be set aside.**

The question whether an appellate judgment, which on the face of it does not comply with the requirements of S. 424 read with S. 367, Cr. P. Code, should be set aside, must be decided on the facts and circumstances of each case. Where such a judgment discloses that sufficient attention has been paid to the points in dispute and the necessary findings are contained therein, it may not be necessary to order rehearing of the appeal. But where it does not mention the points that arose for decision, the decision thereon or the reasons therefor but merely expresses agreement with the findings arrived at in the Court below without stating anything more, it is not such as to enable a revisional Court acting under the provision of Ss. 435 and 439, Cr. P. Code,

to form any conclusion as to the correctness, legality or propriety of the findings, and the appeal ought to be reheard. AIR (Voll 37) 1950 Assam 199.

——Ss. 424 and 367 — Judgment of lower appellate Court — Mere confirmation of lower Court's finding — If a proper judgment.

A judgment by a lower appellate Court which merely confirms the lower Court's findings without stating the grounds thereof is open to the objection that it is not a judgment at all. It deprives the higher Court of the benefit of the lower appellate Court's view of the evidence. AIR (Vol 37) 1950 Kutch 94.

——Ss. 424, 367 — Duty of Appellate Court.

It would be well for District Magistrates who hear appeals in criminal cases to bear in mind that they are also subordinate to higher Courts and it is their duty to satisfy the higher Courts by their judgments that they have applied their minds to the case before them and in recording a finding of conviction upon the evidence produced before them, have arrived at a correct conclusion. In order to discharge this duty, it is necessary for them to see that their judgments fulfil the requirements laid down by the law. Merely saying that all the points arising in the case have been considered by the Court below and have been rightly decided, does not show that Appellate Court has applied its mind to the points arising in the case and has arrived at its own independent judgment in respect of them as it is required by the law to do. AIR (Vol 27) 1940 All 18: 1939 ALJ 671: 1939 AWR 567: 41 Cr LJ 220: ILR (1939) All 865: 185 Ind Cas 682.

——S. 424, 367 — Appellate judgment — Requirements of S. 367 must be fulfilled — Judgment — Appeal rejected not according to law.

An appellate judgment must satisfy the requirements of S. 367 Criminal P. C., the provisions of which are applicable to the judgments of the Appellate Court. A judgment therefore passed in two words 'appeal rejected' is not according to law. AIR (V 24) 1937 Pesh 88 (89) : 39 Cr LJ 337 : 173 Ind Cas 672.

——S. 424 — An appellate Court should write such a judgment which can be followed without reference to the judgment of the trial Court.

It is the duty of an appellate Court not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and the points urged by the appellants have been duly considered & decided. An appellate Court fails in the discharge of the duty imposed upon it by law if it writes a judgment which cannot be followed without a reference to the judgment of the trial Court. AIR (Vol 15) 1928 Lah 863: 110 Ind Cas 499: 10 AI Cr R 492: 29 Cr LJ 705.

——S. 424 — When a judgment, without discussing the points urged in the memorandum of appeal and without giving any reason, holds that the conviction is correct, the judgment is not a legal judgment as it does not contain the point or points for determination raised in the memorandum of appeal, the decision thereon and the reason for the decision. (1928) 107 Ind Cas 665: 29 Cr LJ 270 : 9 AI Cr R 557 (Nag).

——S. 424 — The direction in the proviso of S. 250 is mandatory, the non-compliance whereof vitiates the order of the Magistrate directing compensation to be paid by the complainant. S. 424 applies to an appellate judgment in an appeal from an order for compensation. Appellate Court is bound to record a proper judgment setting forth the points of determination, not objections of the appellant, his decision thereon, and the reasons for his decision. AIR (Vol 9) 1922 Pat 157: 66 Ind Cas 325: 3 Pat LT 203: 23 Cr LJ 261.

——S. 424 — Case gone into by appellate Court but points not set out — Irregularity.

Where the only case in appeal was one of considering whether the evidence did justify the conclusion that the accused persons were responsible for a particular act and the appellate Court did not state in its judgment the points for determination and the reasons for a finding on each point specifically in the manner contemplated by Ss. 367 and 424 but in fact it had gone into the case and said. "The Magistrate's findings of fact are fully justified by the evidence".

Held, there was not an "absence" of a judgment and the irregularity in drawing up the judgment was curable under S. 537. AIR (Vol 13) 1926 Bom 512: 97 Ind Cas 737: 28 Bom LR 1029: 27 Cr LJ 1153 (DB).

——S. 424 — Applicability.

The Judges of Judicial Commissioner's Court, sitting as Sessions Judges for the District of Karachi, should follow as closely as possible the provisions of S. 367 and S. 424. But the omission to do so, cannot vitiate and nullify the whole proceeding before the Sessions Court. The clause "so far as may be practicable" that occurs in S. 424 would certainly bring the error within the scope of S. 537. AIR (Vol 13) 1926 Sind 244: 95 Ind Cas 753: 20 SLR 261: 27 Cr LJ 833 (DB).

——S. 424 — Legality.

Where in an appeal by two accused, the Judge only dealt with the case of one.

Held, that his judgment was not according to law. AIR (Vol 8) 1921 Oudh 102: 24 OC 230.

——S. 424 — Appeal — Dismissed for non-appearance of appellants — Illegal.

A judgment of a District Magistrate contained 'No one appears. I see no reason to interfere. I dismiss the appeal'. The judgment was not in conformity with the law and the order passed by Dt. Magistrate was bad. AIR (Vol 3) 1916 All 43: 14 ALJ 327: 17 Cr LJ 353: 35 IC 657.

### 7. Summary disposal.

——S. 424 — Section 367 does not apply to appeals disposed of summarily whether by District Magistrate, or Sessions Judge or a High Court. AIR (Vol 27) 1940 Oudh 369: 41 Cr LJ 711: 1940 AWR 255 : 1940 OWN 594 : 15 Luck 662 : 189 Ind Cas 83 (DB).

——S. 424 — Summary dismissal — Procedure.

The order of dismissal passed by the appellate Court ran as follows: "Read judgment. Heard the applicant's Pleader. The appeal is summarily dismissed under S. 421, Criminal P. C.":

Held, that it was not a proper judgment and the practice of passing such stereotyped judgments should be condemned. ('37) 166 Ind Cas 494: 3 BR 172: 38 Cr LJ 232.

### 8. "Other than High Court."

——S. 424 — Procedure.

Chotzner, J. — When a complaint has been made under S. 476, the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate and that appeal must be dealt with as an ordinary appeal under the Cr. P. Code as is provided for in S. 424 of the Code

Duval, J. — The appeal must be treated as a miscellaneous appeal and regulated by O. 41, C. P. Code and not by Ss. 422-424 Cr. P. Code. AIR

(Vol 14) 1927 Cal 284: 100 Ind Cas 351: 31 CWN 281: 54 Cal 355 (DB).

—S. 421 — Revision.

Under S. 424 of the Cr. P. Code the rules contained in S. 367 as to the judgment of a Criminal Court of original jurisdiction apply to the judgment of any appellate Court other than a High Court. The High Court will not in revision make up for the deficiency of the appellate judgment by having recourse to that of the Court of first instance. AIR (Vol 10) 1923 Lah 344: 76 Ind Cas 710: 25 Cr LJ 246.

——S. 426.

——S. 426 — **Bail application pending appeal — Granting — Considerations.**

When an accused convicted of an offence under S. 411, I. P. Code and sentenced to imprisonment for a period of three months files an application for bail the next day to the appellate Court, it should not be refused as if he is acquitted in appeal he will have served out part of the substantive sentence for no fault of his. 1949 AMLJ 18.

——S. 426 — **(as amended in 1946), S. 426 (2-B) — Applicability — Conviction by High Court — Grant of special leave to appeal to Privy Council — Power of High Court to grant bail.**

Where the Privy Council has granted an accused person special leave to appeal to the Privy Council from his conviction, in cases where there is no question of the convicted person's absconding during the pendency of the appeal before the Privy Council, and in which it is obvious that the full sentence will be served before the decision of the Privy Council can be shown, it would be proper for the High Court to grant bail to the accused under S. 426 (2-B), Cr. P. Code (as amended in 1946). AIR (Vol 35) 1948 Bom 377: 49 Cr LJ 708: 50 Bom LR 378 (DB).

——S. 426 — There is no reason for limiting the scope of S. 426, so as to narrow it down to cases where persons have been convicted of offences and have preferred appeals under S. 407 and the following sections of Criminal P. C. Although the Sessions Judge has power under S. 498 to admit a person bound over under S. 118 to bail, it does not empower him to pass an order under S. 426 suspending execution of that order. AIR (V 23) 1936 All 107 : 1935 AWR 1401 : 37 Cr LJ 155 : 1935 ALJ 1337 : 58 A 589: 159 Ind Cas 804 (2) (DB).

——S. 426, cl. (3) — **Interpretation — Period of bail, whether should be excluded from term of imprisonment.**

Clause (3) of S. 426, Criminal P. C., does not lay down that the period during which a person is released shall be excluded from the term. What it lays down is that this period will be excluded in computing the terms, which means that this period will be left out in making calculation. On the plain interpretation of the clause, the period during which a person is released on bail cannot reduce the terms of the sentence. On the other hand, it will not affect the term at all as it will not be taken into consideration in computing the period of the term. AIR (V 23) 1936 All 12 : 1935 AWR 1149 : 1935 ALJ 1168 : 36 Cr LJ 1479 : 158 Ind Cas 906.

——Ss. 426, 120 — **Order of imprisonment under S. 120 — Release on bail by appellate Court — Period of bail, if should be excluded from period of imprisonment.**

Whether the provisions of S. 426, Criminal P. C. govern the case of a person against whom an order under S. 120 is passed and who is released on bail by the Appellate Court or not, the general principles of criminal law require that the period during which the applicant was released on bail must be excluded from the period for which he was required to undergo imprisonment failing the giving of security. AIR (V 21) 1934 All 845 : 4 A WR 76 : 57 A 264 : 36 Cr LJ 177 : 152 Ind Cas 785.

——S. 426 — The wodrs "convicted person" in S. 426 (1) would apply to a person against whom an order under S. 107 has been made and that consequently the Court had power to suspend the order relating to the furnishing of security. AIR (V 19) 1932 All 680 : 54 A 861 : 1932 ALJ 624 : 33 Cr LJ 731 (2) : 139 Ind Cas 141.

——S. 426 — **Bail.**

Under S. 426 (1) the existence of an appeal by a convicted person is a condition precedent to jurisdiction to grant bail: AIR (V 17) 1930 Pat 274 125 Ind Cas 792 : 1930 Cr C 455 : 31 Cr LJ 958 : 9 Pat 131 : 11 PLT 261 (DB).

——S. 426 — **"Convicted" — Person ordered to furnish security is not deemed to be "convicted".**

A proceeding under Chap. 8, is an "inquiry" which under the definition of the term excludes a trial. No doubt S. 117 applies to such inquiry the procedure prescribed for conducting trials, and the terms and expressions which occur in a trial come to be loosely applied in an inquiry also for the sake of convenience. But actually the person in respect of whom the inquiry is held is not an accused but a quasi accused, and he is not "deemed" to be an accused, nor when an order under S. 118 is passed against him "deemed" to be convicted within the meaning of S. 426. AIR (V 17) 1930 Pat 274 : 125 Ind Cas 792 : 9 Pat 131 : 11 PLT 261 : 1930 Cr C 455 : 31 Cr LJ 958 (DB).

——S. 426 — **Suspension.**

The result of a suspension of sentence is only that if the appeal finally fails, the convicted person only serves the original period of his sentence less the period of suspension. So such an order should only be passed when very special cause is shown. AIR (V 13) 1926 Nag 279: 27 Cr LJ 319: 92 Ind Cas 703.

——S. 426 — **Order of detention — Sentence — Reformatory Schools Act, (1897) Ss. 8 and 10— Sessions Judge, power of, to suspend order.**

An order of detention passed by a District Magistrate under S. 10 of the Reformatory Schools Act is not a 'sentence' within S. 426. Nor is it a punishment enumerated in S. 53, Penal Code. A Sessions Judge therefore has no power to suspend its operation under S. 426. AIR (V 2) 1915 Mad 1067 : 16 Cr LJ 134 : 27 Ind Cas 193 (DB).

——S. 426 — **Juridiction of High Court to release accused on bail pending appeal to Privy Council — Bail.**

The High Court has jurisdiction to release on bail a person convicted by the Sessions Court of Madras pending appeal to the Privy Council. (1901) 24 M 161 (163): 2 Weir 657 (FB).

——S. 428.

1. **Additional evidence.**
2. **Applicability and scope.**
3. **Non-examination of accused.**
4. **Object.**
5. **Reasons to be recorded.**
6. **Re-hearing of appeal — Application for transfer.**
7. **Revision.**
8. **Sub-section (4).**

**1. Additional evidence.**

(a) **General.**
(b) **Not to cure illegality.**
(c) **Not to fill up gaps in prosecution.**

(a) General.

**——S. 428 — Additional evidence — Cases in which admissible — Defence of India Rules, Rr. 84 (iv) and (vi) — French Establishments in India (Application of Laws) Order, 1941, Cl. (3) — Export of cloth from a French port in India — Offence, punishable under R. 84 (vi) — Defence of India Rules.**

The language of S. 428, Cr. P. Code, seems to indicate cases where there being already evidence on record the Court considers it unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. Where formal proof of a document is the only thing necessary the appellate Court would be perfectly justified in admitting the additional evidence.

According to Cl. 3 of the French Establishments in India (Application of Laws) Order, 1941, all the Indian laws for the time being in force in British India which are relatable directly or indirectly to the imposition and enforcement of prohibitions or restrictions on the import or export of goods, etc., are applicable mutatis mutandis to French possessions like Karaikkal. Hence, where cloth is exported from Karaikkal to Jaffna there is a contravention of the provisions of R. 84 (iv) of the Defence of India Rules and the persons found so exporting are guilty of an offence punishable under R. 84 (vi) of the Defence of India Rules. AIR (Vol 35) 1948 Mad 503: 1948 MWN 409: 49 Cr LJ 745: (1948) 1 MLJ 452.

**——S. 428 — Discretion.**

There is no hard and fast rule to fetter the discretion of Appellate Court to direct further evidence to be taken. AIR (Vol 31) 1944 Oudh 243: 1944 OWN 239: 45 Cr LJ 730: 1944 AWR (CC) 175: 214 Ind Cas 123 (DB).

**——S. 428 — Summons issued to defence witness — — Accused insisting on his attendance — Appellate Court should give opportunity under S. 428 to examine such witness.**

When the Magistrate issues a summons to the defence witness, he undertakes the responsibility of securing his attendance, and if the accused insists upon the attendance being secured, the Magistrate is legally bound to comply. If such a witness is not examined, the Appellate Court should give an opportunity under S. 428, Criminal P. C., to examine the witness. AIR (Vol 31) 1944 Pat 373: 23 Pat 278.11 BR 359 : 46 Cr LJ 546 : 219 Ind cas 255 (DB).

**——Ss. 428, 439 — Power of Appellate Court to make enquiry and take additional evidence — In view of allegations in grounds of appeal, appellate Magistrate summoning trial Magistrate and recording evidence from him as to circumstances under which judgment was delivered — Magistrate's evidence held was not evidence contemplated by S. 428 — But Appellate Court, held had power to enquire by report or otherwise what transpired in Magistrate's Court — Appellate Court's enquiry from Magistrate, held not wrong.**

It was alleged in the grounds of appeal that when the Magistrate pronounced judgment, he said that the accused had been sentenced to a fine of Rs. 100 and to a term of three months' simple imprisonment in default and that on the following day he called the accused and told him that he had been sentenced to three months' rigorous imprisonment also. In view of the nature of this allegation, the Appellate Magistrate summoned the Magistrate and recorded evidence from him as to the circumstances under which the judgment was delivered:

Held, that this evidence of the Magistrate could not be regarded as evidence contemplated by S. 428, Criminal P. C., but it was certainly open to the Appellate Magistrate to ascertain by report or otherwise what transpired in the Magistrate's Court, for it was necessary for him to do so in order to properly dispose of the appeal before him. There was nothing wrong in the appellate Magistrate's enquiring what procedure had been adopted in the trial Court. AIR (Vol 29) 1942 Mad 668: 55 LW 517: (1942) 2 MLJ 278: 1942 MWN 581: 44 Cr LJ 5: 203 Ind Cas 461.

**——S. 428 — Appellate Court, if can examine handwriting expert by taking recourse to S. 428.**

The Appellate Court has power to take additional evidence. It can examine the handwriting expert by taking recourse to the procedure laid down in S. 428, Criminal P. C. AIR (Vol 29) 1942 Pat 143: 43 Cr LJ 134: 8 BR 171: 197 Ind Cas 213.

**——S. 428 — Prosecution witnesses not cross-examined after charge — In appeal, accused wishing to bring such evidence before Court — Jurisdiction of Appellate Court.**

Where the prosecution witnesses not having been recalled after charge, have not been cross-examined and the accused is convicted, and if in an appeal by the accused, he wishes that such evidence should be brought before the Court, the Appellate Court has jurisdiction under S. 428, Criminal P. C., to direct that the witnesses should be cross-examined and their evidence submitted to him and then to dispose of the case on receipt of such further evidence. AIR (Vol 25) 1938 Cal 781: 40 Cr LJ 47: 43 CWN 85: ILR (1939) 1 Cal 205: 178 Ind Cas 422 (DB).

**——S. 428 — Failure of trial Court to make use of S. 540.**

Prosecution witness knowing facts likely to turn hostile — Neither party prepared to call him — Duty of the Court is to arrive at truth by all lawful means — It must call such witness and examine him under S. 540 — On its failure to do so, the Appellate Court should avail itself of the power conferred by S. 428. AIR (Vol 25) 1938 Mad 900: 1938 MWN 817: 48 LW 363: 40 Cr LJ 35: 178 Ind Cas 341.

**——Ss. 428, 423 — Power of Appellate Court to call for further evidence.**

Section 423, Criminal P. C., is not exhaustive of the methods by which a Court can deal with an appeal. Section 423 deals with the disposal of an appeal, and S. 428 provides powers for the Appellate Court to call for further evidence before the appeal is disposed of and Appellate Court can direct the taking of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may be given a chance of adducing further evidence. AIR (Vol 24) 1937 Nag 285: 38 Cr LJ 1058: ILR (1937) Nag 541: 171 Ind Cas 262.

——S. 428 — Offence under S. 368, Penal Code — Accused not aware of the first information report — It is the duty of the prosecution to place it before Court — Application under S. 428, Criminal P. C., to Sessions Judge for production of it and for taking additional evidence:

Held, that it was necessary in the interest of justice that additional evidence should be taken by the Sessions Judge. AIR (Vol 22) 1935 All 63: 4 AWR 949:36 Cr LJ 117:1934 ALJ 1234:152 Ind Cas 550.

——S. 428 — There is no general principle of law that where a right of appeal is given but nothing more is said about the powers of the Appellate Court, the Appellate Court cannot direct the taking of further evidence or direct further enquiry and an order made on appeal from an order under S. 19, Fugitive Offenders Act to take further evidence is not regular or ultra vires. AIR (Vol 21) 1934 Mad

55: 1933 MWN 1481: 38 LW 987: 35 Cr LJ 511: 57 Mad 259: 66 MLJ 383: 147 Ind Cas 929 (DB).

——S. 428 — Unimpeachable evidence to show that the deceased mentioned the name of the culprit soon after the occurrence is necessary — No evidence — In interest of justice case may be sent back to Sessions Judge to take evidence under S. 428. ('31) 1931 MWN 731 (DB).

——S. 428 — Prosecution witness was cited and examined in the committing Magistrate's Court. But he was treated as hostile. At the trial Public Prosecutor declined to call him a witness:

Held, that it is fit in the interest of justice for the Sessions Judge to take evidence of the witness under S. 428. ('31) 1931 MWN 731 (DB).

——S. 428 — High Court has power under S. 307 read with S. 428 to call for further evidence. 119 Ind Cas 378: 33 CWN 632: 56 Cal 566: 50 CLJ 1: 30 Cr LJ 1031: AIR (Vol 16) 1929 Cal 244 (DB).

——S. 428 — There is nothing in the provisions of S. 428 to preclude an appellate Court from endeavouring by taking additional evidence to ascertain the value of statement made by a defence witness, or to limit the application of S. 428 to reception of merely formal evidence. 1928 MWN 777: 28 MLW 785: 1 M Cr C 282: 113 Ind Cas 325: 30 Cr LJ 133: 12 AI Cr R 62: AIR (Vol 15) 1928 Mad 1174: 55 MLJ 676.

**——Ss. 428 and 540 — Additional evidence — Power to examine witnesses — Sessions Judge.**

A request was made by the Crown to examine or cause to be examined two witnesses on appeal. These two witnesses had been named in the initial report and had been examined by the Police at an early stage of the investigation but for some unknown reason they had not been examined by the committing Magistrate nor by the Sessions Judge. The Sessions Judge regarded these witnesses as of importance and found their testimony necessary.

Held, that the interest of justice required their examination. It would save time and would tend to expedite matters if these witnesses were examined before the appeals were proceeded with, further. (1920) 2 Lah LJ 349 (DB).

**——S. 428 — Additional evidence — Admission of, by Appellate Court.**

An Appellate Court has power under S. 428 to take additional evidence to supply a formal defect, but the power has to be exercised only when the Court is satisfied that the case is one of formal proof only.

Sadashiva Aiyar J.: — The power of an Appellate Court to take additional evidence under S. 428 should be exercised against an accused only in very exceptional cases. 42 Mad 885 : 37 MLJ 81 : (1919) MWN 669: 20 Cr LJ 455: 51 Ind Cas 343: AIR (Vol 7) 1920 Mad 928 (FB).

**——S. 428 — Retrial — Taking additional evidence.**

Per Sundara Aiyar, J. — An order for retrial under S. 428, will be proper only, if the trial was illegal, irregular, or defective, where the evidence was rejected by the Lower Court improperly; where the Court thinks that the accused acquitted of one offence should have been tried for another offence, and where persons who should not have been tried have been tried; but not where the prosecution fails to produce evidence though bound to produce.

Per Phillips and Benson, JJ.:— The necessity for taking additional evidence must be determined on the particular facts of each case. 36 Mad 457 : 22 MLJ 73 : 10 MLT 506 : (1911) 2 MWN 576 : 12 Cr LJ 585 : 12 Ind Cas 961. (FB).

**——Ss. 428 and 537 — Power of Magistrate under.**

A Magistrate has power under S. 428 only to order fresh evidence to be taken and not a finding. (1911) 9 MLT 406 : 12 Cr LJ 240 : 10 Ind Cas 290.

**——Ss. 428 and 423 — Additional evidence — Admission of.**

An Appellate Court should not rely upon matters not given in evidence before it and should not admit additional evidence without confirming to the terms of S. 428. (1910) 8 MLT 428 : (1910) MWN 829 : 11 Cr LJ 734 : 8 Ind Cas 943.

——Ss. 428, 195 — A District Magistrate has no power to order further inquiry by a Subordinate Magistrate in regard to a matter dealt with by him under S. 195, Cr. P. C. The power to take or call for further evidence, given by S. 428, Cr. P. C., is expressly limited to appeals under Ch. 31 of the Code and does not extend to proceedings under S. 195, Cr. P. C. (1909) 11 Cr LJ 280 (281) : 20 MLJ 102: 33 M 90 (DB).

**——S. 428— Evidence— Further evidence necessary —Appellate Court's duty.**

Where a Sessions Judge on appeal finds that further evidence is necessary to support a conviction, the proper course for it is to proceed under Cl. 1 of S. 428, Cr. P. C. (1904) 31 C 710 (713) (DB).

**(b) Not to cure illegality.**

——S. 428 — The trying Magistrate committed an illegality in not observing the provisions of S. 256, Cr. P. Code, and the Sessions Judge remanded the case directing the Magistrate to allow the accused to cross-examine prosecution witnesses and to record further evidence and to certify it to the Sessions Court.

Held, that the Sessions Court's order was not justified under S. 428. Since the reason given by the Sessions Judge was that an illegality was committed and not that it was desirable for any other reason that further evidence should be recorded. AIR (V 16) 1929 Bom 309 : 53 Bom 578 : 31 Bom LR 593 : 1929 Cr C 130 (DB).

**(c) Not to fill up gaps in prosecution.**

**——S. 428 — Government pleader not producing certain eye-witness — Appellate Court, if can summon him.**

It is true that it is the duty of the prosecution to produce before the Court all eye-witnesses of the occurrence, but if the Government Pleader takes upon himself the responsibility of not producing a certain eye-witness, then it is not the duty of the Appellate Court to fill up the gap in the prosecution evidence by summoning that witness. AIR (V 22) 1935 Oudh 402 : 1935 OWN 592 : 36 Cr LJ 844 : 11 Luck 231 : 155 Ind Cas 753.

**——S. 428 — Order of remand for taking additional evidence must include the setting aside of conviction by the lower Court.**

Where the appellant had been convicted and in appeal his contention that there had not been due compliance with S. 342, Cr. P. Code, was upheld, and the appellate Court directed the lower Court to examine all the accused under S. 342, Code of Criminal Procedure and call upon them to adduce any defence evidence if any, and re-submit the record to the appellate Court,

Held, that the Judge should have set aside the convictions and sentences and remanded the case to the first Court for that Court to deal with the case on its merits as if it were before that Court for the first time. The Judge's procedure was clearly erroneous. AIR (V 12) 1925 Cal 172 : 84 Ind Cas 457 : 40 CLJ 319 : 26 Cr LJ 313 (DB).

**——S. 428 — Order of remand by an Appellate Criminal Court.**

Section 428 does not empower an Appellate Magistrate to call for a fresh finding from the Subordinate Magistrate or to act upon it if submitted. AIR (V 2) 1915 Mad 756 : (1915) MWN 778 : 16 Cr LJ 79 : 26 Ind Cas 671.

**2. Applicability and scope.**

**——S. 428 — Scope — Discretion of appellate Court is not restricted to formal defect.**

If the appellate Court thinks it necessary in the interests of justice to take additional evidence, it shall do so. There are no words in the section limiting it to cases where there has been merely some formal defect. The matter is one for the discretion of the appellate Court. AIR (V 33) 1946 Nag 99: ILR (1945) Nag 809 : 1945 Nag LJ 491 (DB).

**——S. 428 — High Court, whether can allow additional evidence.**

Obiter.— Assuming that the Sessions Judge may not be entitled to direct additional evidence to be taken, the provision of S. 428, Criminal P. C. authorises the High Court to make such an order 'if it thinks additional evidence to be necessary.' AIR (V 22) 1935 Pat 208 : 16 PLT 154 : 36 Cr LJ 1048 (2) : 14 Pat 455 : 1 BR 676 : 156 Ind Cas 1001 (DB).

**——S. 428 — Appeal against order for compensation — Appellate Court may record additional evidence under S. 428.**

Though S. 250 (3) gives the complainant a right to appeal against an order for compensation in certain cases the section does not indicate a forum, which has to be found out by reference to Chap. 31 The appeal would therefore lie under S. 250 (3) coupled with the relevant section in Chap. 31, viz. S. 407 and all the provisions in that chapter including the power to take additional evidence given by S. 428 apply. AIR (V 17) 1930 Mad 483 : 58 MLJ 414 : 123 Ind Cas 809 : 1930 Cr C 507 : 31 MLW 524 : 31 Cr LJ 602 : 1930 MWN 534 : 3 M Cr C 160 (DB).

**——S. 428 — Wording of S. 428 is not restricted to nature of evidence.**

In S. 428 the word "necessary" does not import that it is impossible to pronounce judgment without the additional evidence. S. 375 says that "additional evidence may be taken upon any point bearing upon the guilt or innocence of the convicted person," whereas all that S. 428 (1) says is "in dealing with any appeal the appellate Court if it thinks additional evidence to be necessary, etc." There is no restriction in the wording of the section either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. AIR (V 12) 1925 Mad 106 : 77 Ind Cas 481 : 25 Cr LJ 401 (DB).

——S. 428 — The scope of S. 428 is prima facie not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. (Object of section indicated.) AIR (V 12) 1925 Pat 526 : 88 Ind Cas 595 : 3 Pat LR (Cr) 101 : 6 PLT 431 : 26 Cr LJ 1171.

**——S. 428 — S. 342 does not apply to S. 428 (1) — Per Bucknill, J. — Fresh opportunity to accused to make statement may be essential in some cases.**

In S. 428 of the Code there is no provision that the accused should be examined after the prosecution evidence is taken and as the examination of witnesses after remand may be made even in the absence of the accused the provisions of S. 342 do not apply to it.

Per Bucknill, J. — The Code itself does not contemplate or provide for the examination of the accused after fresh evidence is taken for the prosecution on remand. However, no hard and fast rule can be laid down with regard to when the provisions of S. 342 are and are not properly complied with; in conceivable cases where fresh evidence on a remand has been taken the applicant ought to be given an opportunity of making a statement, i. e., in effect of being examined by the Magistrate; but provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of S. 342, that is of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure of omission in the procedure ought not to be regarded as rendering a trial wholly nugatory. Should such omission of failure be shown to have prejudiced the accused the matter assumes a different aspect and should be remedied, but not otherwise. AIR (V 12) 1925 Pat 414 : 86 Ind Cas 459 : 4 Pat 488 : 6 PLT 154 : 3 Pat LR Cr 110 : 26 Cr LJ 811 : 1925 PHCC 112 (DB).

——S. 428 — The power to take or call for further evidence, given by S. 428, Cr. P. C. is expressly limited to appeals under Cl. 31 of the Code and does not extend to proceedings under S. 195, Cr. P. C. (1909) 11 Cr LJ 280 : 20 MLT 102 : 33 M 90.

3. Non-examination of accused.

**——S. 428 — Non-examination of accused after examination of witnesses — District Magistrate setting aside conviction — Order giving liberty to hear other evidence to 'complete the inquiry'.**

In an appeal from the conviction of two persons, one of the points taken in argument was that the Magistrate had not examined the accused after two witnesses, who were called by the Court, but who must be regarded, in view of their evidence, as witnesses for the prosecution, had been examined when the accused had closed their defence. The District Magistrate held that this irregularity vitiated the trial and he set aside the conviction and sentence and he returned the case to the Magistrate concerned for "completing the inquiry." The District Magistrate noted in his order that "certain documents" which had not been properly proved or explained had been referred to or relied upon by the Magistrate and his order implied that the trying Court was to take further evidence to remedy this defect:

Held, that S. 428, Criminal P. C. allowed the District Magistrate to order the taking of evidence in formal proof of the documents but that so far as the order gave the trial Court liberty to hear other evidence to 'complete the inquiry,' it was improper. AIR (Vol 21) 1934 Lah 316 : 35 Cr L J 1166 : 150 Ind Cas 973.

**——S. 428 — S. 342 does not apply to evidence taken under S. 428.**

Section 342 does not apply to evidence taken under S. 428. In itself S. 342 applies only to case of original trial. There may be cases where the accused can properly be questioned by the Magistrate in regard to additional evidence taken by him under the directions of the appellate Court but if he does not do so there is no omission of anything required by law. AIR (V 15) 1928 Bom 200 : 52 Bom 699: 30 Bom LR 651 : 29 Cr LJ 972 : 11 AI Cr R 247 : 112 Ind Cas 60 (DB).

——S. 428 — A criminal appeal is a continuation of the criminal case and, therefore, the evidence of a co-accused as a witness, although he has not appealed, ought not to be recorded. AIR (V 13) 1926 Lah 309 : 7 Lah 148 : 27 Cr LJ 463 : 27 PLR 327 : 93 Ind Cas 255.

4. Object.

**——S. 428 — Prosecution having failed once, should not be given opportunity to try case all over again.**

The object of S. 428, criminal P. C. is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial. It is not to enable the prosecution, having failed once, to have an opportunity of trying the case all over again. AIR (V 24) 1937 Mad 131: 1936 MWN 1149 (2) : 44 LW 884 : 38 Cr LJ 257 : (1937) 1 MLJ 75 : 166 Ind Cas 623 (2) (DB).

——S. 428 — The scope of S. 428 is prima facie not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the Court, Sub-Inspector or the Magistrate as the vindication of the innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. It is impossible on the plain words of the enactment to differentiate between these two cases. It would not be a sound exercise of discretion to do so in the circumstances of India, where justice when it fails does so by erroneous acquittal at least as much as by erroneous conviction. In India the onus is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the Appellate Court by S. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice: on the contrary, the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. AIR (V 12) 1925 Pat 526 : 88 Ind Cas 595 : 3 Pat LR Cr 101 : 6 PLT 431 : 26 Cr L J 1171.

——S. 428 — **Additional evidence in appeals against acquittal.**

Section 428 allows additional evidence to be taken in appeals against acquittals as well as in appeals against conviction. AIR (V 1) 1914 Mad 628 : 38 Mad 1028 : 26 MLJ 160 : (1914) MWN 273 : 15 Cr LJ 236 : 23 Ind Cas 188 (DB).

——Ss. 428, 437, 439 — **Evidence taking of or direction to take — Jurisdiction.**

Section 437, Cr. P. C., does not authorise a Sessions Judge or a District Magistrate to take evidence or to direct evidence to be taken supplementing the evidence given in the lower court. The Sessions Judge or the Magistrate is authorised to direct a further enquiry but not to take evidence or direct evidence to be taken. Under S. 428 an appellate court dealing with an appeal may direct additional evidence to be taken or itself record such evidence. The High Court, under S. 430 of the Code, has power as an appellate court to direct evidence to be taken. (1907) 6 CLJ 251 (252) : 6 Cri L Jour 357 (DB).

### 5. Reasons to be recorded.

——S. 428 — **Additional evidence — Power of appellate Court to admit — Reasons — If to be separately recorded — Reasons found in judgment — Sufficiency.**

The Cr. P. Code, permits the appellate Court to take evidence in the appellate stage. S. 428 of the Code provides for such evidence being taken. It is not necessary that the reasons for taking or admitting evidence should be recorded separately; it is enough if the reasons are found in the judgment or if it is clear from the order sheet that before admitting the evidence the Court heard arguments and then came to a decision after considertion. (1947) 230 Ind Cas 412 : 48 Cr LJ 632.

——S. 428 (1) — **Appellate Court's power to remand case for re-trial with condition to consider evidence already on record.**

The lower Appellate Court has no power to order a re-trial with the condition that the evidence already on record should be taken into consideration. If there is to be a re-trial, the accused is entitled to demand that there shall be a de novo trial. Under S. 428 (1), Criminal P. C., if the Appellate Court thinks that additional evidence is necessary, it may, after recording its reasons, either take such evidence itself, or direct it to be taken by a Magistrate. If it thinks that further evidence is necessary, it should proceed under that sub-section. AIR (V 22) 1935 Nag 125 (2) : 36 Cr LJ 740 (2) : 31 NLR 246: 155 Ind Cas 258.

——S. 428 — Where the omission of the appellate Court to record reasons for taking additional evidence under S. 428 does not cause a failure of justice the proceedings are not vitiated. AIR (V 17) 1930 Mad 483 : 58 MLJ 414 : 123 Ind Cas 809 : 1930 Cr C 507 : 31 MLW 524 : 31 Cr LJ 602 (DB).

——S. 428 — **Prosecution under Bombay Abkari Act — Conviction on a report of an Excise Analyst — Report inadmissible — Appellate Court can order examination of the Excise Analyist as a witness.**

In a trial of an offence under S. 43 (1) (a) of the Bombay Abkari Act, 1878, the report of the Excise Analyst that one bottle which had been sent to him contained cocaine and that some other things contained no cocaine, was tendered in evidence, and upon this evidence the accused was convicted. On appeal the Sessions Judge held that the report of the Excise Analyst was inadmissible in evidence and, therefore, proposed to have the Excise Analyst examined under S. 428, Cr. P. Code.

Held, that this was a case where the provisions of S. 428, Cr. P. Code, could properly be availed of in order to have legal evidence as to the contents of the bottle. AIR (V 15) 1928 Bom 241 : 112 Ind Cas 110 : 30 Bom LR 646 : 52 Bom 686 : 29 Cr LJ 990: 11 AI Cr R 243 (DB).

——S. 428 — **Trial by jury — Medical evidence not given viva voce before jury — Trial invalid — High Court refused to examine or order examination of doctor.**

In cases of murder or of a man-slaughter it is unreasonable to expect the jury to convict if a proper exposition and explanation of the medical evidence is not given viva voce by a doctor who can deal with the matter and satisfy the jury. The jury are quite entitled to be fully satisfied. Until one has gleaned all the facts that one can get from the medical reports, one is not really in a position to say what part of other evidence can be relied upon. Where the medical evidence was not given, the High Court refused to examine or order examination of the doctor under S. 428. AIR (V 16) 1929 Cal 244: 33 CWN 632 : 56 Cal 566 : 50 CLJ 1 : 30 Cr L J 1031 : 119 Ind Cas 378 (DB).

——S. 428 — **Prosecution can be allowed to give further evidence if justice requires.**

Intention of the Legislature was to empower an appellate Court to see that justice is done between the prosecutor and the person prosecuted, and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this section and allow prosecution to give further evidence. But it must record its reasons for taking such action. AIR (V 13) 1926 Lah 309 : 7 Lah 148 : 27 Cr LJ 463 : 27 PLR 327 : 93 Ind Cas 255.

——Ss. 428 and 537 — **Power of Magistrate under.**

His omission to state his reasons for the order of fresh evidence is cured by S. 537. (1911) 9 MLT 406 : 12 Cr LJ 240 : 10 Ind Cas 290.

——Ss. 428 and 540 — **Power of Appellate Court to take additional evidence.**

Under S. 428, powers of a Criminal Appellate Court are not analogous to those conferred on a Civil Appellate Court, under C. P. C. A Court of Criminal Appeal can take additional evidence at any time on recording reasons for doing so. 8 MLT

418 : (1910) MWN 819 : 11 Cr LJ 511 : 8 Ind Cas 145.

**6. Re-hearing of appeal—Application for transfer.**

**——S. 428 — Sessions Judge hearing appeal from decision of Assistant Sessions Judge in trial with aid of assessors — Additional evidence — Sessions Judge forming opinion as to guilt of accused on such evidence — Re-hearing — Transfer to another Judge.**

It is only when the Court of Session is setting to hear an appeal from a judgment of a Magistrate, that it has got power under S. 428 of the Criminal P. C. to record additional evidence itself, or direct it to be taken by a Magistrate, and it is only the High Court, which is the Appellate Court of the Court of Session that can, under S. 428 of the Code, direct a Court of Session or a Mgistrate to record additional evidence in a case pending before it in appeal. The Sessions Judge is not justified by the provisions of S. 428, Criminal P. C., in recording additional evidence while deciding an appeal against the judgment of the Assistant Sessions Judge who tried the case with the aid of assessors. Such evidence is not legally admissible and the accused cannot legally be convicted upon that evidence.

When once a Sessions Judge has formed an opinion as to the guilt of the accused upon the additional evidence recorded by him, it is desirable that a re-hearing of the appeal is not made before the same Judge. An application for transfer to another Court should, in the circumstances, be granted. AIR (V 22) 1935 Oudh 402 : 1935 OWN 592 : 36 Cr LJ 844 : 11 Luck 231 : 155 Ind Cas 753.

**7. Revision.**

**——S. 428 — Order allowing additional evidence will not be interfered with in revision except in case of error of law affecting merits of the case.**

The Court of Revision will not interfere with an order of the appellate Court allowing additional evidence even where it might itself in the exercise of its discretion as the Appellate Court, have declined to admit additional evidence. To justify interference in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. AIR (V 12) 1925 Pat 526 : 88 Ind Cas 595 : 3 Pat LR Cr 101 : 6 PLT 431 : 26 Cr LJ 1171.

**8. Sub-section (4).**

**——Ss. 428, 423, 342 — Appellate Court finding documents were not proved and examination under S. 342 was not satisfactory — Setting aside conviction and sending case back for further evidence but not for complete trial.**

Where in an appeal in a criminal case, the Appellate Court finds that some documents which had been marked as exhibits had not been proved according to law, and that the examination of the accused under S. 342, Criminal P. C. had not been satisfactory and that the accused should be examined afresh, there are two courses open to the Judge. He can either proceed under S. 428, Criminal P. C., that is to say, keep the appeal pending on his own file while directing additional evidence to be taken by a Magistrate and duly certified to the Appellate Court which would then dispose of the appeal under S. 428, cl. (2). In ordering additional evidence to be taken, it would be quite proper to direct a further examination of the accused at the same time. Or he can under S. 423 of the Code, set aside the conviction and order the accused to be re-tried by a Court of competent jurisdiction. Such a re-trial, if ordered, would be a de novo trial. But an order setting aside the conviction and sending the case back for further evidence and not for complete trial is illegal. AIR (V 23) 1936 Pat 438 : 17 PLT 444: 2 BR 715 : 37 Cr LJ 906 : 164 Ind Cas 184 (1).

**——S. 429.**

**——S. 429 — Reference under — Scope of enquiry — Duty of third Judge.**

There can be no doubt upon the wording of S. 429, Cr. P. Code, that on a reference made under that section to a third Judge, the whole case is before him, which means not only that he is at liberty, but that it is also his duty to examine the whole of the evidence for himself and come to a final judgment. It is not a case of merely weighing the opinion of one Judge against that of the other and deciding which of these opinions he should accept. ILR (1949) 1 Cal 43 (DB).

**——S. 429 — "Judgment or order" which has to follow the opinion of the third Judge — If can be pronounced by a Bench different from that which originally heard the appeal.**

After an opinion has been given by a third Judge to whom a case has been referred under the provisions of S. 429, Cr. P. Code (read with Cl. 29 of the Letters Patent (All.)), the "judgment or order" which has to "follow such opinion" can be pronounced by any Bench of the Court. It cannot be said that it should be pronounced only by the Bench which originally heard the appeal. AIR (V 35) 1948 A 237 : ILR (1948) All 181 : 1948 AWR (HC) 7 : 1948 ALJ 102 : 1948 ALW 152 : 1948 OA (HC) 7 : 49 Cr LJ 264 (DB).

——S. 429 — Under S. 429, Criminal P. C., the case laid before a third Judge is the complete case of the prisoner as to whom the Judges are divided in opinion. It is his duty to consider all the points involved before he delivers his opinion upon the case. AIR (V 34) 1947 Lah 244 : 48 Pun LR 342.

**——S. 429 — Judges hearing appeal disagreeing as to case of some of appellants.**

Where the Judges composing the Court of Appeal disagree as regards the case of some of the appellants, it is only the case of those particular appellants which need be referred to a third Judge under S. 429 and not the whole case. AIR (V 30) 1943 All 272 : 1943 ALJ 172 : 1943 AWR (HC) 110 : ILR (1943) All 82 : 44 Cr LJ 765 : 208 Ind Cas 262 (DB).

**——S. 429 — Difference of opinion — Whether whole case is open.**

Per Addison, J. — The case laid before a third Judge under S. 429, Criminal P. C., is the complete case in so far as the two Judges who first heard the appeal have differed as regards particular appellants but not the case of the other appellants as to whom they did not differ. AIR (V 18) 1931 Lah 513: 32 Cr LJ 868 : 132 Ind Cas 381 (DB).

——S. 429 — Per Wild, A. J. C. — Where a case is referred to a third Judge on difference, he should not differ from the other two unless there is a mistake of law, or some fact which tells in favour of the accused has escaped notice or in short unless there are strong grounds for so doing. AIR (V 17) 1930 Sind 225 : 1930 Cr C 865 (DB).

——S. 429 — A third Judge to whom reference is made, cannot make a reference to a Full Bench. AIR (V 12) 1925 Cal 1040 : 86 Ind Cas 979 : 41 CLJ 357 : 29 CWN 475 : 26 Cr LJ 915 (FB).

**——S. 429 — Reference to third Judge.**

The third Judge to whom a case is referred will not differ on a point on which both the referring Judges agree. AIR (V 6) 1919 Cal 862 : 22 CWN 745 : 28 CLJ 32 : 19 Cr LJ 753 : 46 Ind Cas 593 (FB);

See however (1911) 38 Cal 202 : 12 CLJ 294 : 15 CWN 18 : 11 Cr LJ 515 : 7 Ind Cas 641 (FB).

**——S. 429 — Opinion of third Judge.**

Per Mookerjee J.:— Where the judges composing the court of appeal are equally divided in opinion upon the question of the guilt of an accused person,

though upon certain aspects of the case they may be agreed, the case will go before another judge whose duty it will be to consider the whole case and all the points involved and it will be according to the opinion of such judge that the judgment will follow. (1910) 12 CLJ 294 : 7 Ind Cas 641 : 15 C WN 18 : 11 Cri L Jour 515 (FB).

——S. 430.

See also, Criminal P. C., S. 417.

——S. 430 — Section 369, Criminal P. C., must be read with S. 430 of the Code. AIR (Vol 26) 1939 Rang 392: 41 Cr LJ 108: 1940 Rang LR 145: 185 Ind Cas 142.

——S. 430 — Section 439 (6) does not destroy the finality of the judgments of appellate Court given by S. 430. AIR (Vol 23) 1936 Sind 233: 38 Cr LJ 114: 165 Ind Cas 933 (DB).

——S. 430 — Where an appeal was presented before the Sessions Judge, who, on finding that there was no copy of the judgment along with the appeal memo, granted time to the accused to file a copy of the judgment, and on the expiry of the period, passed an order dismissing the appeal as no steps had been taken to complete the appeal by filing a copy of the judgment:

Held, that the order was one of rejection of the appeal for non-compliance with the provisions of S. 419, Criminal P. C., and not one of dismissal, and did not come under S. 421. The order could not be held to be an order amounting to a judgment within the meaning of S. 369, Criminal P. C., and did not prevent the Court from considering the appeal on the merits. AIR (Vol 21) 1934 All 206: 35 Cr LJ 441 : 1934 ALJ 329 : 56 All 299 : 4 AWR 516 : 147 Ind Cas 347 (2).

**——S. 430 — Principles, if apply to judgment in revision.**

Even though S. 430, Criminal P. C., does not apply to judgments in revision applications, the principle of finality of judgments there laid down must apply to judgments in revision applications also. AIR (Vol 21) 1934 Bom 471: 36 Bom LR 954: 36 Cr LJ 351: 153 Ind Cas 525 (DB).

——S. 430 — The exception in S. 430, Criminal P. C., as regards the cases provided for in S. 47 and Chap. XXXII, covers the power of enhancement of sentence.

The provisions of S. 369, Criminal P. C., should be read subject to the provisions of S. 430 of the Code. AIR (Vol 20) 1933 All 485: 1933 ALJ 957: 34 Cr LJ 1205: 55 All 715: 146 Ind Cas 157 (DB).

**——S. 431.**

**——S. 431 — Criminal appeal, if abates on death of appellant, when appellant is sentenced to pay fine.**

Ordinarily, a criminal appeal abates on the death of the appellant. Section 431 of the Criminal P. C., has, however, been amended so as to provide that this rule will not apply when the appeal is from a sentence of fine. The fines imposed on the deceased may, if the convictions are allowed to stand, be realized from his legal representatives. It is undesirable that this should be so, when there is no more reason to maintain his convictions. AIR (Vol 28) 1941 Pat 526: 42 Cr LJ 653: 7 BR 890: 195 Ind Cas 126.

**——S. 431 — Interference of High Court in pending cases — Alleged offence not committed within jurisdiction of Court where complaint is filed — Duty of High Court.**

Although the High Court will interfere in pending cases only in extraordinary circumstances, if on the face of the complaint, the offence alleged against an accused person appears not to have been committed within the jurisdiction of the Court in which the complaint is filed, then it would certainly be the duty of the High Court to interfere and save waste of public time and needless expense. AIR (Vol 20) 1933 Sind 88: 34 Cr LJ 364: 142 Ind Cas 590 (DB).

**——Ss. 431 and 439 — Death of accused pending revision — Sentence of fine.**

The principle of S. 431 is applicable to revision. No revision can be entertained against a sentence where the accused has since died, except a sentence of fine. AIR (Vol 6) 1919 Lah 347: 95 PLR 1918: 10 PWR Cr 1919 : 20 Cr LJ 214: 8 PR Cr 1919: 49 Ind Cas 774.

**——S. 432.**

**——S. 432 — Power to make reference under, where Presidency Magistrate doubts the correctness of the decisions of the High Court.**

S. 432, Cr. P. Code, does not give the Presidency Magistrates power to refer points of law settled by decisions of the High Court, where they doubt the correctness of those decisions. ILR (1948) 2 Cal 117: 52 CWN 369 (DB).

**——S. 432 — Reference cannot be directed.**

Per Beaumont, C. J.— The High Court has no jurisdiction to direct the Magistrate to state a case under S. 432, if in his discretion, he does not desire to do so, and in any case, the High Court cannot direct him to state a case after recording an order of acquittal. AIR (Vol 31) 1944 Bom 107: 46 Bom LR 70: 45 Cr LJ 612: ILR (1944) Bom 302: 212 Ind Cas 396 (FB).

**——S. 432 — Making of reference in form which involves giving decision on law divorced from facts is undesirable.**

Although the Presidency Magistrates have, under S. 432, Criminal P. C., the power to refer for the opinion of the High Court any question of law which arises at the hearing of any case pending before them, it may be undesirable to make the reference in the form which involves giving a decision on law, divorced to some extent from the facts. The more desirable course is for the Magistrate to use the second part of S. 432, Criminal P. C. By adopting this course, duplicity of hearing in both Courts would probably be avoided and all the facts would be before the High Court once for all. AIR (Vol 26) 1939 Cal 529: ILR (1939) 2 Cal 411: 69 CLJ 599: 43 CWN 950: 40 Cr LJ 782: 183 Ind Cas 349 (SB).

**——S. 432 — Authority on point.**

It is not open to a Presidency Magistrate under S. 432 to refer a point of law which is covered by an authority binding on him. AIR (Vol 17) 1930 Bom49: 31 Bom LR 1349: 1930 Cr C 113: 54 Bom 146: 31 Cr LJ 633 (DB).

**——S. 432 — Scope.**

Reference by Presidency Magistrate under S. 432 is confined to question of law necessary to dispose of case before him. AIR (Vol 16) 1929 Cal 756: 50 CLJ 408: 34 CWN 13: 1929 Cr C 468 (FB).

**——S. 432 — Powers of superior Magistrate — Superior Magistrates can interfere only under Chap. 32 or by withdrawal.**

Where a Magistrate has once become properly seised of a case by transfer or otherwise he is seised of the whole matter and a superior Magistrate cannot take action except under Chap. 32 or by withdrawal of the case to his own Court. AIR (Vol 16) 1929 Cal 457: 49 CLJ 378: 33 CWN 454: 57 Cal 17: 1929 Cr C 91 (DB).

**——S. 432 — Applicability — District Magistrate has no power to make a reference under S. 432.**

A District Magistrate has no power under S. 432 to refer a case for opinion to the High Court as it only applies to Presidency Magistrates. AIR (Vol 15) 1928 Sind 69: 28 Cr LJ 978: 22 SLR 201: 9 AI Cr R 154: 105 Ind Cas 802 (DB).

**——S. 433.**

——S. 433 — A Court of reference in S. 522 (3), Criminal P. C., can only be interpreted as meaning a Court which has the power to refer, and that is only a Court empowered under S. 433. AIR (Vol 27) 1940 Lah 95: 41 Cr LJ 458: 43 PLR 534: ILR (1941) Lah 377: 187 Ind Cas 407.

**——S. 434.**

**——S. 434 — Autrefois acquit — Plea of law.**

Held, that the plea of 'autrefois acquit' arose "in the trial" or "in the course of the trial" according to Cl. 25, Letters Patent (Mad.) or S. 434 and was taken at proper time and that the trial Judge was entitled to reserve the question if he thought fit as a point of law which had arisen in the trial. AIR (Vol 23) 1936 Mad 353: 43 MLW 548: 1936 MWN 281: 70 MLJ 635: 37 Cr LJ 637: 162 Ind Cas 592 (2) (FB).

**——S. 434 — High Court, if can alter or review its own judgment.**

A High Court has no power to alter or review its own judgment in a criminal case, once it has been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error. The High Court cannot review a judgment passed by the Bench which heard the appeal. The proper course is to file an appeal. AIR (Vol 23) 1936 Nag 132: ILR (1936) Nag 99. 38 Cr LJ 390: 167 Ind Cas 465 (DB).

**——S. 434 — Scope — Conviction under Arms Act — Alteration into conviction under Explosives Act.**

It would not be fair in revision to alter a conviction under the Arms Act to one under the Explosives Act. AIR (Vol 18) 1931 All 17: 1930 ALJ 1467: 1931 Cr C 33.

**——S. 434 — Form of reference.**

The question referred to the Full Bench was whether 44 M 913 was correctly decided.

Held, this is not a desirable form of reference to a Full Bench because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full Bench is desired should be formulated. AIR (Vol 10) 1923 Mad 523: 44 MLJ 655: 46 Mad 605: 24 Cr LJ 599: 17 MLW 592: 32 MLT 352: 1923 MWN 425: 73 Ind Cas 343 (FB).

**——S. 435.**

See also Cr. P. C., S. 439.

1. Applicability and Scope.
2. Grounds of interference.
3. Inferior Court — Illustrations.
3A. Inferior Court — Duty of.
4. Jurisdiction.
5. Judicial orders.
6. Interpretation.
7. Powers of District Magistrate.
8. Powers of High Court.
9. Proceeding under Ss. 144, 176, Chapter XII etc.
10. Reference.

1. Applicability and Scope.

——S. 435 — There is no right conferred by the statute on any of the aggrieved parties to make a further application for revision against the order passed by the Sessions Court in revision of the order passed by the Magistrate on appeal, against a notice of demand, under S. 110, Bombay City Municipalities Act. AIR (Vol 15) 1928 Bom 376: 112 Ind Cas 585: 30 Bom LR 1084: 29 Cr LJ 1081 (DB).

**——S. 435 — Scope.**

S. 438 must be read with S. 435. AIR (Vol 14) 1927 Sind 45: 21 SLR 48: 27 Cr LJ 1253: 98 Ind Cas 101 (DB).

——S. 435 — Orders passed under the Upper Burma Ruby Regulations of 1887, S. 6 are within the scope of the Cr. P. Code as regards appeal and revision though no provision is made in the Regulation for an appeal or revision. AIR (Vol 12) 1925 Rang 12: 84 Ind Cas 433: 2 Rang 321: 3 Bur LJ 168: 26 Cr LJ 289.

——S. 435 — The section does not deal merely with "finding, sentence or order", but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceeding for the purpose of satisfying itself as to the regularity of such proceeding. AIR (Vol 12) 1925 Mad 39: 47 MLJ 373: 81 Ind Cas 785: 47 Mad 722: 20 MLW 234: 35 MLT 77: 1924 MWN 556: 25 Cr LJ 1009.

——S. 435 — An application for revision of an order under S. 476 is not entertainable under the provisions of Ss. 435 and 438, Cr. P. Code. 66 Ind Cas 68: 23 Cr LJ 228: 24 OC 367: AIR (Vol 9) 1922 Oudh 220.

**——Ss. 435 and 439 — Scope of — Sections to be read together.**

S. 439 is to be read along with and subject to S. 435. If a case is outside S. 435, S. 439 cannot apply to it. AIR (Vol 7) 1920 Cal 417: 47 Cal 438: 31 Cal LJ 183: 24 CWN 97: 21 Cr LJ 25: 54 Ind Cas 169 (DB).

**——Ss. 435 and 439 — Scope of — Revisional powers of High Court.**

In considering if certain proceedings are subject to revision, S. 439 should be read with S. 435, and in the former section which does not in any way qualify the latter, words 'the record of which has been called for by itself' are not to be in contradistinction to the words 'which otherwise comes to its knowledge'. There is no ground for construing the latter clause so to refer to a petitioner. AIR (Vol 4) 1917 Oudh 400: 3 OLJ 546: 19 OC 136: 18 Cr LJ 100: 37 Ind Cas 308 (DB).

**——Ss. 435, 437 and 439 — Scope of — Interdependence.**

The Sections 437 and 439 must be taken together and read with S. 435, and a summoning of the record is a necessary preliminary to an action under Sections 437 or 439. AIR (Vol 1) 1914 Oudh 225: 17 OC 25: 15 Cr LJ 217: 22 Ind Cas 1001 (DB).

——Ss. 435 (4) and 438 — Scope of.

S. 435 (4) applies to all cases when a District Magistrate or a Sessions Judge has taken or has refused to take action under Sections 435 to 438 of the Code. 'Further application' in S. 435 (4) means any other application in respect of the order in question of the inferior Court. 10 PR 1912 Cr: 14 Cr LJ 134 : 117 PLR 1913 : 18 Ind Cas 886 (DB).

2. Grounds of interference.

(a) General.
(a-1) Incorrect findings.
(b) Misappreciation of evidence.
(c) Miscarriage of justice.
(d) Withdrawal at the instance of complainant.

(a) General.

——Ss. 435, 439 — Application by third party.

An application filed by a third party who is a total stranger to the criminal proceedings and has no locus standi to invoke the jurisdiction of the Court is merely a miscellaneous application filed for the sole purpose of bringing the facts to the knowledge of the Court, and in such proceedings, his Counsel should not expect to be heard.

An application in revision would not be entertainable, if the accused has failed to avail himself of his right of appeal, but the Court can receive information or knowledge from a third party and act upon it of its own accord. AIR (Vol 20) 1933 All 678: 34 Cr LJ 1115: 1933 ALJ 1059: 56 All 158: 145 Ind Cas 977 (FB).

——S. 435 — Revision — Grounds.

Revision on the assumption that the Sub-Magistrate is a better Judge of fact than the Sub-Divisional Magistrate cannot be granted. AIR (Vol 15) 1928 Mad 369: 108 Ind Cas 80: 29 Cr LJ 325: 1 M Cr C 125.

——S. 435 — The High Court will not interfere in revision on a mere question of motive for the offence which is at best guess-work. AIR (Vol 14) 1927 Mad 613: 100 Ind Cas 991: 28 Cr LJ 383: 26 MLW 33.

——Ss. 435 (1) and 439 — Order of Discharge — Not to be lightly set aside.

An order of discharge on the ground that the complainant does not produce any evidence cannot be set aside if it is neither manifestly perverse nor foolish nor is based upon an obviously incomplete record. Criminal Courts are not to be used to compel an adverse party to settle disputes to one's satisfaction. AIR (Vol 2) 1915 Lah 388: 19 PWR (Cr) 1915: 16 Cr LJ 662: 30 Ind Cas 646.

(a-1) Incorrect findings.

——Ss. 435 and 439 — Interference in revision — Principles governing — Findings of fact.

In revision it would not be proper for the High Court to substitute its own appreciation of the evidence in place of that of the Courts below. The mere fact that if it had tried the case it could have come to a different conclusion from the facts would be no ground for interference with a finding of fact. The distinction between revision and appeal must be maintained and a revisional proceeding should not be converted into an appeal. Unless there is something palpably wrong with the finding of fact which is backed by evidence, a revisional Court should not interfere with it. The finding of fact which is backed by evidence, a revisional Court should not interfere with it. The finding of fact must be so wrong that it can be described as improper. If it could be reasonably arrived at, it cannot be said to be wrong or improper. 1949 ALJ 520.

——S. 435 — Purpose of calling for record under S. 435, explained.

Per Khundkar J.—The record is not to be called for under S. 435, merely to satisfy the Court's curiosity, but it is to be called for in order that the Court may, after examination, take measures to correct by revision what may be incorrect, illegal or improper in something or things which the record contains or discloses. The operation of revising, calls for the exercise of powers. AIR (Vol 31) 1944 Cal 17: 45 Cr LJ 309: ILR (1944) 2 Cal 1: 48 CWN 113: 211 Ind Cas 177 (FB).

——S. 435 — Finding of fact, when can be interfered with.

The High Court does not interfere with findings of fact except in exceptional cases such as where the lower Courts have approached the case from a wrong point of view and the evidence produced has not received due consideration, where the circumstances mentioned in Bhuneshwari Pershad v. King-Emperor, 132 Ind Cas 234 exist, where the findings of fact are not based on evidence on the record and are proved to be wrong from the record itself, where the judgment of the lower Court is palpably wrong, where there has been a miscarriage of justice or where the case appears to be doubtful against the accused and the benefit of doubt has not been given. AIR (Vol 29) 1942 Oudh 473: 1942 OWN 485: 43 Cr LJ 830: 1942 AWR 295: 18 Luck 408: 202 Ind Cas 382.

——S. 435 — Section 435 does permit interference on the ground not merely of the illegality but also on the ground of the impropriety of a finding. AIR (Vol 14) 1927 All 647: 8 LRA Cr 132: 8 AI Cr R 290: 25 ALJ 975: 28 Cr LJ 967: 105 Ind Cas 679.

(b) Misappreciation of evidence.

——Ss. 435 and 436 — Power of Court of revision to direct further enquiry — Discharge by trial Court of one of the six accused charged under S. 430, I. P. Code — Sessions Judge setting aside discharge order and directing further enquiry on the ground that fresh evidence was available — Propriety of course adopted.

The petitioner, one of the six accused, charged under S. 430, I. P. Code, was discharged by the trial Judge. The order of discharge was set aside on application to the Sessions Judge and further enquiry was ordered. The Sessions Judge based his order on the ground that fresh evidence was available which would establish the fact of instigation on the part of the petitioner and that in view of that circumstance, the matter should be re-opened and enquired into afresh. In revision,

Held, such a course was not ordinarily to be adopted by a revision Court. As pointed out by Sankaran Nair, J., in 18 MLJ 57: 31 Mad 133, "a power to order what is practically a re-trial, to give a complainant another opportunity of re-examining witnesses and adducing fresh evidence ought not to be presumed, as it would be unjust to the accused and open wide the door to perjury and corruption". In the circumstances, as it was open to the complainant to file a fresh complaint against the petitioner on the same averments and to make the

fullest use of the fresh evidence available, there was no sufficient or special ground to set aside the order of discharge and to direct fresh enquiry. AIR (Vol 34) 1947 Mad 307: (1947) 1 MLJ 150: 1947 MWN 162: 60 LW 142.

——**S. 435 — Revision against order of Sessions Judge refusing to direct further enquiry — What Crown must show.**

In order to succeed in application for revision against an order of Sessions Judge refusing to order further inquiry, it is for the Crown to show that the Magistrate has passed an order amounting to the dismissal of a complaint or the discharge of an accused person.

A complaint was a simple complaint of cheating the complainant. There was, however, mention in the complaint of S. 489-A/120 of the I.P.C., but that was a matter of which the Magistrate did not find any evidence. Nothing was said in the petition about conspiracy and no reference was made to S. 120-B. This petition was referred to the Police for investigation and report and the Sub-Inspector reported "the charge is well proved against the accused under S. 490, I. P. C." There was nothing in the Police report about any conspiracy. A petition to compromise the case was made by the parties and the Magistrate granted permission to complainant to compound the case and acquitted the accused under S. 345 (2), Criminal P. C. The Public Prosecutor objected to the compromise on behalf of the Crown on the ground that one Z, the accused and some others had formed a conspiracy and were cheating people and that framing of a charge under S. 120-B was necessary :

Held, that in the circumstances in which the case was put forward by the prosecution there was no ground for interference in revision unless and until there was placed before the Magistrate either a fresh complaint or a Police report of facts amounting to an allegation of the offence for which it was sought to put either Z or the accused or both on trial. AIR (V 29) 1942 Pat 58 : 22 PLT 825 : 8 BR 54 : 43 Cr LJ 44 : 196 Ind Cas 604 (DB).

——S. 435 — Decision of subordinate criminal Court on a point of admissibility of a piece of evidence is not revisable. 1936 MWN 1094 (2).

——S. 435 — High Court is precluded from interfering if finding has some basis in some evidence. AIR (Vol 16) 1929 All 587: 117 Ind Cas 346: 1929 ALJ 775: 10 LRA Cr 105: 30 Cr LJ 756: 12 AI Cr R 107: 1929 Cr C 176.

——**Ss. 435 (2) and 439 — Dismissal order.**

Where a Magistrate after hearing all the evidence for the prosecution and thoroughly discussing it, dismisses the charge, a High Court should not set aside the order of dismissal and direct further inquiry unless new and cogent evidence is forthcoming. (1909) 18 PWR 1909 Cr: 11 Cr LJ 110: 4 Ind Cas 990.

——**S. 435 — High Court — Revisional powers — Penal Code, S. 124-A — Sedition — Attempt to publish sedition — Intention in sedition — Question of fact.**

It is the settled practice of the High Court to refuse to interfere in the exercise of its revisional jurisdiction in regard to findings of fact except on very exceptional grounds, such as mis-statement of evidence by the lower Court, or the mis-construction of documents, or the placing by that court of the onus of proof on the accused contrary to the law of evidence. (1909) 11 Cr LJ 180: 12 BLR 21: 5 Ind Cas 612: 34 B 378 (380) (DB).

——**Ss. 435 (1) and 439 — Revision — Questions to be determined.**

The High Court can interfere in revision with a judgment of acquittal passed by a Sessions Judge on the ground of misappreciation of evidence. (1909) 5 MLT 258 : 11 Cr LJ 195 : 4 Ind Cas 1133.

——**Ss. 435 (1) and 437 — Order of discharge — Misappreciation of evidence by a Magistrate — Further enquiry.**

The Sessions Judge may direct further enquiry if in his opinion, misappreciation of evidence led to incorrect or improper order of discharge. (1909) 32 Mad 214: 5 MLT 356: 10 Cr LJ 299: 3 Ind Cas 488 (DB).

——**S. 435 (1) — Order of discharge — District Magistrate.**

The District Magistrate has power to order further enquiry in cases of discharge by Subordinate Magistrates on the ground of incorrect appreciation of evidence. (1909) 6 MLT 157: 10 Cr LJ 218: 3 Ind Cas 28.

——**S. 435 — High Court's powers in revision.**

The High Courts can, under S. 435, Cr. P. C., interfere in revision where there appears misreading of the documentary evidence and fundamental errors in principle which vitiate the conduct and disposal of the case. (1904) 6 Bom LR 324 (341): 28 B 479 (DB).

**(c) Miscarriage of justice.**

——**Ss. 435 and 439 — Revision against acquittal at the instance of a private party — Technical offence — Ordering re-hearing — Not justified.**

The High Court in a revision against an acquittal at the instance of a private party would not order a re-hearing of the case especially where the offence is a technical and insignificant one and the parties are very near relations. AIR (Vol 35) 1948 Mad 477: 49 Cr LJ 716: (1948) 1 MLJ 395: 61 LW 387 (1): 1948 MWN 353 (1).

——**Ss. 435, 439 — Death sentence proper but only transportation awarded — Rule to enhance sentence.**

In cases where the death sentence is not involved, the Court of Revision is not authorised to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by Judge or to a misunderstanding on the part of the jury of the law as laid down by him. But in cases where the death sentence is the proper sentence if the accused is guilty, the Court of Revision, on a rule to enhance the sentence, has all the powers that it would have if the appropriate sentence had been passed by the Sessions Court and a reference made under S. 374, Criminal P. C.

Per Khundkar, J.—The words "the correctness, legality or propriety of any finding, sentence or order" and the words "the regularity of any proceedings" in S. 435, Criminal P. C., and the words "may in its discretion exercise", in S. 439, do not throw the door open for the exercise of any power or jurisdiction, but generally speaking, only of such as have received recognition in practice. In regard to the final finding in a jury trial, the High Court will convert itself into a Court of Appeal, and look at the question only as a Court of Appeal must, subject, of course, to the express words of S. 439. In so doing, the High Court will exercise the powers given to a

Court of Appeal by S. 423, and expressly by S. 439, and those only. The High Court will not exercise powers which are merely implied by Ss. 435 and 439. Hence, in a case in which an accused person has been called upon to show cause why the sentence should not be enhanced to a capital sentence in accordance with the procedure laid down in S. 439, Criminal P. C., such person has not the right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case.

Per Sen, J.—The High Court dealing with a cause shown under S. 439 (6) against a conviction, has the power to go into facts in every case whether tried by the jury or not, and to set aside the verdict of a jury on the ground that the appreciation of the evidence by the jury is wrong. It will, of course, give due weight to the opinion of the jury regarding the facts, but after doing so, it has the power to set aside verdict if it is of opinion that the verdict cannot be supported on the facts. The powers of the Revisional Court are, therefore, not bounded by S. 439 (1).

When a person convicted of murder and sentenced to transportation for life shows cause against his conviction by taking advantage of the provisions of S. 439 (6) he may demand that the verdict of the jury be altered, reversed or set aside on the ground that it is wrong on facts even though there has been no misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge or any other error of law. A convicted person would have this right not only in cases of murder but in every case. AIR (Vol 31) 1944 Cal 17: 48 CWN 113: ILR (1944) 2 Cal 1: 45 Cr LJ 309: 211 Ind Cas 177 (FB).

——S. 435 — Revision.

Where the prosecution has not been prejudiced by the trial Court not taking the statement of the witnesses produced by the prosecution in evidence under S. 33, Evidence Act, it is no ground for interference in revision. AIR (Vol 29) 1942 Oudh 130: 1941 OWN 1290: 1941 AWR (CC) 397: 43 Cr LJ 280: 197 Ind Cas 839.

——Ss. 435, 439 — Acquittal — Interference.

Before the High Court interferes with an acquittal, the prosecutor must make out strong and cogent grounds to justify interference. In Oudh, it is a well-established practice that the Court is loath to interfere in such cases and the power of interference is exercised, if it is proved without any doubt, not only that the accused person is guilty, but that he has been acquitted on unreasonable grounds. ('33) 146 Ind Cas 523 (1) : 10 OWN 999 : 35 Cr LJ 416.

——Ss. 435, 439 — Powers of revision of High Court under — Discretion — Prevention of substantial injustice — Point of law of general importance.

Powers of revision in criminal matters are not given to the High Court so that it may interfere in every case in which a question of law arises. The High Court has an absolute discretion under Ss. 435 and 439, Criminal P. C., to interfere in revision in any case, but that discretion ought only to be exercised in order to prevent substantial injustice, or, where there is involved a point of law of general importance which may govern other cases. AIR (Vol 19) 1932 Bom 637: 34 Bom LR 1444: 56 Bom 554: 34 Cr LJ 142: 141 Ind Cas 339 (DB).

——S. 435 —Order of acquittal.

The order of acquittal cannot be set aside on point of law alone; it must be clearly shown that the order sought to be reversed is clearly wrong in law. 1932 MWN 1353.

——S. 435 — Prosecution for cheating — Lower Court finding fraud but acquitting accused on ground that fraud was inchoate — Revision allowed.

Where, in a prosecution for cheating, the lower Court found that the accused had acted fraudulently but held that the fraud was inchoate and inconsequential, and acquitted the accused.

Held, that on the finding of fraud, a conviction ought to have followed and that the case should be remitted. AIR (Vol 12) 1925 All 473: 87 Ind Cas 426: 23 ALJ 433: 26 Cr LJ 970: 6 LRA Cr 198.

——S. 435 — Charge framed where none necessary — Interference is proper.

If a charge is framed where none should have been framed the proceeding of the Magistrate becomes irregular and the High Court has power to interfere under S. 435 as well as under S. 561-A to prevent abuse of the process of any Court or as necessary to secure the ends of justice. AIR (Vol 12) 1925 All 311: 86 Ind Cas 284: 23 ALJ 21: 6 LRA Cr 60: 26 Cr LJ 748.

——S. 435 — High Court can interfere with pending proceedings.

The High Court has undoubted power to quash proceedings in Subordinate Courts while they are still pending; it is its bounden duty to interfere when it is brought to its notice that a person has been subjected or is about to be subjected to the harassment of an illegal prosecution. AIR (Vol 11) 1924 Cal 1018: 82 Ind Cas 266: 39 CLJ 236: 25 Cr LJ 1258 (FB).

——S. 435 — Revision against acquittal — Retrial will be ordered in case of miscarriage of justice.

In an application in revision against an order of acquittal, although the High Court has the power to order a re-trial, it is a jurisdiction which should be exercised only in exceptional cases and with caution. It should only be done in cases where the alleged offence is of a serious character. If, however, a Judge thinks that there has been a miscarriage of justice, there may well arise an inference either that the Judge has not acted with that propriety and care which is required in the decision of every case, be it civil or be it criminal. In such a case it would be proper, after due examination of the facts, to make an order for retrial. AIR (Vol 8) 1921 All 266: 61 Ind Cas 161: 19 ALJ 589: 22 Cr LJ 337.

——S. 435 (1) — Time for interference — Charter Act, S. 15 — Power of High Court to interfere in pending proceedings.

The High Court can interfere at any stage of the proceedings, if it considers that in the interests of justice it should do so, though this power has to be exercised with great care. AIR (Vol 3) 1916 Mad 408: 39 Mad 561: 28 MLJ 505: 2 LW 463: 17 MLT 398: (1915) MWN 365: 16 Cr LJ 477: 29 Ind Cas 109.

——Ss. 435, 439 — Acquittal — Revision against — Mistaken view of the law — Criminal misappropriation — Promise to pay — Acquittal — Order of — Revision.

Where an acquittal proceeds on a mistaken view of the law, the High Court can interfere in revision. The complainant agreed to receive money which the accused, charged with criminal misappropriation, promised to pay in three days. The Magistrate thereupon acquitted the accused.

Held that the acquittal was illegal. (1909) 6 ALJ 758 (758, 759) : 3 Ind Cas 908 : 10 Cr LJ 417.

——S. 435 (1) — Revision — Questions to be determined.

When the Magistrate could make an order if necessary, whether that order was not the best that could have been made, is not a question to be considered in revision. (1909) 5 MLT 217: 4 Ind Cas 1128.

——S. 435 — Revisional powers of High Court — Calcutta Municipal Act, S. 449 — Wrong exercise of discretion by Magistrate.

When a Magistrate has not properly exercised his discretion, the order is not a proper order and the High Court has power to set it aside. (1905) 3 CLJ 90: 33 C 287 (291): 10 CWN 182 (DB).

(d) Withdrawal at the instance of complainant.

——S. 435 — Tendering pardon under S. 337 of the Criminal P. C. — If revisable by a High Court.

The tendering of pardon by a Magistrate under S. 337 of the Cr. P. Code is not revisable by the High Court. Any irregularities in the grant of the pardon can be urged at the trial. AIR (Vol 35) 1948 Mad 232: 60 LW 695 (1): (1947) 2 MLJ 388: 1948 MWN 56: 49 Cr LJ 451.

——S. 435 — Inquiry under Police Order No. 157 — Witnesses examined on oath.

Where a Magistrate holds an inquiry under Police Order No. 157, revision lies against an order relating to such inquiry when statements of witnesses are taken on oath. AIR (Vol 31) 1944 Mad 37: 56 MLW 437: (1943) 2 MLJ 182: 1943 MWN 706 (1): 45 Cr LJ 212: 210 Ind Cas 321.

——S. 435 — Framing of charges — Complainant's prayer for withdrawal of complaint — Order discharging accused — Petition for revision by complainant.

Held, High Court would not interfere for the benefit of complainant with an order which was passed upon his own request by trial Court. AIR (Vol 20) 1933 Lah 323: 34 PLR 181 and 680: 34 Cr LJ 718: 144 Ind Cas 289.

3. Inferior Court — Illustrations.

——S. 435 — Applicability — Order of Magistrate under S. 110, Bombay Municipal Boroughs Act — Revision — High Court's jurisdiction — Civil or Criminal. AIR (V 37) 1950 Bom 397 : 52 Bom LR 537 (FB).

——S. 435 — Scope — Conviction by Judge of High Court presiding over sessions — Revision to appellate side of High Court — Competency — "Inferior Criminal Court".

The expression "inferior Criminal Court" in S. 435, Cr. P. C., means judicially inferior (not necessarily subordinate). The High Court acting in its original criminal jurisdiction is an inferior Criminal Court within the meaning of S. 435, Cr. P. C.; and therefore an application in revision lies from an order made by a Judge presiding over the Sessions in the High Court to the appellate side of the High Court. AIR (V 36) 1949 Bom 29 : 50 Bom LR 293 : 49 Cr LJ 593 : ILR (1948) Bom 384 (DB).

——Ss. 435 and 439 — Applicability — Order of detention under Sind Frontier Regulation — Powers of High Court to revise or review. AIR (V 35) 1948 Sind 1 : 229 Ind Cas 298.

——Ss. 435 and 439 and D. I. Act (1939), S. 2 (5) — Revision — Competency — Order of officer or authority to whom power has been delegated by the Provincial Government under sub-s. (5) of S. 2 of D. I. Act.

As the officer or authority to whom the power is delegated under sub-s. (5) of S. 2 of the Defence of India Act is really a persona designata and not a Court within the meaning of the Criminal P. C., the High Court is not authorised to call for the record of that Court under S. 435 and deal with it under S. 439 of the Cr. P. C. AIR (V 34) 1947 A 403 : ILR (1947) All 431 : 1947 AWR (HC) 6 : 1947 ALW 112 : 1947 ALJ 97 : 1947 A Cr C 52 : 48 Cr LJ 285 : 229 Ind Cas 164.

(See also AIR (V 34) 1947 All 403: 1947 AWR (HC) 7 (1).

——Ss. 435 and 439 — If the Special Criminal Courts Ordinance is found to be applicable to certain cases, High Courts can have no jurisdiction under Ss. 435 and 439, Criminal P. C., to revise the order of conviction and sentence because this power of revision can be exercised only as against orders passed by Magistrates exercising jurisdiction under the Criminal P. C. AIR (V 30) 1943 Pat 13 : 9 BR 154 : 44 Cr LJ 273 : 24 PLT 50 : 22 Pat 175 : 204 Ind Cas 451 (FB).

——S. 435 — High Court, if can revise proceedings of Panchayat.

A Panchayat constituted under the Bihar and Orissa Vilage Administration Act is a Court and it is in the exercise of its criminal jurisdiction, an inferior Criminal Court, and, therefore, its orders are revisable under S. 435 of the Criminal P. C. AIR (V 28) 1941 Pat 169 : 42 Cr LJ 434 : 7 BR 606 : 193 Ind Cas 491.

——Ss. 435, 491 — Accused arrested on extradition warrant — Act of Magistrate an executive act — Magistrate's power under Extradition Act — If can enquire as to the legality of warrant — High Court, if can interfere under S. 491, Criminal P. C. — Giving bail under S. 8-A, Extradition Act, whether same thing as setting at liberty.

Under S. 435, Criminal P. C., the High Court can call for and examine the record of any proceeding before any inferior Criminal Court situate within the limits of its jurisdiction. And then under S. 439 when the record of any such proceeding has been called for by the High Court or has been reported for orders or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any powers conferred on a Court of Appeal or certain other specified powers. The High Court would not have jurisdiction to interfere with the order of a District Magistrate if it was not an order made in any proceeding before an inferior Criminal Court. The High Court would have no power to interfere with orders passed by a District Magistrate in his executive capacity. There are no provisions in the Extradition Act which would authorise the District Magistrate himself to enquire into the legality, much less the propriety of the warrant issued under S. 7 of Extradition Act and then to refuse to execute it on the ground that in his opinion, the warrant had been wrongly issued. The District Superintendent of Police has just as much authority as the District Magistrate to cause such a warrant to be executed. It cannot be contended that the act of the police officer ordering the execution of such a warrant would be either a judicial act or a proceeding in an inferior Criminal Court. Hence, when a Magistrate orders the execution of the extradition warrant, it cannot be said that he is acting in his judicial capacity or that he is for the time being a Court of inferior criminal jurisdiction. The Magistrate is bound to execute the warrant as required by S. 7 of the Extradition Act; the only discretion open to him is not to deliver over the accused to the State Authorities, but to report the case to the Local Government if he is satisfied that there is sufficient ground for not handing over the accused to the State Authorities. Therefore, the action of

the Magistrate, not being any proceeding of an inferior Criminal Court but an executive act, the High Court has no jurisdiction to interfere with the proceeding on the revisional side. AIR (V 21) 1934 All 148 : 1934 ALJ 556 : 35 Cr LJ 1296 : 56 All 409 : 4 AWR 1526 : 151 Ind Cas 279 (DB).

**——S. 435 — U. P. Municipalities Act (II of 1916), S. 160 — District Magistrate entertaining and deciding appeal purporting to act under S. 160 — Remedy.**

Where a District Magistrate entertained and decided an appeal purporting to act not under the Criminal P. C., or as an inferior Criminal Court, but under powers which he thought he possessed under S. 160, U. P. Municipalities Act:

Held, that no application to the High Court in revision was competent even if the Magistrate had no jurisdiction to entertain the appeal:

Held, also, that if the applicant believed that the action of the District Magistrate was unjustified, and outside the scope of the authority vested in him under the U. P. Municipalities Act, his action was binding on nobody and that he could ignore it or seek redress in any other manner. AIR (Vol 20) 1933 All 281: 1933 ALJ 469: 34 Cr LJ 1105: 145 Ind Cas 959.

**——S. 435 — Special Courts created by Ordinance.**

High Court's power of superintendence does not extend to such Special Courts, on administrative points but on judicial side, the High Court has power to hear appeals in certain cases decided by Special Courts. Excessive severity of sentence is no ground for the High Court to interfere in exercise of its general powers of superintendence. AIR (Vol 20) 1933 Bom 1: 34 Bom LR 1523: 34 Cr LJ 199: 57 Bom 93: 141 Ind Cas 720 (SB).

——S. 435 — Conviction by Special Magistrate appointed under the Ordinance:

Held, that the Court of the Special Magistrate is a Criminal Court inferior to the Court of the Sessions Judge within the meaning of S. 438. And the Sessions Judge has, therefore, power to call for and examine the record and refer the case to High Court if necessary. AIR (Vol 20) 1933 Cal 401: 60 Cal 851: 34 Cr LJ 579: 143 Ind Cas 238 (DB).

**——S. 435 — District Magistrate making reference to High Court of case decided by Sessions Court — Duty of District Magistrate.**

Section 435, Criminal P. C., applies exclusively to the proceedings of an inferior Criminal Court and not those before a superior Criminal Court and as the District Magistrate is inferior as a Court to the Sessions Judge, the District Magistrate has no jurisdiction to examine the records of a case decided by the Sessions Court and to make a reference to the High Court.

If he considers that there is room for reconsideration of the order of the Sessions Judge, the proper procedure is to approach the Local Government or the Government Advocate on the administrative side with a request that the High Court should be moved by means of a revision to consider the propriety of the sentence.

It is the duty of Subordinate Court to show respect and be courteous to a superior Court. AIR (Vol 19) 1932 All 124: 1932 ALJ 67: 33 Cr LJ 474: 137 Ind Cas 525 (DB).

**——S. 435 — Order under S. 478 — Interference.**

The Code permits no appeal against an order under S. 478. The powers of the District Magistrate under S. 435 and the following sections are confined to interference with criminal Courts subordinate to himself. When, therefore, a Magistrate does not pass an order as a Criminal Court but as a Revenue Court the District Magistrate has no jurisdiction to revise his order. AIR (Vol 17) 1930 Oudh 58: 5 Luck 435: 6 OWN 953: 1930 Cr C 154: 124 Ind Cas 364: 31 Cr L J 679.

**——S. 435 — District Magistrate exercising jurisdiction under Election Rules does not act as Criminal Court and no revision lies from his order.**

The provisions of S. 435 do not apply to District Magistrates but to Criminal Courts inferior to the High Court. When exercising jurisdiction under the election rules of the District Board the District Magistrate does not act as a Criminal Court but acts as an authority to whom the returning officer is subordinate. The High Court, therefore, cannot interfere in revision with an order of the District Magistrate under S. 195 (5) even though he denies jurisdiction under the provisions of that section. AIR (Vol 16) 1929 All 931: 120 Ind Cas 128: 30 Cr LJ 1159: 11 LRA Cr 27: 13 AI Cr R 137: 1930 ALJ 216: 1929 Cr C 659.

——S. 435 — Under S. 86 of the Bombay District Municipal Act, a Magistrate hearing an appeal is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is, therefore, not an inferior Criminal Court within S. 435, and the High Court has no power to revise his order. AIR (Vol 14) 1927 Sind 23: 97 Ind Cas 647: 27 Cr LJ 1127: 21 SLR 51 (DB).

**——S. 435 — Calcutta Municipal Act, S. 531.**

The Municipal Magistrate appointed under S. 531 is a Court of inferior Criminal jurisdiction within the meaning of S. 6, Cr. P. Code, and orders for demolition passed by such a Magistrate are subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. Further, an order for demolition, is a judicial order and whether made in the exercise of the Magistrate's civil or criminal jurisdiction is open to revision by the High Court. AIR (Vol 12) 1925 Cal 1251: 90 Ind Cas 317: 52 Cal 962: 26 Cr LJ 1533: 29 CWN 898 (DB).

——S. 435 — The Goondas Act has not created any Court but has only provided a certain procedure for dealing with Goondas. The Secretary to the Local Government exercising the powers conferred on him by the Goondas Act is not therefore a Criminal Court within the meaning of S. 435. AIR (Vol 11) 1924 Cal 698: 83 Ind Cas 500: 51 Cal 460: 26 Cr LJ 20 (DB).

**——S. 435 (1) — Inferior Court — Additional District Magistrate — District Magistrate.**

The Court of the Additional District Magistrate is not an inferior Court to that of the District Magistrate within S. 435 and a District Magistrate cannot call for and deal with the record of any proceeding before the Additional District Magistrate. AIR (Vol 6) 1919 LB 43: 12 Bur LT 56: 20 Cr LJ 494: 51 Ind Cas 478.

**——Ss. 435 (2) and 437 — Magistrate with special powers — Whether inferior Court.**

Where a District Magistrate considers that a case triable only by a Court of Session which has been tried by a specially empowered Magistrate and has ended in a discharge, has been incompletely or imperfectly tried, he may order further inquiry by the same Magistrate or by a Magistrate equally empowered but not by a Magistrate without special powers and therefore in a sense, a Court of inferior jurisdiction to the Court which ordered the discharge. But if the District Magistrate comes to a different conclusion after the evidence, his proper course is to make an order of commitment under S. 436. AIR (Vol 3) 1916 Nag 97: 12 NLR 94: 17 Cr LJ 245: 34 Ind Cas 965.

**——S. 435 (1) — Inferior Court — District Magistrate — Inferior to Sessions Court.**

**For purposes of revision the Court of a District Magistrate is inferior to that of the Sessions Judge. AIR (Vol 3) 1916 Oudh 136: 3 OLJ 38: 17 Cr LJ 223: 19 OC 108: 34 Ind Cas 335.**

**——S. 435 (1) — Inferior Court — High Court as Criminal Court — Power to call for records of Civil and Revenue Courts.**

The High Court acting as a Criminal Court can call for the records only of an inferior Criminal Court and that only under Section 435 but it cannot send for the record of a Civil or Revenue Court. AIR (Vol 1) 1914 Oudh 225: 17 OC 25: 15 Cr LJ 217: 22 Ind Cas 1001 (DB).

**——S. 435 (1) — Inferior Court — Income-tax Act, S. 36 — Applicability.**

Section 435 does not apply to orders of a Collector under Section 36, Income-tax Act, arising out of a proceeding pending before another officer. AIR (Vol 1) 1914 Oudh 114: 15 Cr LJ 2: 22 Ind Cas 146.

**——Ss. 435 and 476 — Inferior Court — District Registrar — Not subordinate to High Court.**

A District Registrar is not a court subordinate to the High Court, and the latter cannot interfere with the former's order impounding a document and calling upon a person to show cause why he should not be prosecuted for forgery. (1913) 35 All 109: 14 Cr LJ 144: 11 ALJ 55: 18 Ind Cas 896 (DB). See also (1912) 14 Bom LR 970: 13 Cr LJ 845: 17 Ind Cas 717.

**——S. 435 (1) — Inferior Court — Revenue Court.**

A Revenue Court before which action is taken under S. 476 is not an inferior Court within S. 435. (1913) 40 Cal 477: 17 CLJ 245: 14 Cr LJ 197: 17 CWN 647: 19 Ind Cas 197 (FB).

**——Ss. 435, 439 — "Criminal Court" — Court acting under S. 3 of Eastern Bengal and Assam Disorderly Houses Act, a Criminal Court:—See (1910) 14 CWN 404 (406): 11 Cr LJ 112: 37 Cal 287: 5 Ind Cas 323: 11 CLJ 297.**

**——Ss. 435 and 476 — Inferior Court — Income-tax officer.**

The High Court has no power to interfere with an order of an income-tax officer hearing an income-tax appeal directing the prosecution of a person under S. 476 for the Income-tax officer is not a Subordinate Criminal Court. (1913) 36 Mad 72: 23 MLJ 393: 13 MLT 367: (1912) MWN 1012: 13 Cr LJ 723: 16 Ind Cas 755 (DB).

**——S. 435 — Magistrate showing cause — Supplementing judgment.**

In showing cause it is not open to the trying Magistrate to submit observations with a view to supplement or add to his judgment. (1903) 7 CWN 859 (860) (DB). See also (1905) 3 CLJ 357 (358).

### 3A. Inferior court — Duty of.

**——S. 435 — Showing cause — Cannot supplement judgment.**

A Magistrate cannot supplement his judgment by his explanation to the superior court. If there are no material findings in the judgment the defect cannot be cured by the Magistrate's explanation. (1907) 7 CLJ 238 (DB).

——S. 435 — Showing cause — Magistrate should explain if there is cause to show. (1908) 12 CWN 678 at p. 681 (DB).

### 4. Jurisdiction.

(a) General.
(a-1) Of Sessions Judge.
(b) Lower courts must be first approached.
(c) Entertainment by both — District Magistrate and Sessions Judge.

#### (a) General.

**——Ss. 435, 439 — Order calling for proceedings signed and issued by Headquarters Assistant for District Magistrate, legality of.**

Under S. 435, Criminal P. C., the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has power, and an order signed by another person "for" the District Magistrate, calling for proceedings is an order without authority. Therefore, the order issued by the Headquarters Assistant and signed by him for District Magistrate is void. AIR (Vol 28) 1941 Rang 114 : 1941 Rang LR 82 : 42 Cr LJ 573 : 194 Ind Cas 370.

**——Ss. 435, 438, 552 — Complaint by father for delivery of daughter from wrongful confinement — Order accordingly passed — Subsequent discovery that girl was married — Proceedings against father under S. 215 — Special Magistrate handing over girl to husband — Order set aside by District Magistrate.**

Upon a complaint by the father for delivery of his daughter who was in wrongful confinement of certain person to the custody of her mother, the Court passed the orders accordingly. It, however, transpired that the girl was already married and proceedings under S. 215, Criminal P.C., were started against the father. No sentence was passed; production of the girl was ordered and she was handed over to her husband. The order was set aside by the District Magistrate in revision and it was ordered that the girl should remain in her mother's custody :

Held, that under S. 435, Criminal P. C., it was open to the complainant to make an application in revision against the order of the Special Magistrate before the District Magistrate. If, however, the District Magistrate decided, upon a consideration of the application and examination of the record, that the order of the Special Magistrate was unjust, then he could only act under S. 438. Under this section, all that the District Magistrate can do is to refer the matter to the High Court with his recommendation. The District Magistrate's powers under S. 438 refer to sentences imposed against the applicant before him. The District Magistrate, however, can only act under S. 552, where there is a complaint before him on oath of the abduction or unlawful detention of a woman or of a female under the age of 16 years. Hence, in the absence of these requisites, the order of the District Magistrate was without jurisdiction. AIR (Vol 23) 1936 All 852 : 1936 AWR 920 : 1936 ALJ 1097 : 38 Cr LJ 301 : 166 Ind Cas 847.

——S. 435 — A conviction of a native of an Indian State for an offence committed in the State territory should be quashed. ('35) 1935 MWN 1295.

**——S. 435 — Withdrawal of cases suspends jurisdiction.**

When an order is made by the District Magistrate under S. 435, calling for the record and proceedings pending before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate the jurisdiction of the former Magistrate is suspended, and he is not therefore entitled to record a composition of the offence and acquit the accused under S. 345, though the case may not have been actually transferred to the other Magistrate. AIR (Vol 12) 1925 Bom 247 : 49 Bom 533 : 27 Bom LR 350 : 26 Cr LJ 996 : 87 Ind Cas 596 (DB).

——Ss. 435 (1) and 439 — Jurisdiction — Article handed to accused under a bond — Nature of transaction.

A Magistrate should not launch with an inquiry as to the nature — genuine or benami — of an instrument under which articles were delivered in a case in which the accused is charged with criminal breach of trust of the articles. AIR (Vol 4) 1917 Mad 414 : (1916) 2 M W N 158 : 4 L W 198 : 18 Cr LJ 34 : 36 Ind Cas 866.

(a-1) Of Sessions Judge.

——Ss. 435 and 438 — Power of Sessions Judge in revision to direct trial Magistrate in pending case to examine a witness under S. 540 — Proper procedure.

In a revision against an order of a Magistrate allowing a witness to be examined under S. 256, Cr. P. Code, the Sessions Judge has no power to direct the trial magistrate to examine that witness under S. 540, Cr. P. Code. He can only make a reference on that point to the High Court, if he thought that such a direction should be given. AIR (Vol 37) 1950 Ajmer 56 : 51 Cr LJ 1512.

——Ss. 435, 438 and 145 — Powers of Sessions Judge — Order of Magistrate under S. 145 for possession in favour of one party — Sessions Judge, if can stay its execution, or order restoration of possession to the other party.

S. 435, Cr. P. Code, makes a distinction between a sentence and an order, and it can only be interpreted as indicating that the Court can only stay the execution of a sentence and not the carrying out of any order. Under that section, a Sessions Judge has, therefore, no jurisdiction to suspend an order by a Magistrate under S. 145, Cr. P. Code, for possession in favour of one party, nor can he order restoration of possession to the other party. The Sessions Judge has no power to decide the question of possession finally. All the power that he has is to report the matter to the High Court stating that the order passed by the Magistrate is wrong. AIR (Vol 36) 1949 Cal 241 : 53 CWN 322 : 50 Cr LJ 471.

——Ss. 435 and 346 — Acquittal under S. 247 — Revision treated wrongly as appeal and further enquiry ordered — Competency of revision against such order.

Where a revision against an acquittal under S. 247, Cr. P. Code, is wrongly treated by the District Magistrate as an appeal and further enquiry is ordered, a revision against such an order would be quite competent and the Sessions Judge can make a reference to the High Court to set aside the order of the District Magistrate as one without jurisdiction. AIR (Vol 35) 1948 All 46 : ILR (1947) All 464 : 1947 AWR (HC) 72 : 1947 ALJ 260.

——S. 435 — Powers of revising Court to revise orders of discharge.

The accused was charged with an offence of storing without a licence large quantities of mill made cloth for sale, and the quantity of cloth seized. The trial Magistrate refused to attach importance to the statements and discharged the accused. On a revision filed by the Crown, the Sessions Judge, while agreeing with the Magistrate in the appreciation of evidence in regard to other particulars, came to the conclusion that the statement of the accused and the quantity of cloth seized were sufficient legal evidence which rendered the order of discharge unreasonable and ordered further enquiry.

Held, in revision, where the trial Magistrate thought there was no legal evidence from which it could be inferred that large quantity found with the accused was stored for sale, but the Sessions Judge found that there was legal evidence from which it could be inferred, it was certainly permissible to the Sessions Judge to set aside the order of discharge and direct further enquiry. AIR (Vol 35) 1948 Mad 324 : (1947) 2 MLJ 359.

——Ss. 435, 528 — Order of District Magistrate under S. 528 — Sessions Judge, if can revise it.

The Sessions Judge has no authority to revise the order of a District Magistrate passed under the provisions of S. 528, Criminal P. C., any more than the High Court has any such authority. AIR (Vol 22) 1935 Rang 446 : 37 Cr LJ 220 : 160 Ind Cas 85.

——Ss. 435, 438 — Revisional powers of Sessions Judge, scope of.

The power of a Sessions Judge to take action under S. 435, Criminal P. C., is not limited to cases in which he happens to have personal knowledge leading him to suspect an irregularity nor to cases in which the persons directly interested as complainants or accused move him to call for records. Directly the Sessions Judge has any reasonable cause of suspicion that an irregularity has occurred he should call for the records irrespective of the source of his information. AIR (Vol 18) 1931 Lah 107 : 32 Cr LJ 653 : 32 PLR 130 (2) : 12 Lah 471 : 131 Ind Cas 108.

——S. 435 (4) — Fresh application — Application to District Magistrate — Refusal to go into merits — "Made", meaning of.

Where an application is made to the District Magistrate under S. 435 (4), Criminal P. C., and he declines to go into the merits on the ground that in the circumstances, the more convenient course would be to represent the application to the Sessions Judge, it is open to the applicant to represent the application to the Sessions Judge.

'Made' in sub-s. (4) of S. 435 means 'entertained and decided'. AIR (Vol 18) 1931 Mad 772 (2) : 34 LW 44 : 1931 MWN 771 : 61 MLJ 123 : 54 Mad 842 : 32 Cr LJ 1278 : 134 Ind Cas 990 (2).

——S. 435 — The practice of the High Court is not to restrict the powers of Sessions Judges any further, than they are restricted by the Cr. P. Code. AIR (Vol 14) 1927 All 38 : 97 Ind Cas 650 : 49 All 230 : 7 LRA Cr 176 : 25 ALJ 42 : 27 Cr LJ 1130.

——S. 435 — Sanction to prosecute.

A Sessions Judge can take up at the instance of a private person any revision of a Magistrate's order under S. 476. AIR (Vol 14) 1927 All 38 : 97 Ind Cas 650 : 7 LRA Cr 176 : 25 ALJ 42 : 27 Cr LJ 1130 : 49 All 230.

——S. 435 — Reference when proper.

Sessions Judge cannot take proceedings under S. 435, Cr. P. Code, when only two witnesses have been examined, in the case and there is no proof of any irregularity in the proceedings before the Magistrate. AIR (Vol 14) 1927 Oudh 571 : 1 LC 271 : 28 Cr LJ 814 : 104 Ind Cas 254.

——S. 435 does enable a Sessions Judge to call for the record of proceedings under S. 110, Cr. P. Code, taken before an inferior Criminal Court within his jurisdiction and the other provisions of the Code enable him to refer the matter to the High Court. AIR (Vol 10) 1923 All 596 : 73 Ind Cas 337 : 21 ALJ 513 : 4 LRA Cr 126 : 24 Cr LJ 593.

——Ss. 435 (1) and 437 — Order of discharge — Additional Sessions Judge.

An Additional Sessions Judge has jurisdiction, in a case transferred to him by the Sessions Judge, to set aside the order of discharge and direct further enquiry into the case against the accused. AIR (Vol 7) 1920 All 55 : 21 Cr LJ 293 : 55 Ind Cas 341.

**——S. 435 (4) — Records called for by Sessions Judge on his own motion and returned without interference — Subsequent application.**

A Sessions Judge having called for the records of a case in which the accused has been discharged, returned the same, as in his opinion there was no cause for interference.

Held, he could entertain an application for reopening the case, presented by the complainant. He cannot reject such application on the ground of his previous non-interference on his own motion. AIR (Vol 4) 1917 LB 7 : 8 Bur LT 243 : 8 LBR 377 : 16 Cr LJ 711 : 30 Ind Cas 999.

**——S. 435 — Sessions Judge's power to call for records or to refer to High Court as regards proceedings under Ch. XII, Cr. P. C. — Disputes as to possession.**

A Sessions Judge has no power under S. 435 to call for records or revise or make any reference in respect to any proceedings under Chapter XII of the Code of Criminal Procedure. (1901) 28 C 416 (418) (DB).

**(b) Lower Courts must be first approached.**

**——Ss. 435 and 439 — Interference in revision — Principles governing — Exercise of discretion — Discharge of accused.**

When a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court as a revisional Court will not interfere with an order of discharge.

Ordinarily the High Court will not entertain a revision against a discharge by a Magistrate where the aggrieved party has not moved the Sessions Court or the District Magistrate before coming up to the High Court. AIR (Vol 35) 1948 Mad 422 : ILR (1949) Mad 64 : 1948 MWN 285 : 49 Cr LJ 540 : 61 LW 208 : (1948) 1 MLJ 223.

**——S. 435 — High Court and Sessions Court having concurrent powers of revision — Revision direct to High Court.**

It is not usual for a High Court to entertain applications in revision made to it directly from a conviction under S. 24, Cattle Trespass Act without going to the Court of Session which has concurrent powers of revision. But after they have been admitted they must be disposed of on the merits. AIR (Vol 27) 1940 Pat 299 : 21 PLT 627 : 6 BR 301 : 41 Cr LJ 257 : 186 Ind Cas 182 (DB).

**——S. 435 — Scope — Accused not availing himself of right of appeal — High Court, if can act upon information from third party — Matter not brought before District Magistrate or Sessions Judge.**

Although the High Court has full jurisdiction to entertain an application in revision even if the District Magistrate or the Sessions Judge has not been approached in the first instance, a practice has grown up in the Allahabad High Court under which the High Court does not ordinarily entertain an application in revision unless the District Magistrate or the Sessions Judge has been moved first. This rule of practice applies to applications filed by a third party also. Consequently, neither an application in revision by an accused nor an application by a third party for the purpose of informing the High Court should be entertained, unless there are special reasons why the applicant should not have gone to the District Magistrate or the Sessions Judge in the first instance; but if a Judge on very special grounds decides to intervene, he cannot be said to be acting illegally although it may be contrary to the practice. Once the application has been admitted and the record called for, such an objection should not be entertained.

The mere fact that an accused in the Magistrate's Court refused to take part in the proceedings before him or stated that he had nothing to say in defence should not prevent a revision from his conviction from being heard as there is an obligation on the High Court to superintend and supervise the Subordinate Criminal Courts and to see that orders of conviction passed by such Courts are not illegal and contrary to law and, if the illegality of a conviction is brought to the notice of the High Court, there should not be a refusal to interfere merely because the accused concerned is quite content with the order and does not wish to challenge it.

Per Mukherji J. —Refusal to take part in one's own trial is not an offence, and a man cannot be punished on that account on the law as it stands at present. If a man before the Court has committed a criminal contempt of it, he may be punished for that, but his refusal to answer questions of the Court cannot justify his conviction or justify inactivity on the part of the High Court, where it is brought to its notice that the conviction is illegal. AIR (Vol 20) 1933 All 678 : 1933 ALJ 1059 : 34 Cr LJ 1115 : 56 All 158 : 145 Ind Cas 977 (FB).

**——Ss. 435, 439 — Application in revision not presented in lower Court — Interference by High Court — Accused person refusing to plead.**

Although it is the invariable practice of the Allahabad High Court to refuse to entertain application in revision when the revisional powers of the lower Courts have not been invoked, but the High Court cannot be held to be bound to refuse an application in every case merely because it had not been presented in the lower Court of appeal.

The Courts are bound to protect the liberty of the individual, but even when the individual does not claim that protection and is ready to forgo his liberty, the Courts have to consider that there are other questions than the wishes of the parties to the proceedings by which they have to be guided. Even where an accused person refuses to plead and shows himself ready to be sent to jail, it is nevertheless the duty of the Court to sift the evidence for the prosecution and refuse to convict the accused if that evidence is insufficient to prove a definite offence. AIR (Vol 20) 1933 All 612 : 55 All 857 : 34 Cr LJ 1053 : 1933 ALJ 1112 : 145 Ind Cas 736.

**——S. 435 — Failure to go in revision to lower Appellate Court — Whether bars entertaining of application by High Court.**

The practice of the Allahabad High Court is to refuse to entertain an application in revision when the applicant has not gone in revision either to the Sessions Judge or to the District Magistrate. An application in revision to the lower Court is an essential step in the procedure and failure on the part of the applicant in this respect operates as a bar to the application being entertained by the High Court. AIR (Vol 20) 1933 All 283 : 1933 ALJ 119 : 55 All 261 : 34 Cr LJ 1048 : 145 Ind Cas 726.

——S. 435 — **Concurrent jurisdiction in District Magistrate and Sessions Judge and High Court— Interference by High Court.**

The High Court will not entertain an application for revision in circumstances where the District Magistrate and Sessions Judge have concurrent revisional jurisdiction with the High Court, unless some special grounds are shown. AIR (Vol 18) 1931 Oudh 418 : 8 OWN 1027 : 33 Cr LJ 195 : 135 Ind Cas 701.

——S. 435 — **Revision — Practice — Revision competent before Dt. Magistrate — Filing of, in High Court — Entertainability.**

Where the accused was convicted by a Magistrate, First Class, under S. 506, Penal Code, and ordered to execute bond for keeping the peace under S. 106, Cr. P. Code, and he applied for revision to the High Court under S. 439, Cr. P. Code.

Held, that such application can be entertained by the District Magistrate or Sessions Judge under S. 435, Cr. P. Code, and unless the District Magistrate or Sessions Judge is first moved in the matter, application for revision was not entertained by the High Court. AIR (Vol 16) 1929 Nag 13 : 10 AI Cr R 333 : 29 Cr LJ 618 : 109 Ind Cas 810.

——S. 435 — **Revision competent before Sessions Court — High Court will not entertain revision direct to itself.**

A person dissatisfied with any order or proceeding in a Court of inferior jurisdiction to that of the Sessions Judge or of the District Magistrate should, in the first instance obtain the opinion of the Sessions Judge, or of the District Magistrate, on the matter in question, before invoking the jurisdiction of the High Court. This he should do irrespective of the question whether the Sessions Judge or the District Magistrate can grant the relief applied for or not. AIR (Vol 8) 1921 All 30 : 43 All 497 : 19 ALJ 425 : 22 Cr LJ 715 : 63 Ind Cas 875 (DB).

——S. 435 — It is not the practice of the High Court to entertain applications for revision of the order of a Magistrate in a case under Cr. P. Code, S. 133 unless the party has first moved the Sessions Judge to make a reference to the High Court. AIR (Vol 8) 1921 Cal 76 : 48 Cal 534 : 22 Cr LJ 650 : 63 Ind Cas 410 (DB).

——**Ss. 435 (1), 438 and 125 — Jurisdiction — Sessions Court — Revisional jurisdiction.**

Section 125 does not affect the revisional jurisdiction of Sessions Court or District Magistrate under Ss. 435, 438. The jurisdiction of High Court and Sessions Judge under S. 435 is concurrent and in such cases, the aggrieved party has to first seek his remedy in the Subordinate Court. AIR (Vol 5) 1918 Pat 588 : 4 Pat LW 327 : 3 Pat LJ 302 : 19 Cr LJ 589 : 45 Ind Cas 397 (DB).

——**Ss. 435, 438, 439 — Practice — District Magistrate or Sessions Judge to be moved first.**

The High Court refused to entertain an application for the revision of an order of a First Class Magistrate against which no application had been previously made to the Sessions Judge with a view to his referring the matter to the High Court. The practice of first applying to the Sessions Judge or the District Magistrate should be followed in all cases where they have concurrent jurisdiction with the High Court, even when such jurisdiction is not final. (1909) 13 CWN 753 : 36 C 643 (644) : 2 Ind Cas 846 (DB).

**(c) Entertainment by both — District Magistrate and Sessions Judge.**

——S. 435 — The construction of sub-s. (4) clearly is that where either the Sessions Judge or District Magistrate has had an application in revision in the same matter, before them, moved by either party, the other local District Court would have no jurisdiction to hear a further application in the same matter. AIR (Vol 17) 1930 All 257 : 1930 ALJ 521 : 1930 Cr C 369 : 52 All 257 : 31 Cr LJ 995 : 126 Ind Cas 253.

——**Ss. 435 (4) and 437 — District Magistrate acting under S. 435 — Further enquiry.**

Where the District Magistrate in directing a further enquiry acted under S. 435, the Sessions Judge is not competent to direct a further enquiry in view of S. 435 (4). (1913) 17 CWN 451 : 14 Cr LJ 123 : 17 CLJ 608 : 18 Ind Cas 683 (DB).

**5. Judicial order.**

——Ss. 435-439 — Revision — Competency — Order passed under S. 45 (3). See AIR (Vol 37) 1950 All 540.

——**S. 435 — Revision — Competency — Direction by District Magistrate to Public Prosecutor to withdraw under S. 494, Cr. P. Code, a prosecution launched — Nature of order, if revisable.**

Where a District Magistrate gives a direction to the Public Prosecutor to withdraw under S. 494, Cr. P. Code, a prosecution which had been launched against a head constable and a constable, there is no judicial order to consider in revision at that stage. It must be viewed merely as an order of administrative instructions to the Public Prosecutor. There is nothing in this order which could in any legal manner affect the exercise of discretion of the Magistrate before whom the case was pending to allow the withdrawal. 1950 MWN 147 : 62 LW 651 : (1949) 2 MLJ 388.

——Ss. 435 and 439 — Revision — Competency — Orders passed in proceedings under S. 310 (2) of the U. P. Municipalities Act (II of 1916). AIR (Vol 36) 1949 All 738 : 1949 ALJ 460.

——**Ss. 435 and 45 (3) — Revision — Competency — Executive order appointing a mukhia under S. 45 (3).**

As an order appointing a mukhia under S. 45 (3) of the Cr. P. Code is purely an executive or administrative order, there can be no revision against such an order or any reference. AIR (Vol 35) 1948 All 114 : ILR (1948) All 758 : 49 Cr LJ 31 (1) : 1947 AWR (HC) 294 (1) : 1947 ALJ 526.

——S. 435 — Revision — Competency — Administrative order in proceedings under S. 145 (4). See (1947) 2 MLJ 459 : AIR (Vol 35) 1948 Mad 234.

——**S. 435 — Order under R. 81, Defence of India Rules — Revision.**

Where Town Rationing Officer, who is also Magistrate passed an order under R. 81, Defence of India Rules regarding control of house accommodation, the High Court has no power to interfere with such order in revision as a Court of Criminal Revision, the order not being passed in Magisterial capacity. AIR (Vol 34) 1947 All 51 : 1946 ALJ 214 : 1946 ALW 288 : 1946 AWR (HC) 438 (2) (DB).

——**Ss. 435 and 439 — Criminal Court — District Magistrate requiring person to let part of house to specified person under R. 81 (2), Defence of India Rules — Order is not one made by Court.**

An order by a District Magistrate exercising the powers under R. 81 (2), Defence of India Rules requiring a person to let a part of his premises to

the person specified is not a judicial order made by a Court and is not, therefore, revisable by the High Court. AIR (Vol 33) 1946 Bom 533 (FB).

**(Overrules AIR (Vol 32) 1945 Bom 385 : 47 Bom LR 357, Cri. Revn. Appln. No. 23 of 1945 and Cri. Revn. Appln. No. 303 of 1945).**

**——Ss. 435, 439 — Order prohibiting unauthorised persons to practise in Courts.**

An order of the District Magistrate directing the Subordinate Magistrates not to allow certain unauthorised persons to practise in their Courts is an administrative order and is not subject to revision under Ss. 435 and 439, Criminal P. C. AIR (Vol 30) 1943 Mad 470 : 1943 MWN 223 : 56 MLW 256 : (1943) 1 MLJ 382 : 44 Cr LJ 662 : 207 Ind Cas 623.

**——Ss. 435, 439 — Order of District Magistrate under S. 3, Sarais Act (XXII of 1867), calling upon certain persons to register their Sarais, if subject to revision by High Court.**

The District Magistrate as the chief officer charged with the executive administration of a district in criminal matters can, under no stretch of language, be treated as a Court. His functions as an executive officer are poles asunder from his functions as a judicial officer and it is only in his judicial capacity that he is subject to the revisional jurisdiction of the High Court. His order calling upon certain persons to register their Sarais under S. 3, Sarais Act, not being a judicial order is not subject to the revisional jurisdiction of the High Court. AIR (Vol 28) 1941 Lah 71 : 42 Cr LJ 448 : ILR (1940) Lah 577 : 193 Ind Cas 564 (DB).

——Ss. 435, 192 — Magistrate's action in taking cognizance and transferring the case to another Magistrate for trial is a judicial matter open to scrutiny by courts of Revision under S. 435, Criminal P. C. AIR (Vol 28) 1941 Pat 395 : 22 PLT 348 : 7 BR 681 : 42 Cr LJ 504 : 194 Ind Cas 94.

——S. 435 — When the District Magistrate passes orders under R. 17 framed under S. 39-A of the Bombay District Police Act, he is not acting as an inferior Court within the meaning of S. 435, Criminal P. C. High Court, therefore, cannot interfere with his order. AIR (V 26) 1939 Sind 340 : ILR (1940) Kar 102 : 41 Cr LJ 179 : 185 Ind Cas 392 (DB).

——S. 435 — Passenger travelling by higher class on tickets for lower class — Proceedings under S. 113, Railways Act :

Held, that the proceedings were judicial and the High Court had power to revise any order passed by the Magistrate. AIR (Vol 20) 1933 Bom 59 : 34 Cr LJ 239 : 34 Bom LR 1666 : 141 Ind Cas 794 (DB).

**——S. 435 — Order refusing to grant a copy under S. 165 (5) can be set aside.**

The order directing an application for copies under S. 165 (5) to be filed is tantamount to refusing to grant the copies. Such an order cannot be treated as an extra judicial order, and being actually in disregard of the specific provisions of the law is illegal and can be set aside under S. 435. AIR (Vol 15) 1928 All 402 : 26 ALJ 703 : 9 AI Cr R 536 : 9 LRA Cr 84 : 29 Cr LJ 663 : 110 Ind Cas 215.

**——S. 435 — Magistrate acting under S. 221, Madras Local Boards Act — District Magistrate can interfere.**

A Magistrate acting under S. 221, Madras Local Boards Act, acts in the capacity of a Magistrate and his orders are subject to the provisions of Ss. 435 and 439, Cr. P. Code. The District Magistrate can call for the records of the case and may proceed in accordance with the provisions of Ss. 435 and 439 if the facts of the case warrant such action. AIR (Vol 15) 1928 Mad 495 : 27 MLW 320 : 29 Cr LJ 389 : 10 AI Cr R 53 : 1 M Cr C 12 : 108 Ind Cas 414.

**——S. 435 — Revision — Proclamation — Order under S. 88 is a proceeding.**

An order under S. 88 is a proceeding within the meaning of S. 435 and is subject to the revisional jurisdiction of the High Court. AIR (Vol 11) 1924 Lah 617 : 25 Cr LJ 82 : 76 Ind Cas 18.

**——S. 435 — District Magistrate acting under Police Act — No revision.**

Where the District Magistrate had authority to grant the sanction to prosecute in virtue of Police Act No. V of 1861, section (4), and he was not acting as the presiding officer of the Court of a District Magistrate constituted under Code of Criminal Procedure (Act No. V of 1898), the Sessions Judge has no jurisdiction to interfere with his order, and the order of the District Magistrate, not being that of a Court of justice, is not in itself subject to the revisional jurisdiction of the High Court. AIR (Vol 10) 1923 All 149 : 45 All 135 : 24 Cr LJ 597 : 73 Ind Cas 341 (DB).

**——Ss. 435 and 439 — Revision — Executive order — Police Act, S. 17.**

An order under S. 17 of the Police Act appointing special constable, is executive in its nature and not open to revision. AIR (Vol 4) 1917 Oudh 170 : 20 OC 229 : 18 Cr LJ 900 : 42 Ind Cas 132.

——S. 435 — Revision — Executive order — Order of District Magistrate dismissing headman :

Held, that an order passed by a District Magistrate under the rules framed by Government under S. 45 (3), Cr. P. C., is an executive order and not subject to the revisional powers of the High Court. (1907) AWN 168 : 29 A 563 (565).

### 6. Interpretation.

**——S. 435 — "Proceeding" — Meaning of.**

The word "proceeding" in S. 435, Cr. P. Code, cannot be given a restricted meaning as having any reference by itself to the commission or trial of an offence. AIR (Vol 33) 1946 Bom 533 : ILR (1946) Bom 768 : 48 Bom LR 387 : 48 Cr LJ 152 : 228 Ind Cas 123 (FB).

**——S. 435 — Words "finding, sentence, order" and "proceeding" — Meaning of, explained — Scope of revision — If wider than that of appeal.**

Per Khundkar J. — The word "finding" in S. 435 includes a conviction or an acquittal. The word "sentence" means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. "Order" covers commands or directions that something shall be done, discontinued or suffered, but it does not include "sentence" and "finding". The word "proceedings" is wider than the expression 'judicial proceedings", and covers everything done and recorded by an inferior Criminal Court acting as a Court. But it means everything of this kind which is not a finding, sentence or order. The words 'finding', 'sentence', 'order', and 'proceedings' cover everything which may be remedied in revision. No part of the subject-matter of revision falls outside these words. There is nothing capable of revision which is not either a finding, or a sentence, or an order or a proceeding. The words taken together, are coterminous with the things which revision may reach. That, therefore, is the scope of revision in so far as its subject-matter is concerned. No appeal will lie from mere findings which are not convictions or acquittals, or from any proceedings which are not convictions, acquittals, sentences, orders or

mere findings. Now, inasmuch as proceedings in this sense, are mere findings, and convictions, sentences and orders from which no appeal lies to the High Court are capable of revision by High Court, the subject-matter of revision is wider than the subject-matter of appeal. AIR (Vol 31) 1944 Cal 17 : ILR (1944) 2 Cal 1 : 48 CWN 113 : 45 Cr LJ 309 : 211 Ind Cas 177 (FB).

——S. 435 (1) — **'Finding, sentence or order' in S. 435 (1) are three separate matters.**

The words "finding, sentence or order" in S. 435 (1), Criminal P. C., are three separate matters and are separated by the disjunctive conjunction "or" — "finding or sentence or order." AIR (Vol 27) 1940 All 426 : 1940 ALJ 462 : 41 Cr LJ 876 : 1940 AWR 379 : ILR (1940) All 539 : 190 Ind Cas 225.

——S. 435 — **Meaning of legality and propriety explained.**

The words legality and propriety in S. 435 would both include questions of law as to whether a finding, sentence or order is legal or proper having regard to the evidence. The word 'correctness' does not mean that the High Court may inquire whether the finding was acceptable to it on a balance of the evidence recorded in the trial Court. The correctness of the finding, sentence or order also implies a legal defence such as the finding being based on an entire want of evidence or being incorrect in the sense that witness may have said for instance, that no theft was committed and the Court may have recorded a finding that theft was committed. A I R (Vol 16) 1929 All 587 : 1929 ALJ 775 : 10 LRA Cr 105 : 30 Cr LJ 756 : 12 AI Cr R 107 : 1929 Cr C 176 : 117 Ind Cas 346.

### 7. Powers of District Magistrate.

——Ss. 435 and 423 — **Calling for record of pending case for submission to Provincial Government — Permissibility.**

A Court of appeal or revision has power to call for the record of a Court subordinate to it after the case has been completed. So far as pending cases are concerned, it is arguable that the High Court or the Sessions Judge or the District Magistrate or a specially empowered Sub-Divisional Magistrate may call for the record for the purpose of satisfying itself as to the regularity of the proceedings of the inferior Court under S. 435. This section however does not authorise the District Magistrate or Sub-Divisional Magistrate to call for the record of a pending case for the purpose of submitting it to the Provincial Government or any one else, and it is absolutely wrong for the District Magistrate or Sub-Divisional Magistrate to call for the record of an inferior Court for this purpose, or for the trying Court itself to part with its record in any circumstance except for the purposes sanctioned by the Statute or the rules by which it is bound. AIR (Vol 36) 1949 Pat 222: 50 Cr LJ 474 (FB).

——S. 435 — Direction by Additional District Magistrate to treat a case as a preliminary register case under S. 395, I. P. Code, without notice to accused and without hearing him — Legality.

A complaint was filed against the petitioner alleging that they entered the house of complainant and stole some cinema articles. The Magistrate admitted the case under S. 380, Indian Penal Code, on receiving the complaint. When the case was pending, the Additional Magistrate was moved and he directed that the case should be treated as a preliminary registered case and proceed with under section 395 Indian Penal Code.

It is stated that the Magistrate had no jurisdiction to pass an order like this without notice to the petitioner and secondly that he had no jurisdiction to pass such order. (1947) 2 MLJ 137: AIR (Vol 35) 1948 Mad 95.

——S. 435 — **Powers of revision under Ss. 435 and 436.**

The District Magistrate has undoubtedly powers of revision under Ss. 435 and 436, Criminal P. C. But those powers can be exercised for the limited purpose indicated in those sections. Except for that special purpose, he has no power to revise the opinion of the Subordinate Magistrate in a case reported to him under S. 346, Criminal P. C. When the provisions in the Code confer special powers on the District Magistrate, those powers must be exercised only in the particular way indicated. AIR (Vol 29) 1942 Bom 84: 44 Bom LR 53: 43 Cr LJ 562: ILR (1942) Bom 198: 199 Ind Cas 351 (DB).

——S. 435 — Where the matter is properly before the Additional District Magistrate under S. 435, Criminal P. C., he has the power to go into the merits of the case to satisfy himself as to the correctness and legality or propriety of the order passed by the Magistrate. If he does so, and he is of opinion that the Magistrate had misconceived the evidence recorded by him, he would certainly be right in even ordering the Magistrate to issue process against the person against whom the Magistrate had dismissed the complaint. AIR (Vol 27) 1940 Nag 128: 1940 NLJ 43: 41 Cr LJ 312: 186 Ind Cas 459.

——S. 435 — **Considered order on complaint — Second application on same facts — Order for further inquiry.**

When a considered order has been made on a complaint by a Magistrate, it is not open to the District Magistrate to order a further inquiry into the complaint. A second application on the same facts should not be entertained. ('33) 34 Cr LJ 923: 145 Ind Cas 280 (281).

——Ss. 435 (1), 438 — **District Magistrate cannot recommend revision of order of Sessions Judge passed on appeal.**

It is not open to a District Magistrate to report against and recommend revision of an order passed on appeal by a Sessions Judge. AIR (Vol 20) 1933 Pat 305: 14 PLT 364: 34 Cr LJ 947 (2): 145 Ind Cas 393 (DB).

——S. 435 — **District Magistrate cannot order retrial.**

A District Magistrate has no jurisdiction to order a retrial of a case. He can order, if he so wishes, on proper grounds, under S. 436, a further inquiry into the complaint, but it is reserved to the High Court in S. 439 to use any of the powers conferred on a Court of appeal which would include the right of ordering a re-trial. AIR (Vol 17) 1930 All 257: 1930 ALJ 521: 1930 Cr C 369: 52 All 257: 31 Cr LJ 995: 126 Ind Cas 253.

——S. 435 — Under S. 435, a District Magistrate may reject the application for revision or may take action under S. 438. He cannot set aside the order. AIR (Vol 11) 1924 Oudh 331: 11 OLJ 59: 25 Cr LJ 440: 77 Ind Cas 728.

——S. 435 — **Order of discharge.**

District Magistrate can set aside an order of discharge passed by a Magistrate of First Class and order further inquiry. (1929) 115 Ind Cas 539: 30 Cr LJ 490: 30 PLR 448: 12 AI Cr R 291.

——S. 435 — District Magistrate cannot question the propriety of order by Court of Session.

Under S. 435 the District Magistrate can refer the proceedings of any inferior Court but he is not entitled to question the propriety of an order passed by a Court of Session. His proper course when he considers that action is necessary, is to move the Government to file an application in revision. (1926) 24 ALJ 224: 7 LRA Cr 33: 7 LRA Cr 161: 27 Cr LJ 327: 92 Ind Cas 743.

——S. 435 — Order dismissing complaint for default amounts to acquittal and cannot be set aside under S. 435.

An order dismissing the complaint for default in prosecution must be taken to have been passed under S. 247 of the Cr. P. Code. Though the section is not mentioned in the order, such an order is tantamount to an order of acquittal and cannot be set aside by the District Magistrate under S. 435. AIR (Vol 12) 1925 Oudh 44: 77 Ind Cas 295: 25 Cr LJ 359.

——Ss. 435(1) and 439 — Time for interference — When records should be called for.

District Magistrate should not make the work of persons entitled to appeal difficult, by calling for proceedings and taking action upon them within the period allowed for appeal. AIR (Vol 4) 1917 UB 2: 2 UBR (1916) 124: 18 Cr LJ 355: 10 Bur LT 166: 38 Ind Cas 739.

——S. 435(4) — Revision application to Sessions Judge — District Magistrate, power of, to entertain application.

Where an application under S. 435 is entertained by a Sessions Judge, the District Magistrate cannot deal with the matter suo motu nor can his order invalidate an order passed by the Sessions Judge. AIR (Vol 1) 1914 LB 260: 8 LBR 361: 10 Bur LT 172: 17 Cr LJ 497: 36 Ind Cas 465.

——S. 435, Cl. 4 — Commitment by District Magistrate suo motu after Sessions Judge's refusal.

Under Cl. 4 of S. 435, Cr. P. C., it is not competent to the District Magistrate to entertain an application for commitment of a discharged accused after Sessions Judge had once refused to do so; nor can he act suo motu. The fact that the District Magistrate passes the order of commitment without knowledge of the Sessions Judge's refusal does not make it less illegal. (1902) 26 Mad 477 (478): 2 Weir 542 (DB).

——S. 435 — District Magistrate — Fresh evidence — Reference to High Court.

The Code of Criminal Procedure does not empower a District Magistrate to record evidence of his own motion in a case which comes before him under S. 435 of the Code. (1901) 3 Bom LR 677 (678) (DB).

### 8. Powers of High Court.

——Ss. 435 and 439 — Finding of fact — If binding — Interference — Powers of High Court, in appeal and revision.

The High Court, in the exercise of its appellate as well as of its revisional jurisdiction, is not bound by the findings of fact of the lower Courts; nor is it precluded, if it considers that the evidence so justifies, from making other and different or additional findings of fact. AIR (Vol 34) 1947 Pat 339: 25 Pat 571 (DB).

——S. 435 — Special Criminal Courts Ordinance (2 of 1942), Cl. 26 — High Court's power of revision is taken away — High Court cannot exercise inherent jurisdiction.

No Court can claim inherent jurisdiction to exercise powers expressly taken away by legislation. Clause 26 of the Special Criminal Courts Ordinance, 1942 expressly takes away all powers of revision by the High Court and consequently the High Court does not possess inherent jurisdiction to interfere with the order of a Special Magistrate acting under that Ordinance. Moreover, a Special Magistrate is not a Court inferior to the High Court and indeed not a Court at all and, therefore, the High Court has no power of revision under Ss. 435 and 439 of the Criminal Procedure Code. AIR (Vol 33) 1946 PC 169.

——S. 435 — Order under S. 517, Criminal P. C. — Application made to High Court under S. 523, Criminal P. C. against the order.

Held, that the application could be treated as revision application under S. 435, Criminal P. C. AIR (Vol 31) 1944 Oudh 310: 1944 AWR (CC) 223 (2): 46 Cr LJ 756: 220 Ind Cas 437.

——S. 435 — Once the case has come before the High Court by way of revision, it can deal with the matter under Ss. 435 and 439, and it is not necessary for the High Court to see whether the petition of revision is in order and the affidavit was properly sworn to by the accused. AIR (Vol 29) 1942 Pat 150: 22 PLT 976: 8 BR 534: 43 Cr LJ 537: 199 Ind Cas 218.

——S. 435 — Expression of opinion, on points beyond those provided within S. 435.

Per Sharpe J.: It is of considerable doubt as to whether it is within the province of the High Court when acting under S. 435, Criminal P. C., to canvass, and express opinions upon all topics, however interesting may be the points of law or practice involved in them, which have arisen in the course of the proceedings before the inferior Criminal Court. On revision its inquiry is limited to "the correctness, legality or propriety of any finding, sentence, or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court." AIR (Vol 25) 1938 Rang 161: 11 Rang 9: 39 Cr LJ 642: 175 Ind Cas 639 (DB).

——Ss. 435, 438, 439 — Order declining to stay proceedings — Reference — Powers of High Court.

An order by a Magistrate declining to stay proceedings is an order within the meaning of S. 435, Criminal P. C. The power to refer to the High Court given by S. 438 is not limited to matters which the High Court will deal with under S. 439, and can be invoked in the case of a matter of stay of proceedings.

Per Divatia J.: It does not matter whether the High Court interferes in its revisional jurisdiction or in its inherent jurisdiction so long as it is moved by the Sessions Judge. Therefore, S. 438 is not limited to the interference of the Court under S. 439 but it can interfere under the wide powers which it possesses, whether under Ss. 439 or 561-A. AIR (Vol 20) 1933 Bom 485: 35 Bom LR 1054: 58 Bom 49: 35 Cr LJ 311: 147 Ind Cas 230 (DB).

——S. 435 — The amendment introduced by the Act of 1923, by deleting sub-s. (3) from S. 435, Criminal P. C., which till then existed, has made the

order of the Magistrate open to revision, and as a Court of Revision, the High Court has to consider not merely the legality of such orders but their propriety as well. AIR (Vol 20) 1933 Cal 348: 34 Cr LJ 334: 142 Ind Cas 319 (DB).

——S. 435 — Matter of discretion.

(The necessity of amending S. 526 pointed out.)

Powers of revision which the Court has under S. 435, Criminal P. C. are discretionary. AIR (Vol 18) 1931 Cal 626: 59 Cal 478: 33 Cr LJ 31(2): 35 CWN 1112: 55 CLJ 34: 134 Ind Cas 1057 (DB).

**——S. 435 — High Court's powers very wide.**

The powers of High Court under Ss. 435 and 439 are wide and it can proceed in the matter even suo motu and interfere if it considers just and proper. It can call for and examine the record of any proceedings and interfere even when a certain order, though legal, is improper. AIR (Vol 17) 1930 Nag 61: 121 Ind Cas 651: 1930 Cr C 149: 26 NLR 50: 12 NLJ 180: 31 Cr LJ 284.

**——S. 435 — High Court has power to interfere with an order of discharge at the instance of private prosecutor.**

High Court has full power to revise an order of discharge at the instance of a private prosecutor. But the Court, in considering whether to interfere or not, is bound to have regard to the fact that its interference may not work injustice to accused upon the ground of prosecution and want of finality, and, in the event of its coming to a conclusion that the proceedings were taken with a view to furthering either of these objects to the exclusion of other matters proper for it to consider, the High Court would refuse such an application. AIR (Vol 14) 1927 Rang 74: 4 Rang 471: 99 Ind Cas 1019: 28 Cr LJ 219: 7 AI Cr R 373.

**——S. 435 — Powers of High Court.**

The High Court on reference or revision can pass a substantive period of imprisonment even though the accused has served the sentence of imprisonment actually passed on him by the lower Court. AIR (Vol 13) 1926 Bom 256: 28 Bom LR 300: 27 Cr LJ 557: 93 Ind Cas 1053 (DB).

——S. 435 — The only Acts which are excepted from the revisional jurisdiction of the High Court are the Press Act, the Extradition Act and the Reformatory Schools Act, and this only in regard to certain orders passed by lower Courts. AIR (V 12) 1925 Rang 12: 84 Ind Cas 433: 26 Cr LJ 289: 3 Bur LJ 168: 2 Rang 321.

**——S. 435 — High Court can act on any information.**

It would be open to High Court on information contained in a newspaper, a placard on a wall, or an anonymous post-card, to take action, if it considered that sufficient grounds were established to justify sending for record under S. 435. AIR (Vol 10) 1923 All 85: 71 Ind Cas 243: 20 ALJ 909: 45 All 128: 24 Cr LJ 115.

**——S. 435 (1) — Revision at preliminary stage.**

The High Court can revise any preliminary or final order passed by an Inferior Court. Where a District Magistrate asked a witness to show why he should not be prosecuted under S. 193, Penal Code, the High Court interfered and discharged the Magistrate's order as records showed that the prosecution could not stand. AIR (Vol 4) 1917 All 371 (1): 14 ALJ 851: 18 Cr LJ 46: 36 Ind Cas 878.

**——S. 435 (2) — Ultra vires order.**

The Chief Court can annul the ultra vires orders of Magistrate under S. 435(2). AIR (Vol 1) 1914 LB 218: 15 Cr LJ 500: 7 Bur LT 293: 24 Ind Cas 588.

**——Ss. 435(1) and 439 — Order of discharge — Presidency Magistrate — Revision — Further inquiry.**

Under Ss. 435 and 439 the High Court can order further enquiry in a case in which a Presidency Magistrate has discharged an accused person. (1909) 36 Cal 994: 13 CWN 1221: 10 Cr LJ 385: 11 CLJ 150 and 221: 3 Ind Cas 861 (DB).

**——Ss. 435, 118 — Revision — Finding of fact how far conclusive — Security for good behaviour — Showing cause — Accused must be ready with his evidence — Questions to witnesses — Disallowed by the Court.**

The High Court, acting in revision, under S. 435, Cr. P. C., is bound to accept the finding of the lower court unless there is any error of law or procedure vitiating that finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact the lower court has misapprehended the evidence. Where a person is called on to show cause why he should not be required to give security for good behaviour, under S. 118, Cr. P. C., he must be ready with his evidence when he appears in obedience to the notice. That is the meaning of the expression "to show cause" in law. If he has been unable to bring the evidence within time on account of the shortness of the notice or other reasonable cause, it is his duty when he appears to apply at once for summonses to the witness he proposes to call. A party asking for redress at the hands of an appellate or revisional court on the ground that the court below has wrongly excluded a question which the party wished to put to a witness, must state the form and substance of the question proposed to be put to enable the appellate or revisional court, as the case may be, to determine whether the particular question in each case was so framed as to make it admissible under the Evidence Act. (1907) 9 Bom LR 1385 (1386, 1388): 3 MLT 53 (DB).

**——S. 435 — Charter Act, S. 15 — Orders under S. 146, Cr. P. C. — High Court — Power of, to interfere with such orders.**

The High Court cannot interfere with orders made by a District Magistrate under S. 146 of the Criminal Procedure Code. (1902) 6 CWN 469 (470): 29 Cal 382.

**——Ss. 435, 467 — Notice — Accused discharged — Order for retrial by Sessions Judge — Order passed without notice to accused — High Court's powers of revision.**

An order under S. 437 to the prejudice of the accused ordering a retrial should be passed only on notice to the accused whenever there is no difficulty in giving such notice. The High Court is competent to revise an order passed under S. 437 without notice to the accused. Quaere: Whether omission to give notice to the accused before passing an order for retrial will in itself render the order bad. (1902) 26 Mad 41 (42) (FB).

### 9. Proceedings under Ss. 144-176 and Chapter XII etc.

——Ss. 435 and 439 — Application for stay of delivery of possession or continuation of receiver after termination of proceedings under S. 145, Cr. P. Code, pending disposal of revision in the High Court against the final order in such proceedings — Maintainability. AIR (Vol 35) 1948 Mad 133: (1947) 1 MLJ 171.

——S. 435 — After the amendment of S. 435, Criminal P. C., by S. 116, Criminal Procedure Amendment Act (18 of 1923) by which sub-s. (3) of S. 435, Criminal P. C., has now been omitted, the High Court has revisional jurisdiction also in cases disposed of under S. 144, Criminal P. C. Even before this amendment the High Courts exercised this power of revision under S. 107, Government of India Act, and this power has always been considered statutory and necessary. AIR (Vol 30) 1943 Cal 35: ILR (1942) 1 Cal 488: 46 CWN 136: 44 Cr LJ 288: 204 Ind Cas 370 (DB).

——S. 435 — The propriety of an order passed under S. 144, Criminal P. C., as well as its legality can be considered by the High Court in revision, though, in examining the propriety of the order, the High Court will undoubtedly give due weight to the opinion of the District Magistrate who is the man on the spot and responsible for the maintenance of public peace in his district. AIR (Vol 29) 1942 Lah 171: 44 PLR 297: 43 Cr LJ 747: ILR (1942) Lah 510: 201 Ind Cas 572 (FB).

**——Ss. 435, 561-A, 145(7) — Legal representative, if can be brought on record.**

Where after the filing of the revision petition against an order under S. 145(7), Criminal P. C., before the High Court, the petitioner dies, the High Court, in view of the provisions of Ss. 561-A and 435 has ample power to bring legal representatives on record if the ends of justice require it. AIR (Vol 29) 1942 Mad 249: 1941-2 MLJ 1047: 1942 MWN 38: 43 Cr LJ 487: 199 Ind Cas 320.

——S. 435 — Jurisdiction of District Magistrate with regard to order passed under S. 145 by Magistrates subordinate to him is not appellate jurisdiction. All he can do is to call for record of case under S. 435, Criminal P. C. AIR (Vol 28) 1941 Pat 105: 7 BR 492: 42 Cr LJ 340: 192 Ind Cas 784.

**——Ss. 435, 144 — Revision after cancellation of order under S. 144.**

It frequently happens that the High Court is called upon under S. 435, Criminal P. C., to revise an order of conviction after the sentence passed by the convicting Court has expired. It is open to this Court, if it thinks that an order under S. 144 ought never to have been made, to set aside, although before that action can be taken, the order may have ceased to be in operation.

Where a part of the order had been rescinded by the Magistrate before there was time to make any application to him, the fact that the petitioner did not avail himself of the remedy under S. 144(4) is no ground for refusal to interfere in revision by the High Court. AIR (Vol 27) 1940 Bom 42: 41 Bom LR 1253: 41 Cr LJ 319: 186 Ind Cas 477.

**——S. 435 — Executive order passed by District Magistrate.**

An executive order passed by the District Magistrate is not revisable under S. 435, Criminal P. C.: Held, that the order passed by the District Magistrate was purely an executive order for controlling the procession in village which he could pass as a District Magistrate. The order did not show that any conditions or formalities which are required under S. 144, Criminal P. C., were observed and, therefore, no revision lay. AIR (Vol 27) 1940 Oudh 416: 1940 OWN 652: 41 Cr LJ 781: 1940 AWR 304: 189 Ind Cas 666.

——S. 435 — With the deletion in 1923 of sub-s. (3) of S. 435, Criminal P. C., High Court has full revisional power over proceedings under Ss. 145 and 147. AIR (Vol 26) 1939 Pat 206: 20 PLT 164: 5 BR 539: 40 Cr LJ 538: 181 Ind Cas 176.

**——Ss. 435 and 144 — Order under S. 144 — Revision.**

The effect of omission of cl. (3) of S. 435 is that now under the present Code, High Court has power to revise orders under S. 144 and in order that the High Court may revise the order the revisional jurisdiction must be exercised within 2 months of the passing of the order. AIR 1928 Mad 1108, Overruled. AIR (Vol 17) 1930 Mad 242 (DB).

**——S. 435 — Revision.**

By the removal now of sub-s. (3), S. 435, proceedings under Chap. 12 become liable to revision in the same manner as other proceedings. AIR (V 16) 1929 Mad 847: 31 MLW 104: 1929 MWN 708 : 2 M Cr C 321 : 120 Ind Cas 895 : 1929 Cr C 615 : 31 Cr LJ 190.

**——S. 435 — Possession proceedings — Order without taking evidence — Revision lies.**

In a case regarding possession of the property in dispute the counter-petitioner was absent at the final hearing of the case. The trying Magistrate passed order in favour of the petitioner without recording any evidence at all upon the question of possession.

Held, that the Magistrate had no jurisdiction to found an order upon the mere absence of a party.

Held further, that the irregularity is material enough for the counter-petitioner to be entitled to have it set right. AIR (Vol 16) 1929 Mad 847: 120 Ind Cas 895: 31 MLW 104: 1929 MWN 708: 2 M Cr C 321: 1929 Cr C 615: 31 Cr LJ 190.

——S. 435 — The High Court has power to revise proceedings of a Magistrate under S. 176, either under S. 435 or 439, apart from its inherent powers under S. 561-A. AIR (Vol 15) 1928 Bom 390: 112 Ind Cas 567: 30 Bom LR 1050: 29 Cr LJ 1063: 11 AI Cr R 324 (DB).

**——S. 435 — Order under S. 144, Cr. P. Code.**

Order of the Magistrates acting under S. 144 is not the order of a Court. No revision therefore lies against such order under S. 435, in spite of omission of cl. 3 from the Code of 1898.

Magistrates are not always Courts. Section 6 is not inconsistent with the idea that Magistrates may sometimes act in executive and administrative capacity and not as Court. AIR (V 11) 1924 Pat 703, Not Appr. AIR (V 15) 1928 Mad 1108: 113 Ind Cas 279: 28 MLW 506: 1928 MWN 779: 52 Mad 69: 1 M Cr C 304: 30 Cr LJ 119: 12 AI Cr R 17: 55 MLJ 621.

**(Overruled by AIR 1930 Mad 242).**

——S. 435 — The High Court has power to consider under S. 435, Criminal P. C., whether a Magistrate has jurisdiction to pass an order under S. 144, Criminal P.C. AIR (V 15) 1928 Mad 1108: Held

overruled by AIR (V 17) 1930 Mad 242. AIR (V21) 1934 Rang 124: 12 Rang 283: 35 Cr LJ 1300: 151 Ind Cas 211.

——S. 435 — Revision — Possession proceedings — If a declaratory order is passed under S. 145(6) the order can be revised, but if the Magistrate on the facts refuses to proceed under S. 145, such order cannot be revised.

If the Magistrate after issuing a preliminary order and holding an enquiry under S. 145 comes to a decision that a declaratory order is necessary and passes such an order under cl. (6) of the Section, such order is capable of revision under S. 435. But, if the Magistrate holds a preliminary enquiry and comes to the conclusion that the facts stated in the application are not true, and that, therefore, there is no probability of a breach of the peace, and refuses to proceed under S. 145, such order is not an order under S. 145, cl. (6), and is not, therefore, an order liable to revision on the merits. AIR (Vol 13) 1926 Sind 85: 89 Ind Cas 309: 18 SLR 278: 26 Cr LJ 1333 (DB).

**——S. 435 — No finding as to breach of peace — Magistrate satisfied about existence of dispute — No revision.**

Proceedings under S. 145 were instituted but there was no finding that there was any likelihood of a breach of the peace. However, the notice showed that the Magistrate was satisfied that there was a serious dispute between the parties and from the judgment it appeared that there was a quarrel between the parties with reference to the possession of several plots of land.

Held, it was a proceeding under S. 145 and therefore the High Court could not interfere in revision. AIR (Vol 9) 1922 All 31: 66 Ind Cas 527: 23 Cr LJ 303.

**——S. 435 — Aggrieved party not given opportunity to produce evidence — Irregularity is only procedural — Revision does not lie.**

The essential requisite to give a Magistrate jurisdiction under S. 145 is that he must be satisfied that a dispute likely to cause a breach of the peace exists and that once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. It being so, the High Court will not interfere in revision with an order under S. 145, even when the order is passed without giving an opportunity to the aggrieved party to produce evidence, that being only an irregularity in procedure. AIR (Vol 9) 1922 Lah 454: 67 Ind Cas 584.

——S. 435 — If the High Court is of opinion that the Appellate order under S. 144(5) is wrong, although it may have expired, it would not be deterred from expressing its view about it, in case it is sought to use it in the litigation which may be pending, in view of the fact that, for the time being, it purports to settle the claims of the parties. AIR (Vol 9) 1922 Mad 76: 42 MLJ 352: 67 Ind Cas 500: 15 MLW 423: 1922 MWN 177: 30 MLT 148: 23 Cr LJ 404.

**——S. 435 — Attachment under S. 146 — Release, on order of Revenue Court deciding one party to be entitled to possession is correct and no revision lies.**

Where a property was attached under S. 146, Cr. P. Code, and subsequently the Revenue Court decided in an enquiry under S. 40 of the Land Revenue Act that the non-applicant was entitled to possession and thereupon the Magistrate released the property from attachment, held, that the Magistrate was within his jurisdiction in having done so. AIR (Vol 9) 1922 Oudh 300: 73 Ind Cas 153: 25 OC 242: 24 Cr LJ 537.

**——S. 435 — Proceeding instituted without jurisdiction under Cr. P. Code, S. 145 — High Court has inherent power to set aside proceedings and pass consequential orders.**

It is now well settled that a High Court is competent, in the exercise of the power of superintendence vested in it under S. 107 of the Government of India Act, 1915 (which re-placed S. 15 of the Indian High Courts Act, 1861), to set aside proceedings instituted without jurisdiction by a subordinate Court under S. 145 of the Cr. P. Code; such power of superintendence can be exercised notwithstanding S. 435 (3), Cr. P. Code; which lays down that proceedings under Chapter XII (which comprises Ss. 145-148) are not proceedings within the meaning of that section. The High Court can, when it sets aside the proceedings, proceed to give such consequential directions as may be found necessary in the interests of justice in the circumstances of the particular case. Although the Cr. P. Code does not contain a provision corresponding to S. 151 of the C. P. Code, yet the inherent power of Courts is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intention of the Legislature as indicated in statutory provisions. Where in a dispute as to lac between tenants and zamindars it was manifestly impossible to restore the physical condition of things as they existed when the proceedings under S. 145 were instituted and where the title was in dispute and the Court was not in a position to make an assumption as to possession in favour of either party.

Held, that in such circumstances, the best course to adopt was to keep the property in the custody of the Court pending decision by a Civil Court on the question of title. AIR (Vol 8) 1921 Cal 30: 60 Ind Cas 325: 48 Cal 522: 22 Cr LJ 213 (SB).

——S. 435(3), Cr. P. Code, expressly excludes the exercise of revisional powers in cases under S. 144, Cr. P. Code. The High Court has merely to satisfy that the facts found fall within the section so as to give jurisdiction to the Magistrate. AIR (Vol 7) 1920 Bom 367: 62 Ind Cas 409: 22 Cr LJ 521: 22 Bom LR 157 (DB).

**——S. 435 (3) — Proceedings under S. 145, Cr. P. Code.**

The High Court cannot interfere in revision in proceedings under Chapter XII of the Code, as Section 435(3) does not apply to them. AIR (Vol 4) 1917 All 396: 18 Cr LJ 418: 38 Ind Cas 978.

**——S. 435(3) and Chap. XII — Calling for records — When proper.**

A Sessions Judge is not required by law to call for or examine the record of any proceeding before

an inferior Criminal Court; especially where the proceeding in the Inferior Court is one under Chap. XII of the Code. AIR (Vol 3) 1916 All 304: 14 ALJ 146: 17 Cr LJ 145: 33 Ind Cas 625.

**——Ss. 435(3) and 145 — Proceedings in dispute as to immovable property.**

A High Court has no power to send for the record of a case which in intention and in fact has been begun and continued under Chapter XII, Cr. P. C. (1912) 13 Cr LJ 495 : 15 Ind Cas 495.

**10. Reference.**

——S. 435 — Where proceedings are submitted to the Sub-Divisional Magistrate under S. 380, Criminal P. C., he can only dispose of the case in the manner provided by S. 380. The reference to the District Magistrate under S. 435 is incompetent; nor is it a proper case for submission to the High Court under S. 438, Criminal P. C. ('40) 191 Ind Cas 149 (150): 1940 MWN 244 (1): 51 LW 430: 42 Cr LJ 89.

**——Ss. 435, 438 — Appeal dealt with by Sessions Judge — District Magistrate, whether can refer case to High Court for enhancement of sentence passed by Sessions Judge.**

Sections 435 and 438, Criminal P. C., empower a District Magistrate to refer the case to the High Court after examining the record of any proceedings before any inferior Criminal Court. Where, however, the appeal has already been dealt with by the Sessions Judge, the District Magistrate is not entitled to refer the case to the High Court under Ss. 435 and 438, Criminal P. C., for enhancing the sentences passed by the Sessions Judge. The proper course for him is to instruct the law officers of the Crown to file a petition for revision asking for the enhancement of the sentences awarded to the accused with the sanction or under the instructions of the Provincial Govt. AIR (Vol 26) 1939 Lah 323: 40 Cr LJ 879: 41 PLR 825: 184 Ind Cas 204.

**——Ss. 435, 438 — Abstract questions of law, if can be referred — Sessions Judge finding no illegality.**

Abstract questions of law should not be referred to the High Court for decision in pending proceedings. The object of Ss. 435 and 438, Criminal P. C., is that incidents of incorrectness, illegality or impropriety should be brought to the notice of the High Court, and where the Sessions Court itself considers that there has been no illegality, etc., there is no proper ground for making a reference. AIR (Vol 25) 1938 Nag 56: 20 NLJ 151: 39 Cr LJ 660: ILR (1938) Nag 248: 175 Ind Cas 935.

**——Ss. 435, 438 — Conviction by Deputy Magistrate — Appeal to Sessions Judge — Dismissal of appeal — Reference for enhancement of sentence.**

Where a Deputy Magistrate convicted certain persons under S. 9, Opium Act, for being in illegal possession of opium and an appeal by the accused therefrom was dismissed by the Sessions Judge, in a reference by the District Magistrate for enhancement of sentence under S. 438, Criminal P. C.:

Held, that although in the circumstances it could not be said that the District Magistrate had no power to call for the record from the Deputy Magistrate's Court under S. 435, Criminal P. C., or to make a report under S. 438, it was not desirable for the High Court to entertain the matter on a letter of reference addressed to the High Court by a District Magistrate when the facts of the case had already been brought to the notice of Sessions Judge in appeal. AIR (Vol 20) 1933 Cal 791: 57 CLJ 211: 35 Cr LJ 27: 146 Ind Cas 354 (1) (DB).

——S. 435 — Under the explanation to S. 435, the District Magistrate is inferior to the Sessions Judge. The latter has jurisdiction to call for the record of a case decided by the former and make a reference to the High Court. 89 Ind Cas 146: 23 ALJ 894: 6 LRA Cr 135: 26 Cr LJ 1282: AIR (Vol 12) 1925 All 591.

——S. 435 — The High Court will not ordinarily accept a reference direct from the District Magistrate. 82 Ind Cas 285: 22 ALJ 772: 46 All 851: 5 LRA Cr 121: 25 Cr LJ 1277: AIR (Vol 11) 1924 All 770.

**——Ss. 435, 438, 439 — Practice — Revision — Reference by District Magistrate recommending the re-consideration of an order of acquittal passed by a Subordinate Magistrate.**

In the case of an acquittal by a Subordinate Magistrate where the Local Government does not appeal, the High Court will not, as a general rule, entertain a reference direct from the District Magistrate under S. 438 of the Code of Criminal Procedure. (1902) AWN 89 (90): 24 All 346.

**——S. 436.**

1. **Applicability and scope.**
2. **Grounds for interference.**
3. **Jurisdiction.**
4. **Notice.**
5. **Order under.**
   See also N. 1 and 2.
6. **Power of High Court.**
   See also, N. 8.
7. **Proceedings on further enquiry.**
8. **Revision.**
   See also N. 6.

**1. Applicability and scope.**

**——Ss. 436 and 435 — Application under — Who can make — Question of personality or authorisation is not relevant.**

It is plain from the language of Ss. 435 and 436, Criminal P. C., that in an application under S. 436 the question of personality or authorisation is not relevant. A revision application made to a Sessions Judge cannot, therefore, be rejected on the ground that it is filed at the instance of the Inspector of Police or that it is not properly authorised by the Government. AIR (Vol 33) 1946 Sind 75 (78): 47 Cr LJ 221: 221 Ind Cas 616 (DB).

——S. 436 — An order under S. 249 is neither one of dismissal of a complaint under S. 203, or S. 204, nor is it an order of discharge and therefore, S. 436 has no application to such an order. AIR (Vol 21) 1934 All 17: 35 Cr LJ 564: 1934 ALJ 360: 147 Ind Cas 1028 (2).

——S. 436 — Application under Ss. 436 and 439, Criminal P. C., to quash proceedings in second case where 'autrefois acquit' is not available:

Held, that where on the same facts, a second complaint is laid against different accused, Courts should not proceed with the second complaint, when a complete trial in the first case has been held. ('33) 1933 MWN 246.

——S. 436 — Section 436 only contemplates further inquiry into any complaint which has been dismissed under S. 203 or sub-s. (3) of S. 204 or into the case of any person accused of an offence who has been discharged. AIR (V 18) 1931 All 53: 1930 ALJ 1475: 32 Cr LJ 570: 53 All 148: 130 Ind Cas 630.

——S. 436 — Further inquiry which may be directed under S. 436 is not confined to a further enquiry under S. 202. Further, there is nothing to prevent a District Magistrate when moved to act under S. 436 from taking cognizance in his discretion, of the complaint under S. 190 (1). AIR (Vol 18) 1931 Pat 50: 32 Cr LJ 548: 12 PLT 729: 130 Ind Cas 529.

——S. 436 — Revision Court cannot direct further inquiry into an offence under S. 193, where the sanction of the Court in which that offence was committed is wanting. 118 Ind Cas 232: 1929 ALJ 512: 10 LRA Cr 90: 12 AI Cr R 22: 30 Cr LJ 874: 1929 Cr C 1: AIR (Vol 16) 1929 All 374.

**——S. 436 — Complaint under Ss. 323, 347 and 358, Penal Code, against police — Complaint dismissed — District Magistrate ordering further enquiry to give accused opportunity to vindicate themselves — Magistrate issuing process against accused without preliminary inquiry and committing accused to Sessions.**

M made a complaint alleging that the police had committed offences under Ss. 323, 347 and 358, Penal Code. The complaint was dismissed under S. 203, Cr. P. C. Whereupon the Deputy Superintendent of Police filed a petition of complaint against M under S. 192, Cr. P. Code. M moved the Deputy Commissioner for reference to High Court alleging that the proceedings against them could not be taken except on complaint by the Court. The reference was made and the proceedings quashed by the High Court. The Deputy Superintendent of Police thereupon petitioned to the Deputy Commissioner alleging that the complaint of M was serious and that the order of the Magistrate was vague and prayed for further enquiry. Proceeding under S. 436, the Deputy Commissioner directed further enquiry into the complaint in order to give opportunity to the accused to vindicate themselves and to prove that the allegations made against them were not only open to doubt but false. Sub-Divisional Officer directed to make further enquiries, at once issued processes against the police officer under Ss. 323 and 347 and preferred charges under Ss. 323 and 347. The case was then transferred to Deputy Magistrate who recorded the evidence of some witnesses for prosecution and committed the accused to Sessions under S. 388, Penal Code.

Held, (i) that the Magistrate had discretion to issue the process against the accused and after hearing the evidence, to commit the accused to the Sessions and had discretion to dispense with any preliminary enquiry under S. 202 and that the procedure involved in hearing the evidence and committng the accused for trial was further enquiry under S. 436 and within the scope of the order. AIR 1928 Pat 12, Diss. from.

(ii) In case the above view was wrong the conduct of the Magistrate in issuing the summons to the accused instead of conducting preliminary enquiry and committing the accused to the Sessions was an irregularity and not an illegality and the commitment cannot be quashed unless the accused are prejudicially injured thereby. 126 Ind Cas 146: 31 Cr LJ 961: 9 Pat 155: 1929 Cr C 372: AIR (Vol 16) 1929 Pat 644 (DB).

——S. 436 — Further inquiry in S. 436 means an inquiry of the same nature as was previously held under S. 202. (1928) 108 Ind Cas 328: 10 AI Cr R 25: 9 PLT 459: 29 Cr LJ 372.

——S. 436 — An order of the District Magistrate setting aside the order of the Sub-Divisional Magistrate discharging an accused under S. 107 is illegal as S. 107 is not included in the provisions of S. 436. 77 Ind Cas 819: 46 All 235: 22 ALJ 129: 5 LRA Cr 64: 25 Cr LJ 467: AIR (Vol 11) 1924 All 592.

**——Ss. 436 and 258 — Acquittal by first class Magistrate of offence under S. 465, I. P. C. — Power of Sessions Judge to order committal for offence under Section 467, I. P. C.**

Per Richardson J.— When a person is acquitted of an offence under S. 465, I. P. C., by a first class Magistrate under S. 258, Cr. P. C., the Sessions Judge has no power to direct a committal under S. 436 Cr. P. C., for an offence under S. 467, I. P. C.

Per Teunon J.— The acquittal of such person on a charge under S. 465, I. P. C., cannot be construed as an order of discharge of an offence under S. 467, I. P. C. 26 CLJ 210: 18 Cr LJ 834: 22 CWN 117: 41 Ind Cas 658: AIR (Vol 5) 1918 Cal 943 (2) (DB).

**——S. 436 — Power to order—Commitment by District Magistrate — Case not "triable exclusively by the Court of Session" — Jurisdiction.**

Held that a case does not come within the purview of S. 436 of the Code of Criminal Procedure merely because in the opinion of the District Magistrate the offence alleged to have been committed could not be adequately punished by a Magistrate. (1908) AWN 189 (190): 8 Cri LJ 47.

**2. Grounds for interference.**

**(a) General.**
**(a-1) Difference of opinion.**
**(b) Evidence.**
**(c) Order perverse or foolish.**
**(d) Point of public importance.**
**(e) Proceedings illegal.**
**(f) Wrong decision.**

**(a) General.**

**——S. 436 — Further inquiry — Order for — When justified — Absence of evidence connecting accused with offence or case alleged in complaint — Procedure.**

When there is prima facie no legal evidence available to connect the accused with the offence or offences alleged or to substantiate the case of the complainant, it would be quite wrong to harass the accused with facing a further inquiry or trial. 13 Cut LT 27: AIR (Vol 35) 1948 Pat 31: 48 Cr LJ 952.

**——S. 436 — Further inquiry — When should be ordered.**

Section 436, Criminal P. C., contemplates that an applicant who asks for further inquiry under S. 436, Criminal P. C., acts in good faith, desiring to challenge the order of discharge as such is not guilty of gross delay and has no ulterior purpose in his application.

(Order for further inquiry was set aside). AIR (Vol 30) 1943 Sind 149: ILR (1943) Kar 105: 44 Cr LJ 728: 208 Ind Cas 35 (DB).

——S. 436 — Accused charged under Ss. 193, 467, 477, I. P. C. — Prosecution evidence taken — Government calling for record and returning it after six months — Government Pleader applying for withdrawal of case — Magistrate finding prima facie case but discharging accused — Accused relation of one of the Ministers — Order of withdrawal and discharge should be quashed — Action of Government, held illegal. AIR (Vol 26) 1939 Cal 220: 43 CWN 301: ILR (1939) 1 Cal 407: 40 Cr LJ 349: 180 Ind Cas 384 (SB).

——S. 436 — Before ordering further enquiry, it is necessary that the Magistrate should not be satisfied with the correctness, legality or propriety of any finding, sentence or order," and it is then his duty to exercise the discretion he possesses under S. 436 and to order that further enquiry be made into the complaint that had been dismissed. AIR (Vol 24) 1937 Rang 120: 38 Cr LJ 709: 169 Ind Cas 63.

**——S. 436 — Case starting on major charge — Accused later on charged of minor offence — Whether amounts to discharge under major offence — Sessions Court if can interfere.**

Where a Magistrate deliberately frames a charge on a minor section instead of on the major

section on which the case starts, his action is equivalent to a discharge with regard to the major offence. The Sessions Court, therefore, has power to interfere under S. 436, Criminal P. C. AIR (Vol 23) 1936 Nag 87 (88): ILR (1936) Nag 54: 37 Cr LJ 715 (2): 162 Ind Cas 925.

——S. 436 — Where there has been a full enquiry under S. 302, Criminal P. C., the District Magistrate can interfere. There is nothing in S. 436 to support the view that it is only on a point of law that the District Magistrate can interfere. AIR (Vol 22) 1935 All 439: 36 Cr LJ 526: 1935 AWR 209: 154 Ind Cas 513.

——S. 436 — If the offence is a technical one, the revisional power to set aside discharge order should not be used. ('35) 1935 MWN 654 (655).

——S. 436 — Discharge, whether before or after hearing all prosecution evidence is not an acquittal so as to bar further trial for the same offence under S. 403, Criminal P. C. and S. 436 empowers the Magistrate to order further enquiry when he thinks that a prima facie case has been made out against the accused. AIR (Vol 21) 1934 All 944: 4 AWR 37: 36 Cr LJ 202: 152 Ind Cas 884.

——S. 436 — Section 436, Criminal P. C., does not limit the grounds on which further enquiry is to be ordered. AIR (V 21) 1934 All 944 (945) : 4 AWR 37: 36 Cr LJ 202: 152 Ind Cas 884.

——S. 436 — Where a Magistrate completes an enquiry and discharges the accused further enquiry should not be ordered except for very strong reasons. 12 NLJ 173: 121 Ind Cas 671: 31 Cr LJ 279: 1929 Cr C 673: AIR (Vol 16) 1929 Nag 360.

**——S. 436 — When can be ordered.**

Where a Magistrate dismisses a complaint under S. 203 without examining the complainant, he, not being present on any of the dates of hearing, the complainant cannot afterwards be heard to say that the matter should be sent back for further inquiry. 111 Ind Cas 126: 48 CLJ 90: 11 AI Cr R 48: 29 Cr LJ 798: AIR (Vol 15) 1928 Cal 569 (DB.)

——S. 436 — Further enquiry can be ordered by the Sessions Judge on the same facts as have been considered by the trial Court. Where a Magistrate was very much influenced by the fact that a civil suit was pending and he regarded the complaint as a sort of forestalling the civil suit.

Held, that the Sessions Judge's order directing further enquiry was a good order. 86 Ind Cas 224: 23 ALJ 20: 6 LRA Cr 55: 26 Cr LJ 736: AIR (Vol 12) 1925 All 298.

**——S. 436 — Order for re-trial merely "in the interests of justice" is bad.**

Where the Sessions Judge without reasons ordered further inquiry in the interests of justice though the order of discharge was not perverse or foolish, held, that a further inquiry merely amounted to a re-hearing of the same evidence by another Magistrate, and that the order was illegal. 72 Ind Cas 890: 24 Cr LJ 474: AIR (Vol 9) 1922 Lah 409.

——S. 436 — Where, after a full trial, the accused persons were discharged, that discharge is, for all practical purposes, as good as an acquittal and the Magistrate is not justified in ordering further enquiry.

A Magistrate while ordering further enquiry after the accused have been once discharged, should not remark that he considers that a prima facie case has been made against accused. 4 LLJ 331: AIR (Vol 8): 1921 Lah 283.

**——S. 436 — Revisions of orders of discharge by District Magistrate — Committal to Sessions Court on grounds of expediency — Propriety.**

Where a District Magistrate acting under S. 436, Cr. P. Code set aside the order of discharge of a police officer accused for extortion on the ground that the case was of an important character which ought to go before the Courts of Session and when his order does not show that the accused had been improperly discharged, there is no sufficient reason for interfering with the order of discharge. 1 PLJ 97: 17 Cr LJ 330: 3 PLW 87: 35 Ind Cas 506: AIR (Vol 3) 1916 Pat 233 (1) (DB).

**(a-1) Difference of opinion.**

**——S. 436 — Ss. 436, 435 — Sessions Judge should not interfere because he holds different views on evidence.**

Section 436, Criminal P. C., must be read with S. 435, and the limitations within which jurisdiction in revision is to be exercised, are indicated by the words of sub-s. (1), itself. It is true these words are wide but they again are limited in their application by the fact that jurisdiction exercised in revision is an extraordinary jurisdiction and that that jurisdiction to be exercised only in exceptional cases and sparingly.

It is not intended by sub-s. (1) of S. 435, Criminal P. C., that a Sessions Judge should usurp the jurisdiction conferred by law upon Magistrates and that he should interfere with an order of a Magistrate which may fairly be deemed a proper order, merely because the Sessions Judge does take a different view upon the evidence from that of the trying Magistrate, the view of the trying Magistrate being a reasonable view in all the circumstances of the case. AIR (Vol 26) 1939 Sind 71: 40 Cr LJ 454: ILR (1939) Kar 370: 180 Ind Cas 581 (DB).

**——S. 436 — Discharge of accused — When improper.**

Where in a case, two views of the evidence are possible and neither one can be said to be unreasonable, it is not proper to set aside discharge and order further enquiry. ('37) 1937 MWN 332 (332).

——S. 436 — Order of acquittal — Principles.

Where it is not possible to say that the view taken by the trying Magistrate is palpably unreasonable, or by any means perverse and the Magistrate has not overlooked or ignored any evidence, the fact that the Court of revision is inclined to take a different view of the evidence from that of the trying Magistrate is not a sufficient ground justifying interference with an order of acquittal. AIR (Vol 19) 1932 Oudh 114: 9 OWN 134: 33 Cr LJ 383: 137 Ind Cas 71.

**——S. 436 — Power under, should be used sparingly and with caution — Evidence capable of presenting two different views — Discharge not perverse — No suggestion of further evidence forthcoming — Further enquiry should not be ordered.**

The Sessions Judge and Magistrates should in a case where a man has been discharged use the powers given to them with great caution and circumspection, specially in cases where the question involved are mere matters of fact. If the circumstances and the evidence are such that two different courts might take two different views of the evidence and the order of discharge is one which cannot be said to be either perverse or prima facie incorrect and there is no suggestion that any further evidence is forthcoming, no further enquiry should be directed under S. 437. 102 Ind Cas 777: 49 All 879 : 25 ALJ 703 : 8 AI Cr R 1: 8 LRA Cr 89: 28 Cr LJ 601: AIR (Vol 14) 1927 All 804.

——S. 436 — Where the nature of the case is such that Courts are liable to take different views of the evidence and of the probabilities, the case is not one which calls for any further enquiry. 100 Ind Cas 822: 7 AI Cr R 400: 8 LRA Cr 61: 28 Cr LJ 342: AIR (Vol 14) 1927 All 754.

——S. 436 — Where on the evidence, a revising authority comes to a different conclusion from the Court that hears the evidence, a further enquiry under S. 436 (new) should not be ordered. 85 Ind Cas 726: 6 LRA Cr 47: 26 Cr LJ 582: AIR (Vol 12) 1925 All 477.

——S. 436 — The mere fact that the District Magistrate does not agree with the decision of the trying Court is not sufficient ground for ordering a further enquiry which is what is directed by S. 437. Nor can such enquiry be ordered without notice to the party concerned. 71 Ind Cas 600: 21 ALJ 194: 24 Cr LJ 184: 4 LRA Cr 95: AIR (Vol 10) 1923 All 484.

——S. 436 — Merely because the District Magistrate takes a view of the evidence on record in any proceedings different from that taken by the trying Magistrate that is no reason for ordering further enquiry under S. 437 especially when there is no suggestion that further evidence is available or should be taken. 71 Ind Cas 528: 44 All 691 24 Cr LJ 176: AIR ( Vol 9) 1922 All 429.

(b) Evidence.

**——Ss. 436, 437 — Order of discharge when can be set aside on ground of misappreciation of evidence.**

It is both legal and proper for a Sessions Judge or a District Magistrate to set aside an order of discharge under S. 436, Criminal P. C., on the ground of misappreciation of evidence. It is, strictly speaking, legal for a Sessions Judge or a District Magistrate to do so on the ground of misappreciation of evidence, but it is not proper to do so unless he is clearly of opinion that the misappreciation is so flagrant that in effect, the order is perverse or manifestly unreasonable or foolish or prima facie incorrect. Where exactly to draw the line is a matter for the exercise of common-sense. In the application of these principles, there is no practical difference between S. 436 and S. 437, Criminal P. C. AIR (V 25) 1938 Nag 394 : 1938 NLJ 250 : ILR (1938) Nag 442 : 39 Cr LJ 917 : 177 Ind Cas 605 (2) (DB).

**——S. 436 — Further enquiry, when to be ordered.**

For accepting revision against a discharge order and ordering further enquiry the Court should find whether a specific charge on the facts could have been framed against the accused, which they ought to be called upon to answer. Where it is impossible to say on the evidence what particular form the alleged dishonesty of the accused took, it is clear that it would not be possible to frame a charge except in the alternative. (1937) 1937 MWN 871 (873).

**——S. 436 — Considerations.**

In deciding whether a further enquiry should be ordered, the District Magistrate should consider the question whether it is really necessary to have a fresh hearing of the case in view of the fact that evidence on both sides has been taken. (1937) 1937 MWN 868.

**——S. 436 — Order of discharge.**

Where there are serious discrepancies existing in the evidence of the important eye-witnesses for the prosecution it is perfectly within the trying Magistrate's competence to disbelieve these witnesses and hold that there was no prima facie case as against the accused and the District Magistrate has, therefore, no power under S. 436 to interfere with the order of discharge which is based on a careful appreciation of the evidence on record. AIR (V 17) 1930 Nag 108 : 1930 Cr C 316 : 31 Cr LJ 417 : 122 Ind Cas 434.

**——S. 436 — Order of discharge need not be foolish.**

Section 436 does not lay down any rule that further inquiry should only be directed when it is found that the judgment is perverse or foolish.

As a rule of prudence, it has often been held that the superior Court should not lightly discard the estimate of evidence appraised by the trial Court and should not set aside the dismissal of a complaint simply because a different view of the evidence might be taken. AIR (V 15) 1928 Pat 12 : 9 PLT 12 : 28 Cr LJ 857 : 9 AI Cr R 61 : 104 Ind Cas 633.

——S. 436 — That the reasons given by the trial Magistrate for disbelieving witnesses are not cogent, is not sufficient ground for ordering a re-trial. (1926) 27 PLR 397 : 27 Cr LJ 565 (2) : 94 Ind Cas 133 (2).

**——S. 436 — Fresh evidence not possible — Further enquiry need not be directed.**

Where no fresh evidence is likely to be produced on further enquiry, the superior Court should hesitate before exercising its powers under S. 437, Criminal P. C., unless there are palpable errors in the decision of the lower Court and not merely a difference of opinion as to the weight to be given to the discrepancies in evidence. AIR (V 11) 1924 Cal 229 : 25 Cr LJ 191 : 38 CLJ 206 : 76 Ind Cas 431 (DB).

**——S. 436 — 'Further enquiry' cannot be ordered on chance of offence being disclosed.**

Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available which has not been taken and which would support a charge for that offence. AIR (V 10) 1923 Mad 59 : 43 MLJ 504 : 1922 MWN 801 : 16 MLW 494 : 31 MLT 254 : 23 Cr LJ 592 : 68 Ind Cas 624.

(c) Order perverse or foolish.

——S. 436 — A dismissal of a complaint under S. 203, Criminal P. C., does not bar a fresh complaint on the same facts. But the order of dismissal will not be set aside unless that order is manifestly perverse or foolish or based on a record of evidence which was obviously incomplete. AIR (V 29) 1942 Pesh 24 : 43 Cr LJ 611 : 200 Ind Cas 60.

——S. 436 — It is commendable on the part of the Magistrate, proceeding under S. 202, Criminal P. C., to show keenness in finding out the truth or falsity of the case, before he gives the accused person the trouble of appearing before him in response to a criminal charge. Therefore, the anxiety of the trial Magistrate to get at the truth, and his intensive cross-examination of the witnesses for that purpose are no grounds in law for directing a further enquiry. A further enquiry can be ordered only on the ground that the judgment of the trial Magistrate is perverse and foolish. AIR (V 26) 1939 Pesh 16 : 40 Cr LJ 674 : 182 Ind Cas 522.

——S. 436 — The District Magistrate is entitled to exercise his power of directing further enquiry only when the order of discharge is perverse or prima facie incorrect.

Held, after reviewing evidence that as the order of discharge cannot be said to be perverse, the District Magistrate's order for further enquiry is set aside, and the order of discharge, restored. (1936) 159 Ind Cas 238 (239, 240) : 18 NLJ 90 : 37 Cr LJ 89.

——S. 436 — Where an order of discharge has been made by a Magistrate after hearing all the prosecution evidence, it should not be set aside unless it is perverse or manifestly unreasonable and inconsistent with an honest appreciation of evidence before

the Court. AIR (V 21) 1934 Bom 48 : 35 Bom LR 1181 : 35 Cr LJ 644 : 148 Ind Cas 271 (DB).

——S. 436 — An order for further enquiry cannot be made against a person who has been discharged unless the order is perverse. AIR (V 20) 1933 Lah 166 : 34 Cr LJ 190 : 34 PLR 148 : 141 Ind Cas 263.

——S. 436 — In an appropriate case, the Sessions Judge has the power to set aside an order of discharge passed by the Magistrate, even though no additional evidence is sought to be produced.

But generally speaking, further enquiry after discharge is improper unless the order of discharge was perverse or foolish or was based upon a record of evidence which was obviously incomplete and while no invariable rule could be laid down and each case must depend on its peculiar facts and circumstances, it is well-settled that further enquiry should be undertaken only in exceptional cases and for good reasons shown.

The Sessions Judge or the District Magistrate should not order enquiry on the same materials simply because he was inclined to take a view of the evidence different from that of the Magistrate or merely because he thinks that in the interest of justice, it is necessary to do so.

Further, it is not for the accused person to convince the Court of Revision why further enquiry should not be ordered against him, but that it is for the prosecution to bring the case within the rule.

In considering whether an order for fresh enquiry has been properly passed or not, too much emphasis should not be laid on a sentence here or a sentence there in the judgment of the Sessions Judge but his judgment must be considered as a whole in order to see if it offends against the well-settled rule.

Similarly, in determining whether the order of the Magistrate discharging the accused was "foolish or perverse", it is not sufficient to pick out holes in his judgment on matters of detail, but what is to be seen is whether taking a broad view of material points requiring decision in the case, and on a consideration of the whole of the evidence, the order could have been passed by a Judge fairly and impartially dealing with the case. AIR (V 20) 1933 Lah 561 : 34 Cr LJ 735 : 34 PLR 719 : 144 Ind Cas 331.

——S. 436 — When in a criminal case, the trying Magistrate passed an order of discharge and it was not suggested that the Magistrate had overlooked or ignored any evidence, nor could it be said that his view was palpably unreasonable or perverse, and any further evidence was not forthcoming:

Held, that the order of discharge was neither perverse nor prima facie incorrect and no further enquiry could be directed by the Sessions Judge. (32) 138 Ind Cas 142 : 9 OWN 442 : 33 Cr LJ 571.

——S. 436 — The dictum that "further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish" does not apply to a case in which the Magistrate is acting as a Court of enquiry and not a trial Court. AIR (V 17) 1930 Oudh 415 : 1930 Cr C 955 : 7 OWN 749.

——S. 436 — Further inquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. AIR (V 15) 1928 Lah 42 : 28 PLR 593 : 28 Cr LJ 860 : 9 AI Cr R 42 : 104 Ind Cas 636.

——S. 436 — Further inquiry after discharge is "improper" unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. AIR (V 15) 1928 Lah 97 : 9 Lah LJ 508 : 29 Cr LJ 39 : 9 AI Cr R 328 : 9 AI Cr R 399 : 106 Ind Cas 455.

——S. 436 — Further inquiry should be undertaken only in exceptional cases and for good reasons shown and, speaking generally, only if the order of discharge is perverse or foolish or based upon a record of evidence obviously incomplete, and where a Sessions Judge has considered the whole of the evidence in an exhaustive order and has held, after going through the whole record, that the order of discharge was perverse and set it aside, the High Court will not interfere in revision. AIR (V 14) 1927 Lah 775 : 9 Lah LJ 114 : 28 Cr LJ 238 : 99 Ind Cas 1038.

——S. 436 — Further enquiry after an order of discharge should not take place unless that order is perverse or foolish or based on an incomplete record of evidence. AIR (V 14) 1927 Lah 815 : 28 Cr LJ 607 : 102 Ind Cas 783.

——S. 436 — Further enquiry should not be ordered unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which was obviously incomplete. AIR (V 13) 1926 Lah 130 : 27 Cr LJ 661 : 94 Ind Cas 709.

——S. 436 — Revision Court should not direct further inquiry after discharge unless it is perverse or foolish or based on incomplete record of evidence.

Speaking generally, further enquiry after discharge is improper unless the order of discharge is manifestly peverse or foolish, or is based upon the record of evidence which is obviously incomplete. It is not sufficient for a Court to merely say that the trial Judge has not gone fully into the case and to declare that a further enquiry is necessary. Before ordering a further enquiry the Court of Revision should state in what respect the trial Judge's conclusions are either foolish or perverse or otherwise unsatisfactory, and if the case is sent back on the ground that the decision of the trial Court has been arrived at upon an incomplete record this should be stated. AIR (V 13) 1926 Lah 50 : 26 PLR 291 : 26 Cr LJ 1393 : 89 Ind Cas 705.

——S. 436 — A direction for further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. (1926) 96 Ind Cas 869 (2) : 27 Cr LJ 1013 (2) (Lah).

——S. 436 — Generally speaking further enquiry after discharge is improper, unless the order of discharge is manifestly perverse or foolish or incomplete. (1926) 95 Ind Cas 307: 27 Cr LJ 771: 27 PLR 488.

——S. 436 — Further inquiry should only be ordered in exceptional cases and for good reasons shown. Ordinarily when a man is discharged under circumstances which make the order of discharge equivalent to one of acquittal no further proceedings should be taken against him under S. 437, and speaking generally, further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete. (1926) 94 Ind Cas 133 (2): 27 PLR 397: 27 Cr LJ 565 (2).

——S. 436 — Further enquiry should be ordered by District Magistrate very sparingly and only when the order of discharge is perverse.

The powers vested in a District Magistrate ordering further enquiry under S. 437 should be used sparingly and with great circumspection; it is only where the order of discharge is perverse or foolish or the Magistrate has not dealt with the evidence or has not recorded sound reasons for the discharge that the District Magistrate might exercise his powers of directing further enquiry. A District Magistrate cannot set aside an order of discharge if there be no irregularity, illegality or impropriety

in the proceedings. Where further enquiry is directed, it does not in all cases mean taking of additional evidence, but may be rehearing and reconsideration of the evidence already taken. AIR (Vol 13) 1926 Nag 117: 90 Ind Cas 385: 21 NLR 88: 26 Cr LJ 1537.

——S. 436 — **Discharge does not preclude fresh proceedings on same facts — But fresh enquiry is not permissible except in special cases.**

When a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts although the order of discharge has not been set aside by higher authority. But, generally speaking, further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete. AIR (Vol 12) 1925 Lah 439: 90 Ind Cas 292: 7 LLJ 252: 26 PLR 353: 26 Cr LJ 1508.

——S. 436 — A Revising Court has power to order further enquiry even when the Subordinate Magistrate has recorded all the evidence of the prosecution. Where the Sessions Judge after going carefully through the evidence came to the conclusion that the finding of the Magistrate was either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded and where this was his considered opinion, the High Court refused to hold that his order directing a further enquiry was illegal, improper or incorrect. AIR (Vol 12) 1925 Oudh 180: 87 Ind Cas 111: 11 OLJ 611: 26 Cr LJ 959.

——S. 436 — When a Magistrate has passed an order discharging an accused person, generally speaking, further enquiry should not be directed unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. AIR (Vol 10) 1923 Lah 329: 72 Ind Cas 369: 24 Cr LJ 369: 7 PWR Cr 1923.

**(d) Point of public importance.**

——**Ss. 436, 437 — Penal Code, S. 463 — Forgery — Discharge of accused — Pendency of civil suit — Power to order further inquiry.**

Where a person accused of forgery is discharged and the Sessions Judge is moved under Ss. 436 and 437, Criminal P. C., the Judge, if he thinks further inquiry necessary, should proceed under the said section and if he does not, he should dismiss the application. He has full discretion in the matter and the circumstance that the accused has lodged a civil suit in respect of the same matter is irrelevant to the question whether the discharge of the accused should or should not be set aside.

Forgery is an offence of too grave a public importance to be made merely triable by Subordinate Magistrate. AIR (Vol 19) 1932 Mad 216: 1931 MWN 1191: 35 LW 267: 33 Cr LJ 362: 136 Ind Cas 780.

——**S. 436 — Order for further enquiry — No prospect of public advantage — Order is not proper.**

Where in an aplication under S. 437 of the Code, the Court is asked to set aside the order of discharge passed by the Lower Court, and to order a further enquiry, the material point for consideration by the Court is to see whether there is a prospect of any public advantage from the case being re-opened. An order passed without such consideration is one without jurisdiction. AIR (Vol 10) 1923 Mad 134: 43 MLJ 555: 16 MLW 585: 31 MLT 419: 1923 MWN 56: 23 Cr LJ 600: 68 Ind Cas 824.

**(e) Proceedings illegal.**

——S. 436 — Even misappreciation of the evidence by the trying Magistrate will not in law justify the District Magistrate in setting aside the order of discharge which can only be done if there is either irregularity or illegality in the proceedings. AIR (Vol 17) 1930 Nag 108: 31 Cr LJ 417: 1930 Cr C 316: 122 Ind Cas 434.—

——S. 436 — Cross-examination and arguments 'inter partes' are out of place in an enquiry into the truth of the complaint. Such departure from the strict letter of the law constitutes a mere irregularity and the High Court should not in the exercise of its discretion direct a further enquiry. AIR (Vol 13) 1926 Pat 34: 89 IC 706: 7 PLT 36: 26 Cr LJ 1394.

**(f) Wrong decision.**

——**S. 436 — Further inquiry — When can be ordered by Superior Court.**

Though the revising Court has jurisdiction to order further enquiry on the same materials, a superior Court should hesitate before exercising its power under S. 437 to order further enquiry, unless there are palpable errors in the decision of the lower Court. AIR (Vol 16) 1929 Cal 755: 50 CLJ 284: 1929 Cr C 467: 31 Cr LJ 475: 123 Ind Cas 246 (DB).

**3. Jurisdiction.**

**(a) General.**
**(b) District Magistrate.**
**(c) Sessions Judge.**

**(a) General.**

——**S. 436 — Withdrawal of complaint by Joint Magistrate — Interference by District Magistrate.**

An order of the joint Magistrate directing the withdrawal of a complaint is not an order of discharge and the District Magistrate has no jurisdiction to set aside in revision. All that he can do is to send up the papers to the High Court for orders under S. 438, Criminal P. C. in case he considers the order to be incorrect. AIR (Vol 32) 1945 Mad 58: 57 LW 515: (1944) 2 MLJ 208: 1944 MWN 600: 46 Cr LJ 421: 218 Ind Cas 109.

——**S. 436 — Person having his remedy under S. 476-B to Sessions Judge cannot come to District Magistrate under S. 436, only because he could be influenced.**

It is not in the interests of justice that persons of influence should believe that it is in their power to by-pass, as it were, the Court of Session whom they ought to have approached under S. 476-B but whom they cannot influence, by an application to the District Magistrate under S. 436, whom they can influence. However influential, they must follow the proper procedure for the redress of their grievances or supposed grievances, which the law provides. AIR (Vol 30) 1943 Sind 149: ILR (1943) Kar 105: 44 Cr LJ 728: 208 Ind Cas 35 (DB).

——S. 436 — It is not open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority. If the complainant in this is aggrieved by the dismissal of his complaint and the discharge of accused under S. 259, Criminal P. C., it is open to him to move the Sessions Court to order further inquiry under S. 436, Criminal P. C., because that section is now amended and relates not only to dismissal of complainant under S. 203 or S. 204 (3), but to any case where persons accused of an offence

have been discharged. AIR (Vol 26) 1939 Sind 38: 40 Cr LJ 287: ILR (1939) Kar 228: 179 Ind Cas 898 (DB).

——S. 436 — Where the accused was not present before the Magistrate who dismissed the complaint against him, he has no right to appear before the Sessions Judge, and to argue his case before the Court orders further inquiry in the case. AIR (V 16) 1929 Pat 230 : 30 Cr LJ 1069 : 119 Ind Cas 559.

——S. 436 — A Magistrate has jurisdiction to order a further inquiry upon the same materials which were before the trying Magistrate. AIR (V 12) 1925 Oudh 36: 75 Ind Cas 978: 25 Cr LJ 66.

——S. 436 — An order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided by S. 437. One Magistrate of co-ordinate jurisdiction should not, in effect & substance, deal with, as if it were an appeal of a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority. But this rule admits of exception. AIR (V 9) 1922 Sind 23: 69 Ind Cas 625: 15 SLR 131: 23 Cr LJ 737 (DB).

**——S. 436 — "Judge making order under, trying the case" objectionable.**

The practice current in the mofussil, of a Judge who makes an order under S. 436, Cr. P. Code directing the Magistrate to commit the accused to the Sessions, and then trying the case himself is undesirable, and should be avoided if possible. AIR (V 2) 1915 Bom 237: 17 Bom LR 590: 16 Cr LJ 754: 31 Ind Cas 354 (DB).

**(b) District Magistrate.**

**——Ss. 436, 437 and 403 — Power to order further enquiry — Charge sheet under S. 307, I. P. Code — Charge framed under S. 337, I. P. Code, & conviction thereunder — S. 403, Cr. P. Code, if a bar to the trial of the offence under S. 307, I. P. Code.**

Where a charge sheet is filed against the accused under S. 307, I. P. Code, but the Magistrate frames a charge under S. 337, and not under S. 307, I. P. Code, his action amounts to a discharge of the accused of an offence under the latter section. In such a case it is open to the District Magistrate under Ss. 436 and 437, Cr. P. Code, if he considers it necessary, to order a further enquiry or to order commitment to the Court of Session without making a reference to the High Court. The conviction under S. 337, I. P. Code, will not in any way interfere with the order of discharge under S. 307, I. P. Code.

The facts and circumstances which according to the Court of first instance constituted the offence under S. 337, I. P. Code, along with other ingredients might constitute an offence under S. 307, I. P. Code and there is no prohibition in law under S. 403, Cr. P. Code, in trying the accused for the serious offence, the conviction under S. 337, I. P. Code, not being a bar. AIR (Vol 36) 1949 Mad 430: (1949) 1 MLJ 145: 1949 MWN 12: 50 Cr LJ 558.

**——S. 436 — Order dismissing complaint for want of sanction for prosecution — Further inquiry — If may be ordered — Proper procedure — Order setting aside dismissal — Accused's right to be heard.**

An order dismissing a complaint for want of necessary sanction for the prosecution of the accused, does not fall under S. 203, Cr. P. Code. The dismissal of a complaint under S. 203 is essentially a dismissal on the merits, and can be ordered only where the Court has jurisdiction to hear it. The order is passed not under any express provision of the Code, but in the exercise of the inherent powers of the Court. In these circumstances it is not open to the District Magistrate to order further inquiry under S. 436, Cr. P. Code, which permits only reversals of orders under Ss. 203, 204 (3) and 253, Cr. P. Code. The District Magistrate can only act under S. 438, Cr. P. Code, and it is open to him to report to the High Court under that section that the order passed by the trial Court was wrong or unsustainable. He can make suitable recommendations, but he has no power to pass final orders.

The dismissal of the complaint being in the exercise of the inherent jurisdiction of the Court, there is no express provision in the Code, requiring that an opportunity must be allowed to the accused before the order dismissing the complaint against him is set aside, but in the interests of justice such an opportunity should be given. AIR (Vol 34) 1947 Pesh 58: 48 Cr LJ 953 (DB).

**——S. 436 — Ss. 436 and 119 — Discharge under S. 119 — District Magistrate, if can order further enquiry.**

The District Magistrate has no power to order a further enquiry in a case which does not relate to the commission of an offence, such as proceedings under S. 107 or S. 110. No further enquiry, therefore, can be ordered under S. 436 against a person discharged under S. 119. AIR (Vol 31) 1944 Pesh 48 (2): 46 Cr LJ 156: 216 Ind Cas 265.

**——S. 436 — District Magistrate's power to direct further enquiry.**

Where the Magistrate has not dealt with the evidence, it is certainly open to the District Magistrate to direct a further enquiry. ('36) 163 Ind Cas 702 (703): 18 NLJ 289: 37 Cr LJ 853.

**——S. 436 — Discharge under S. 494 — Power to order further enquiry.**

A District Magistrate may, under S. 436, Criminal P. C., order a further enquiry in the case of persons who have been discharged under S. 494 of the Code. AIR (Vol 20) 1933 Nag 78: 29 NLR 201: 34 Cr LJ 519: 143 Ind Cas 77.

**——S. 436 — Application under S. 107, Cr. P. Code —Dismissal—Application by complainant to District Magistrate under Ss. 435, 436 — District Magistrate directing further enquiry — Legality.**

Where a complaint under S. 107, Cr. P. Code, was dismissed with the remark that there was no apprehension of breach of the peace and the complainant having applied to the District Magistrate under Ss. 435 and 436 he ordered further enquiry. Held, that the order of the District Magistrate was without jurisdiction. AIR (Vol 18) 1931 Lah 185: 31 Punj LR 350: 127 Ind Cas 716 : 32 Cr LJ 21.

——S. 436 — The District Magistrate is competent to revise an order of discharge passed on withdrawal of complaint authorized by himself to direct further enquiry into the case. AIR (Vol 16) 1929 Lah 315: 114 Ind Cas 50: 30 PLR 58: 30 Cr LJ 233: 12 AI Cr R 113.

——S. 436 — Under S. 436 as amended in 1923, a District Magistrate has no jurisdiction to revise the case of a person who has been led upon to give security and is discharged. 24 All 148, held no good law. AIR (Vol 15) 1928 All 755: 9 LRA Cr 146: 10 AI Cr R 488: 113 Ind Cas 79: 51 All 408 : 1929 ALJ 146 : 30 Cr LJ 63.

——S. 436 — A District Magistrate has no power to order further inquiry in a case where an application under S. 145 has been rejected. All that

the District Magistrate has power to do in revision is to make a reference to the High Court under S. 438. AIR (Vol 15) 1928 Rang 292: 30 Cr LJ 709: 117 Ind Cas 59.

——S. 436 — Whenever a District Magistrate decides to exercise his revisional jurisdiction under S. 436 or S. 437 he should ordinarily confine the exercise of his power of interference to those powers which are expressly specified in those sections, and not take upon himself the duty of trying those persons and convicting them as a Magistrate exercising original jurisdiction, though it is not illegal for the Magistrate to take such a course. AIR (Vol 13) 1926 Nag 374: 27 Cr LJ 728: 95 Ind Cas 56.

——S. 436 — The Disrict Magistrate under S. 430 (now S. 436) had no power to order a further inquiry in cases under Chapter VIII of the Code. AIR (Vol 11) 1924 Rang 207: 2 Rang 30: 2 Bur LJ 285: 25 Cr LJ 1146: 81 Ind Cas 970.

——S. 436 — Where a number of persons are included in the police report on the basis of which a Magistrate takes cognizance of a case, and some of these only appear and warrant against the rest is re-called, and then the case is transferred to another Magistrate under S. 192, the whole case including that against the accused against whom the warrant was re-called, should be deemed to be transferred. If the Magistrate to whom the case is transferred for disposal refuses to summon the accused against whom the warrants were recalled, the Magistrate who transferred the case has no jurisdiction to do so himself. The order refusing to summon accused is equivalent to an order of discharge and the District Magistrate can only pass an order for further enquiry under S. 437. AIR (Vol 8) 1921 Pat 474.

**——S. 436 — Graver charge — Not pressed by prosecution — Jurisdiction of District Magistrate to direct — Committal to Sessions.**

Where a graver charge was neither mentioned in the Police charge sheet, nor pressed by prosecution for framing charge before the Sub-Magistrate, the District Magistrate has no jurisdiction under S. 436, Cr P. Code to direct the Sub-Magistrate to commit the accused to the Sessions on the graver charge. AIR (Vol 6) 1919 Mad 847 (1): 41 Mad 982: 35 MLJ 667: 24 MLT 82 (1918) MWN 486: 19 Cr LJ 945: 47 Ind Cas 669 (DB).

**——Ss. 436 and 437 — Revisional jurisdiction.**

Where a subordinate Magistrate of the first class invested with powers under S. 30, Cr. P. C. makes an order of discharge in a case which is under Sch. II of the Code read with S. 28 or 29 thereof triable exclusively by the Court of Session, such order can be revised by the District Magistrate under Sections 436 and 437. AIR (Vol 3) 1916 Nag 97: 12 NLR 94: 17 Cr LJ 245: 34 Ind Cas 965.

**——S. 436 — Commitment, power to order — By District Magistrate.**

Where a District Magistrate committed a person to Sessions on a charge under S. 477 A of the Penal Code, he can add a charge under S. 408 I. P. Code, if the latter charge is so intimately connected with the former, as to form part of the same transaction. AIR (Vol 1) 1914 Bom 4: 16 Bom LR 80: 15 Cr LJ 292: 23 Ind Cas 500 (DB).

**——Ss. 436, 437, 438 and 439 — Jurisdiction of District Magistrate under.**

It is competent to a District Magistrate or Sessions Judge in their revisional jurisdiction to set aside orders of discharge of accused persons on the ground of misappreciation of evidence, to himself frame a charge or order the Magistrate to frame charge and try the accused if the judge or the Magistrate finds a prima facie case has been made out and also to order reconsideration of evidence when a difference of opinion arises between himself and the subordinate Magistrate and not refer it to the High Court and lastly to order a case to be tried by any other Magistrate. (1909) 32 Mad 220 : 5 MLT 233: 19 MLJ 157: 9 Cr LJ 192: 1 Ind Cas 228 (FB).

**——S. 436 — "Pass an order for his committal" — Jurisdiction of District Magistrate to commit the accused himself.**

The words "order him to be committed" in S. 436, Cr. P. C., do not mean more than "pass an order for his committal" and enable the District Magistrate himself to make a committal or to direct a Subordinate Magistrate to make a committal. (1907) 31 M 40 (41): 7 Cr LJ 29: 3 MLT 25.

**——S. 436 — Power to order commitment — Further inquiry — Commitment.**

Under S. 436, Cr P.C., the District Magistrate or the District Judge has jurisdiction not merely to order further inquiry, but also to order a commitment upon the evidence already recorded. (1901) 5 CWN 574: 28 C 397 (399) (DB).

**(c) Sessions Judge.**

**——Ss. 436 and 437 — Powers under — Discharge of accused under S. 209 — Powers of Sessions Judge in revision against such discharge — Setting aside of order of discharge and direction for framing a charge — Legality.**

Under Ss. 436 and 437 of the Code, only two courses are open to the Sessions Judge in a revision against the discharge of an accused. He may either straightaway order the committal of the accused or direct the Magistrate to enquire into the matter afresh, the result of adopting the latter course being that all the previous proceedings and the examination or cross-examination of witnesses and the other evidence let in would be wiped off the record. An order, therefore, setting aside the order of discharge and directing that a charge be framed against the accused is not warranted by law. AIR (V 37) 1950 Mad 462: ILR (1951) Mad 65: 1950 MWN 257: 51 Cr LJ 1076: 63 LW 279: (1950) 1 MLJ 340.

——Ss. 436 and 437 — Powers of Sessions Judge — Committed to Sessions on certain charge — Order by Sessions Judge directing magistrate to hold further inquiry to see whether charges of a more serious nature can be framed — Legality. AIR (Vol 32) 1945 Mad 424: ILR (1946) Mad 136: 47 Cr LJ 230: 222 Ind Cas 36.

——S. 436 — The Sessions Judge should not, under S. 436, override the trying Magistrate's discretion when he has dismissed a complaint on finding that the allegations of major offences have been falsely mixed with the complaint of minor offences. AIR (Vol 31) 1944 Nag 318: 1944 NLJ 403: 46 Cr LJ 195: ILR (1945) Nag 486: 217 Ind Cas 142.

**——S. 436 — Power of Sessions Judge to direct enquiry.**

If a complaint is transferred at the very outset by one Magistrate to another, the latter has power to take action under Ss. 202 and 203, Criminal P. C. but it is impossible to suppose that the Code contemplates that when one Magistrate has examined witnesses under S. 202, and has believed them, and thereupon transfers the case for trial to a Subordinate Magistrate, that Magistrate should have power

to examine those same witnesses over again under S. 202, and then proceed to dismiss the complaint under S. 203, Criminal P. C.:

Held, however, that even assuming that the Special Magistrate had power under the Code to take evidence under S. 202, Criminal P. C., and dismiss the complaint under S. 203, further enquiry ought to have been made into the case. The Sessions Judge himself could have ordered further enquiry under the provisions of S. 436, Criminal P. C. and it was not necessary for him to make reference to the High Court at all. AIR (Vol 24) 1937 Oudh 81: 12 Luck 523: 1936 OWN 1079: 37 Cr LJ 1128: 165 Ind Cas 28.

——**S. 436 — Power of Sessions Court to order further inquiry without reference to High Court.**

The order of Magistrate quashing the proceedings amounts to an order of discharge and it is open to the Sessions Judge, if he is of that opinion, to order further inquiry into the complaint without referring to High Court. AIR (Vol 22) 1935 Pat 52: 36 Cr LJ 650: 14 Pat 299: 15 PLT 775: 1 BR 395: 155 Ind Cas 126 (DB).

——**Ss. 436, 195, 209(2) — Order declining to proceed for want of jurisdiction — Sessions Judge's power to revise.**

If a Magistrate had no jurisdiction to entertain the complaint he could certainly have no jurisdiction to discharge the accused under S. 209(2), Criminal P. C.

An order of a Magistrate declining to proceed with the case for want of jurisdiction is not an order that could be revised by the learned Sessions Judge. It is neither an order of discharge within S. 209(2), nor an order dismissing the complaint within S. 203. AIR (Vol 20) 1933 Mad 413: 37 LW 547: 1933 MWN 217: 34 Cr LJ 800: 144 Ind Cas 519.

——S. 436 — Where, on a complaint of kidnapping, the Police sent a referred charge to the Sub-Divisional Magistrate who ordered the Police to file a fresh charge sheet, and the Police again put in a referred charge sheet before the succeeding Sub-Divisional Magistrate who agreed with the Police and directed the case to be treated as one of a civil nature, and in revision, the Sessions Judge ordered further enquiry:

Held, that the Sessions Court was not competent under S. 436, Criminal P. C. to revise the order of the Sub-Divisional Magistrate to treat the matter as of a civil nature.

Held also, that by the order of the first Sub-Divisional Magistrate, he could not be said to have taken cognizance of the case and that his successor was therefore, in the same position as if he had been dealing with the report of the Police. AIR (Vol 19) 1932 Mad 673: 33 Cr LJ 785: 36 LW 788: 1932 MWN 548: 63 MLJ 679: 139 Ind Cas 500.

——S. 436 — Where a trying Magistrate finds that in his judgment there is no sufficient ground to proceed against an accused and dismisses the complaint, the Sessions Judge to whom the case goes up for revision may, if he thinks that the Magistrate was wrong in dismissing the complaint, direct the Magistrate to make further inquiry into the complaint but he cannot compel the Magistrate to summon the accused, when in his judgment there was no sufficient ground to proceed against the accused. Such order if made would be without jurisdiction. AIR (Vol 15) 1928 All 684 : 10 AI Cr R 99 : 9 LRA Cr 88 : 30 Cr LJ 631: 116 Ind Cas 494.

——S. 436 — Proceedings under S. 133 and Chap. 10 are not covered by S. 436 and the Sessions Judge has no power to order further enquiry in such proceedings. The only action which he can take, if one is indeed necessary, would be under S. 438, to make a report to the High Court. AIR (Vol 12) 1925 Oudh 736: 88 Ind Cas 995: 2 OWN 549: 26 Cr LJ 1251.

——**S. 436 — Sessions Court — Direction to Magistrate to commit — Penal Code, S. 471.**

A direction by Sessions Court to a Magistrate to commit an accused to Sessions for offence under S. 471, I. P. C. is beyond its powers. AIR (Vol 6) 1919 Mad 45 (2): 42 Mad 561: 36 MLJ 296: 9 LW 349: (1919) MWN 183: 25 MLT 356: 20 Cr LJ 379: 50 Ind Cas 987 (DB).

### 4. Notice.

——**Ss. 436, proviso, 203 — Dismissal of complaint under S. 203 — Accused not summoned — Proviso to S. 436, applicability of.**

Where a complaint is dismissed under S. 203, Criminal P. C., and the accused has not been summoned, the proviso to S. 436 of the Act does not come into operation and further inquiry cannot be ordered under it. AIR (Vol 22) 1935 Pesh 141: 36 Cr LJ 1384 (1): 158 Ind Cas 31 (1).

——**S. 436, proviso — Disregard of proviso to S. 436 — Whether an illegality.**

A disregard of the proviso to S. 436 is an illegality, and in any case, such irregularity seriously prejudices an accused person who is ordered to be proceeded against. AIR (Vol 21) 1934 All 51: 56 All 285: 3 AWR 137: 35 Cr LJ 418: 1934 ALJ 69: 147 Ind Cas 335.

——**S. 436 — Trial in pursuance of order in revision — Failure to give notice to accused.**

Where a trial is held in pursuance of an order in revision in exercise of power conferred by S. 436, Criminal P. C., without first complying with the requirement of the proviso thereto, it is bad in law. But as the section is only directory, a conviction on such trial need not be set aside if non-compliance has not resulted in miscarriage of justice. AIR (Vol 21) 1934 Rang 181: 35 Cr LJ 1408: 151 Ind Cas 722.

——S. 436, proviso — The proviso to S. 436, Criminal P. C., makes it obligatory on a Court not to pass an order under the section until the person discharged has had an opportunity of showing cause. AIR (Vol 20) 1933 Lah 1018(2): 35 Cr LJ 404(1): 35 PLR 149: 147 Ind Cas 299 (1).

——**S. 436 — Necessity of.**

Before further inquiry under S. 436, Criminal P. C. can be directed in the case of a person who has been discharged, he should be given an opportunity of showing cause why such direction should not be made. AIR (Vol 20) 1933 Sind 299: 34 Cr LJ 1157: 146 Ind Cas 35 (DB).

——**S. 436 — Further enquiry after discharge — Accused has no right to appear — Magistrate allowing him to appear is illegality which cannot entitle him to appear at every subsequent stage.**

When the order is passed, after an order under S. 203, directing further enquiry, the accused has no right under the law to appear either before the trial Court or before the revision Court. And if the Magistrate allowed the accused to appear before the trial

Court to cross-examine the witnesses he acted illegally and this illegal act of the Magistrate does not create a right in the accused to appear at every stage of the proceeding. AIR (Vol 16) 1929 Cal 508: 119 Ind Cas 376: 49 CLJ 422: 30 Cr LJ 1030 (DB).

——S. 436 — **Notice to accused before ordering further enquiry is not necessary.**

Where after the dismissal of a case under S. 203 further enquiry is ordered, the accused need not be given notice before further enquiry is ordered against him as he has no locus standi and it cannot be said that it is desirable to issue a notice upon an accused person in every case where an order is passed against him. AIR (Vol 16) 1929 Cal 508: 119 Ind Cas 376: 49 CLJ 422: 30 Cr LJ 1030 (DB).

——S. 436 — In the case of a dismissal of a complaint under S. 203, notice is not necessary to the accused before ordering further enquiry under S. 436. AIR (Vol 14) 1927 Bom 436: 102 Ind Cas 511: 29 Bom LR 713: 28 Cr LJ 575: 8 AI Cr R 228 (DB).

——S. 436 — **Notice to accused is not necessary before ordering further enquiry as he is not "discharged" within S. 436.**

The dismissal of a complaint under S. 203 or subs. 3 of S. 204 is before the appearance of the accused and no accused person can be said to be discharged when no process has been issued for his appearance. An accused person is said to be discharged when the case against him is thrown out under Ss. 209, 253 or 259 or when the Advocate-General enters a nolle procequi under S. 333. The expression "person who has been discharged" in S. 436 refers to a person who has been discharged" under Ss. 209, 253 or 259. A person against whom no process has been issued under S. 204 is not a discharged person and therefore no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under S. 203 or sub-s. (3) of S. 204. AIR (Vol 14) 1927 Mad 19: 99 Ind Cas 337: 49 Mad 918: 24 MLW 613: 28 Cr LJ 129: 51 MLJ 605 (FB).

——S. 436 — **Dismissal under S. 203 — Further enquiry — Notice to accused is not necessary.**

When an order has been passed under S. 203, Cr. P. Code, it is not necessary for the District Magistrate to give an opportunity to the accused of showing cause why orders should not be passed against him under S. 436. The proviso to S. 436 applies only to cases where the accused person has been discharged and not to cases where orders have been passed under S. 203, Criminal P. C. AIR (Vol 14) 1927 Oudh 264: 103 Ind Cas 106: 2 Luck 573: 1 LC 184: 28 Cr LJ 650.

——S. 436 — **Complaint dismissed under S. 203 — Proviso to S. 436 does not apply.**

The proviso to S. 436 cannot apply to a dismissal of a complaint under S. 203; it only applies to the case where an accused person has been discharged. Hence, when a complaint is dismissed under S. 203, it is not necessary to issue notice to the accused person before ordering further inquiry. AIR (Vol 12) 1925 All 537: 88 Ind Cas 600: 47 All 722: 23 ALJ 451: 6 LRA Cr 119: 26 Cr LJ 1176.

——S. 436 — An order directing further enquiry passed by the Sessions Judge under S. 437 against the accused without notice having been served on him, cannot stand. AIR (Vol 10) 1923 All 122: 65 Ind Cas 422: 20 ALJ 91: 23 Cr LJ 70.

——S. 436 — **Want of notice to the accused, who has already been discharged vitiates the order setting aside the order of discharge and directing further inquiry.** AIR (Vol 10) 1923 Lah 689: 77 Ind Cas 987: 25 Cr LJ 523.

——S. 436 — **An order for a further enquiry should not be passed without notice to the person accused and then only if the order of discharge was manifestly perverse or occasioned a grave miscarriage of justice.** AIR (Vol 10) 1923 Lah 158: 73 Ind Cas 510: 24 Cr LJ 622.

——S. 436 — **No notice to accused is necessary if he is not prejudiced.**

Where an order of discharge is set aside notice to accused is not absolutely necessary especially where the accused cannot be said to have been prejudiced by want of it, the question being one of law on which the order was set aside and the accused being heard in full before the High Court. As a general rule notice should go to the party before an order is made to his prejudice. AIR (Vol 10) 1923 Mad 327: 72 Ind Cas 525: 24 Cr LJ 413: 17 MLW 247.

——S. 436 — **Notice as a general rule must be issued though failure to give it is not illegal — Further inquiry not to be ordered unless order of discharge is perverse or foolish.**

So far as the question of notice is concerned, there can be no doubt whatever that S. 437 does not make the issue of notice necessary. All the Courts throughout India have, however, repeatedly pointed out that, though an order passed under S. 437 without notice was not illegal, notice should, as a general rule, be issued. Failure to issue notice, however, would not justify interference. A District Magistrate has power to order a further enquiry when he is of opinion that the evidence on the record has not been properly appreciated. At the same time it has been repeatedly held by the High Court that a further enquiry should not, as a general rule, be ordered unless the order of discharge under S. 203 or 204 was manifestly perverse or foolish or was based on a record for evidence which was obviously incomplete. AIR (Vol 9) 1922 Lah 59: 69 Ind Cas 373: 4 Lah LJ 411: 23 Cr LJ 693.

——S. 436 — Notice to accused who has been discharged, is necessary before directing further inquiry or re-trial under S. 437. AIR (Vol 8) 1921 All 55: 19 ALJ 71.

——S. 436 — **Previous notice to accused is not compulsory but advisable.**

There is nothing in S. 437 which renders previous notice to the accused, compulsory before an order setting aside a discharge can be passed under S. 437, but as a matter of judicial discretion, it is advisable that such notice should be given. AIR (Vol 8) 1921 Oudh 97: 63 Ind Cas 415: 24 OC 142: 22 Cr LJ 655.

——S. 436 — **Offence not triable exclusively by Court of Session — District Magistrate directing Sub-Divisional Magistrate to commit to Sessions — Legality — Opportunity to show cause, necessity.**

A District Magistrate has no power under S. 436, Cr. P. C., to direct a Sub-Divisional Magistrate to commit the accused for trial to the Sessions in a case where the offence with which the accused is charged is not one triable exclusively by the Court of Session. A District Magistrate acting under S. 436 should give the accused opportunity to show cause

why the commitment should not be made. An opportunity given to show cause before the Assistant Magistrate is not a compliance with the law. (1905) 15 MLJ 373 (373): 2 Cr LJ 774 (DB).

**5. Order under.**

**See also N. 1 and 2.**

**——S. 436, Proviso — Applicability — Dismissal of complaint under S. 203.**

Under the proviso to S. 436, Cr. P. Code, it is imperative that before further enquiry is ordered in the case of a person who has been discharged, an opportunity should be given to the accused to show cause why further enquiry should not be ordered. The proviso, however, does not apply to the dismissal of a complaint under S. 203. As a matter of fact it will be very undesirable to issue notice to the accused person in such cases. The accused person has no locus standi in inquiries under Chap. XVI, Cr. P. Code and the principle is equally applicable where the order in such an enquiry is under revision. AIR (Vol 37) 1950 EP 18: 51 Cr LJ 344.

**——S. 436, Proviso — Dismissal of complaint — Discharge of accused under S. 259 — Fresh complaint — Dismissal after recording the sworn statement of complainant — Further enquiry ordered in revision without notice to accused — Legality.**

After some of the prosecution witnesses were examined, a complaint of defamation was adjourned and on the adjourned date it was dismissed as the complainant was said to be absent and the accused were discharged under S. 259, Cr. P. Code. A fresh complaint was preferred but the trial Magistrate dismissed it after recording the sworn statement of the complainant. The Sessions Judge in revision set aside the order of dismissal and directed the restoration in revision that notice to the discharged accused was necessary before an order for further enquiry could be made,

Held, that the proviso to S. 436, Cr. P. Code, only directs notice in the case of "any person who has been discharged" and not in the case of a person to whom no process has been issued and when the complaint has been dismissed without notice to him. Hence the order of the Sessions Judge was right. AIR (Vol 34) 1947 Mad 389: 60 LW 378: 1947 MWN 406: (1947) 1 MLJ 368.

**——Ss. 436 and 437 — Sessions Judge, if can direct further inquiry to consider whether there are grounds for a charge against accused of more serious character.**

A Sessions Court is not a Court of first instance. There is no provision of law which enables a Sessions Judge either to take cognizance of an offence himself or to direct a Magistrate to take cognizance of an offence. The Sessions Judge cannot direct the Magistrate to hold a further inquiry and consider whether there are, or are not, grounds for inquiring into a charge against the accused of a more serious character than the charge in respect of which they were committed. He can direct further inquiry into the case of a person who has been discharged. AIR (Vol 32) 1945 Mad 424: 58 MLW 319: (1945) 2 MLJ 88: 1945 MWN 427: 47 Cr LJ 230: ILR (1946) Mad 136: 222 Ind Cas 36.

**——S. 436 — Magistrate should give reasons for orders passed.**

Chapter XXXII, Criminal P. C., which governs references and revisions, says nothing about the giving of reasons for any order passed. As in many places in the Code, it is required of a Magistrate or Judge that reasons should be given for the order passed, it must be taken that the Legislature did not intend to make it obligatory on Revisional Courts to give reasons for their orders. Nevertheless, it is, as a rule, desirable that reasons should be given. But the fact that no reasons are given is no indication that the Magistrate has not given the matter his full consideration; but sometimes mistakes, even of fact, are made by Revisional Courts. In order that the High Court should exercise its revisional powers satisfactorily, it is desirable that it should know what was in the mind of the lower Revisional Court, when it passed its order. AIR (Vol 29) 1942 Mad 653: 55 LW 424: (1942) 2 MLJ 103: 1942 MWN 438: 44 Cr LJ 70: 203 Ind Cas 205.

**——S. 436 — Charge framed by Sub-Magistrate — Power of District Magistrate.**

A District Magistrate has no power under S. 436 to quash a charge framed by a Sub-Magistrate. AIR (Vol 28) 1941 Mad 804: 1941 MWN 677: 54 LW 391 (2).

**——S. 436 — Magistrate, if can be directed to frame charge and dispose of case.**

It is not permissible under S. 436, Criminal P. C., to direct the Magistrate to frame a charge and dispose of the case. AIR (V 28) 1941 Mad 65: 1940 MWN 526: 52 LW 66(1): 42 Cr LJ 102: 191 Ind Cas 88.

——S. 436 — Under S. 436, the Court can order enquiry into a case which had been dismissed under S. 202, but it cannot compel the Magistrate to issue process and make an enquiry for the purpose of framing a charge. AIR (Vol 27) 1940 Nag 128: 1940 NLJ 43: 41 Cr LJ 312: 186 Ind Cas 459.

——S. 436 — Dismissal of complaint under S. 203, Criminal P. C. — Sessions Judge moved to direct further enquiry — Sessions Judge directing other Magistrate to issue summons, without issuing notice to accused:

Held, that the form of the Judge's order was not correct. AIR (Vol 25) 1938 Cal 22: 39 Cr LJ 292: 173 Ind Cas 318 (DB).

——S. 436 — When a complaint is dismissed under S. 203, Criminal P. C., the District Magistrate cannot, under S. 436 of the same Code, order it to be restored to file. AIR (Vol 25) 1938 Mad 112: 46 LW 642: 1937 MWN 1242: 39 Cr LJ 281 (1): 173 Ind Cas 213 (1).

——S. 436 — The order by a superior Court to an inferior Court to hold further inquiry into a complaint which has been dismissed under S. 203, Criminal P. C., has acquired what may be called a technical meaning. It simply means re-consideration. What step is to be taken thereafter will depend upon the circumstances of the case. AIR (Vol 25) 1938 Pat 369: 19 PLT 336: 4 BR 750: 39 Cr LJ 778: 176 Ind Cas 715 (DB).

**——Ss. 436, 537 — Order of discharge by Magistrate — Sessions Judge while setting it aside, if can direct same Magistrate to go on with further inquiry.**

Per Mehta A. J. C. (Haveliwala A. J. C. contra.) — The first part of S. 436, Criminal P. C., is to the effect that the High Court or the Sessions Judge may direct the District Magistrate to make further inquiry either by himself or by any of the Magistrates subordinate to him. If the High Court or the Sessions

Judge can direct a District Magistrate by himself to make an inquiry, a fortiori can the High Court or the Sessions Judge direct that any particular Magistrate subordinate to the District Magistrate should make the further inquiry. Where, therefore, an order is made by a Magistrate discharging an accused, the Sessions Judge can direct the same Magistrate, while setting aside the discharge order, to complete the inquiry.

Per Haveliwala A. J. C.— The language of the section is plain and leaves no room for doubt that the Sessions Judge has not the power of setting aside an order of discharge, and to send the case back to the same Magistrate for inquiry. AIR (Vol 24) 1937 Sind 86: 38 Cr LJ 596: 168 Ind Cas 777 (DB).

——S. 436 — **Necessity to give reasons.**

In a case in which the Sessions Judge reverses the order of the Magistrate discharging an accused person, the Sessions Judge ought to give reasons for directing further enquiry. It is highly desirable that such order should make it clear that the Magistrate's order discharging an accused person is based on grounds which cannot be sustained. AIR (Vol 21) 1934 All 51: 35 Cr LJ 418: 1934 ALJ 69: 3 AWR 137: 56 All 285: 147 Ind Cas 335.

——Ss. 436, 437 — **Proceedings in trying Magistrate's Court — Whether can be quashed by Sessions Judge — Penal Code, Ss. 354, 366, 511.**

The allegations against the accused were that they followed a girl in a motor car while she was on her way to her work and when they came up to her two of them jumped out of the car and while they seized her hands, the other attempted to snatch her gold chain. On these allegations the trying Magistrate held that a case under S. 354, I. P. C., had been made out and he framed a charge under that section. On appeal, the Sessions Judge held that a case under S. 366/511 and not one under S. 354 had been made out. Accordingly, he forwarded the proceedings to the District Magistrate asking him to direct further inquiries by any other Magistrate:

Held, that the procedure adopted by the Sessions Judge in withdrawing the case from the trying Magistrate's file and forwarding it to the District Magistrate was tantamount to quashing the charge, and that the Sessions Judge had no power to do so under S. 436 or S. 437, Criminal P. C.

Held, also that a prima facie case under S. 366/511 had been made out. AIR (Vol 20) 1933 Rang 214: 34 Cr LJ 1083: 145 Ind Cas 720.

——S. 436 — **Order directing Magistrate to frame charge — Legality of.**

Section 436, Criminal P. C., only empowers a Sessions Judge to direct a further enquiry; it does not empower him to direct the Magistrate to frame a charge and to try the accused on that charge. AIR (Vol 19) 1932 Lah 362: 33 PLR 267: 33 Cr LJ 341: 13 Lah 599: 136 Ind Cas 705.

——S. 436 — **Contents of order.**

The section does not lay down, as in analogous circumstances it is laid down elsewhere in the Code, that there shall be a detailed order. AIR (Vol 16) 1929 Lah 28: 115 Ind Cas 540: 30 PLR 449: 30 Cr LJ 490: 12 AI Cr R 248.

——S. 436 — When the order directing further enquiry does not give detailed reasons and a revision has been admitted, it must be possible to establish, at any rate by the order read with the record, that the requirements laid down in 10 PR 1911 (FB) do exist, i.e., the order must be manifestly perverse or foolish. AIR (Vol 16) 1929 Lah 28: 115 Ind Cas 540: 30 Cr LJ 490: 30 PLR 449: 12 AI Cr R 248.

——S. 436 — **Order of discharge set aside — Court must give reasons.**

It is the bounden duty of the revisional authority to record its reasons for setting aside the order of discharge, and to show how the order of discharge was improper. Such revisional jurisdiction cannot be said to have been properly exercised without having and assigning solid and sufficient reasons for doing so. The object of this rule is that the High Court in the absence of such reasons cannot exercise supervision over the Magistrates, 'or Judges' proceedings' and also because it is fair to the person whose liberty is going to be affected by such order, that he should have notice of the grounds on which the further enquiry is going to be made. AIR (Vol 13) 1926 Nag 374: 27 Cr LJ 728: 95 Ind Cas 56.

### 6. Power of High Court.

See also N. 8.

——S. 436 — **Discretion of Sessions Judge — Interference by High Court.**

Where the Sessions Judge acting under S. 436, Cr. P. Code, has exercised a discretion vested in him by law, it is not open to the High Court to interfere with the exercise of that discretion unless it comes to the conclusion that the order passed under S. 436 is perverse. AIR (Vol 37) 1950 EP 18: 51 Cr LJ 344.

——S. 436 — **Revision — Further inquiry — Power to order further inquiry in revision is discretionary — In circumstances of case, held further inquiry should not be ordered.**

The revisional jurisdiction of the High Court is discretionary.

The complainants who were students, were suspected to have taken part in a fracas. They agreed to submit to chastisement by the authorities of their school, if no prosecution was instituted against them. It was for the purpose of giving effect to this agreement that they were sent to the bungalow of the Deputy Commissioner who, not being satisfied with the chastisement inflicted by the physical instructor of their school, requested the Superintendent of Police, who happened to be present, to inflict the chastisement himself. He accordingly chastised the complainants. The complainants lodged complaints against the officers under S. 323, Penal Code, but the Magistrate dismissed them for want of sanction under S. 197:

Held, that what was done was not only irregular but illegal. But the accused were acting from the best of motives. Though the chastisement which the complainants contemplated and agreed to was chastisement at the hands of the school authorities and not at the hands of an officer of police, but they did not suffer any such harm as could be considered excessive and they escaped the ignominy and risks of a prosecution. In these circumstances, it was not desirable, in the exercise of the discretionary powers, to direct further inquiry into the complaints. AIR (Vol 33) 1946 Pat 432.

——Ss. 436, 435 — **High Court, if can set aside in review order of discharge passed under S. 494.**

Per Bartley and Henderson JJ.— The High Court has jurisdiction in review to interfere with an order of discharge passed upon an application made by the

Public Prosecutor under the provision of S. 494, Criminal P. C. Under the very terms of Ss. 436 and 435, the High Court has power to order a further enquiry in a case in which an accused person has been discharged. AIR (Vol 26) 1939 Cal 220: 43 CWN 301: ILR (1939) 1 Cal 407: 40 Cr LJ 349: 180 Ind Cas 384 (SB).

**——S. 436 — Jurisdiction of High Court where application lies to Sessions Court.**

Although the High Court will not ordinarily entertain applications for revision under S. 436, Criminal P. C., when the Sessions Court has jurisdiction to entertain them, the High Court may entertain them in special cases. When the application is connected with another application which has been made and which can be entertained only by the High Court, it may be entertained. AIR (Vol 19) 1932 Sind 28: 25 SLR 395: 33 Cr LJ 298: 136 Ind Cas 513 (DB).

——S. 436 — Where the defect discovered by the High Court is in the order in appeal, it has jurisdiction to interfere with the order in appeal and order a re-trial of the appeal only and not of the entire case. AIR (Vol 12) 1925 Oudh 321: 95 Ind Cas 934: 12 OLJ 63: 2 OWN 50: 28 OC 384: 27 Cr LJ 854.

**——S. 436 — High Court interference.**

A High Court should be slow to interfere with the wide discretion of the Sessions Judge. AIR (Vol 2) 1915 All 86: 13 ALJ 111: 16 Cr LJ 139: 27 Ind Cas 203.

**——Ss. 436, 439 — Revisional powers of High Court.**

The High Court has power under S. 439, Cr. P. C., to interfere on grounds other than want of jurisdiction, when a criminal court has taken action under S. 476, Cr. P. C. (1909) 3 I C 934 (936) : 19 MLJ 766: 33 Mad 48: 10 Cr LJ 420 (FB).

**——Ss. 436, 439 — Revision of commitment order — Power of enquiring Magistrate to discredit evidence.**

The High Court has full jurisdiction under S. 439, Cr. P. C., to revise a commitment order made under S. 436 on points of law as well as facts. An enquiring Magistrate is competent to examine the credibility of evidence adduced in the enquiry; and he should not commit the accused for trial if he is of opinion that the evidence is unreliable. (1907) 12 CWN 117 (119, 121): 6 CLJ 760: 6 Cr LJ 406.

**7. Proceedings on further enquiry.**

**——Ss. 436, 203, 350 — Magistrate conducting enquiry and discharging accused — On revision further enquiry ordered — Magistrate, if should resummon witnesses — De novo enquiry, if can be had under S. 350 — Magistrate deciding re-summoning witnesses but changing mind before starting further enquiry.**

When an order of discharge is set aside and further enquiry ordered under S. 436, Criminal P. C., the enquiry recommences where it was left off at the time when the improper order of discharge was passed. Further enquiry does not mean merely an examination of witnesses, but a further consideration of the evidence and the Magistrate is, therefore, justified, when ordered to make further enquiry, upon perusing the evidence already on record, in framing the charge.

Prior to the framing of the charge, an accused is not entitled under S. 350, Criminal P. C., to have a de novo enquiry. Section 350 gives the accused a right to have a de novo trial. The trial begins only after the framing of a charge. The Code leaves the re-summoning of witnesses entirely to the discretion of the Magistrate. He may feel that he would like to see a witness or question him further; and S. 350 (1), gives him authority to do so. If he does not feel it necessary to examine any witness afresh, it is not incumbent on him to do so. The Code does not recognize any principle of natural justice in such matters.

Where the Magistrate exercises his discretion in favour of commencing the enquiry de novo by summoning the witnesses, he is not precluded from changing his mind before he re-commences the inquiry. The re-summoning of the witnesses is not tantamount to recommencing the enquiry. AIR (Vol 25) 1938 Mad 742: 48 LW 136: 1938 MWN 587: 39 Cr LJ 828: (1938) 2 MLJ 222: 176 Ind Cas 879(2).

**——S. 436 — Complaint dismissed under S. 203, Criminal P. C. by Sub-Divisional Magistrate — Sessions Judge ordering further inquiry — Sub-Divisional Magistrate ordering other Magistrate to hold enquiry and report — Such magistrate issuing summons on accused and discharging them holding trial — Sub-Divisional Magistrate ignoring trial and accused convicted.**

The complaint in the case was referred to the Police and on receipt of the Police report, the Sub-Divisional Magistrate, after considering it and various aspects of the case, dismissed it under S. 203, Criminal P. C. The Sessions Judge was moved by the complainant and he directed a further inquiry into the complaint. On receipt of this order, the Sub-Divisional Magistrate sent the case to another Magistrate to hold inquiry and ordered for a report by certain date. The Magistrate summoned the accused and proceeded to try the case. He examined some witnesses and discharged the accused under S. 233 (2), Criminal P. C., and recommended to the Sub-Divisional Officer for a proceeding under S. 145. When the matter was put up before the Sub-Divisional Magistrate, the holding that the discharge of the accused by the Magistrate was entirely without jurisdiction, ignored it and ordered summons to be issued against the accused who were subsequently convicted:

Held, that as the Magistrate was only ordered to hold inquiry and make a report, he had no jurisdiction to try the case and hence the Sub-Divisional Magistrate was perfectly justified in ignoring the trial. As the Magistrate ignored the order that he was directed to make a report and overlooked it, he could not be said to have acted with care and caution within the meaning of S. 529, Criminal P. C., and his action could not be allowed to stand. AIR (Vol 25) 1938 Pat 369: 19 PLT 336: 4 BR 750: 39 Cr LJ 778: 176 Ind Cas 715 (DB).

**——S. 436 — Powers of District Magistrate to hold further inquiry and trial.**

When a further enquiry is made in pursuance of an order under S. 436, Criminal P. C., whether by the District Magistrate or by a Magistrate subordinate to him, the Magistrate who holds that enquiry, can, if he finds sufficient grounds for doing so, not only frame a charge but also proceed to hold a trial. AIR (Vol 21) 1934 Mad 209: 1934 MWN 102: 66 MLJ 318: 39 LW 344: 35 Cr LJ 691: 148 Ind Cas 573.

——S. 436 — To base an order for further enquiry not on the merits of the case but because in a civil suit it was held that a theft had been committed, is improper. Further enquiry must be on merits. ('34) 1934 MWN 740.

——Ss. 436, 438 — Order for further enquiry — Powers of Magistrate — Giving directions as to mode of inquiry — Legality — Discretion of Magistrate to issue process or hold trial — 'Enquiry', meaning of — Report under S. 438, when to be made.

A Subordinate Magistrate directed to make further enquiry into a warrant case by an order made under S. 436, Criminal P. C., has all the powers provided for by Chap. XXI of that Code.

When an order for further enquiry is passed, no directions or instructions can lawfully be given to the Magistrate as to the manner in which he should conduct the inquiry. It is the function of the Magistrate to determine whether or not process shall issue or a trial take place, and his discretion in the matter is not to be fettered by instructions or directions from any quarter. In holding the further inquiry, the Magistrate will be at liberty to conduct the inquiry in his own way, provided he conforms to the provisions of the Code. He can examine such persons (whether or not they were examined in the course of the previous enquiry), and take such further or other steps for the purpose of ascertaining whether or not process should issue or a charge should be framed as are permitted by law, and as he deems to be advisable or he may determine the matter upon a reconsideration of the same materials as were available when the earlier order of dismissal or discharge was passed, in the light of the observations of the revising officer and at the conclusion of the enquiry the Magistrate will decide according to law whether or not process shall issue, or an order of committal be made, or a trial be held, as the case may be.

Per Page C. J.— In cases to which S. 436, Criminal P. C., is applicable, a Sessions Judge or District Magistrate is competent under S. 438 to report the result of the examination of the record to the High Court for such orders as the High Court may deem fit to pass under S. 439. But a report ought not to be made to the High Court under S. 438 on matters of fact, or unless the examination of the proceedings in the inferior Court discloses a question of law which the Sessions Judge or District Magistrate thinks, would more properly be determined by the High Court.

Section 436 has no application to trials, but relates to proceedings antecedent and preliminary to a trial the object of which is to ascertain whether or not a trial shall take place. AIR (Vol 18) 1931 Rang 225: 9 Rang 239: 32 Cr LJ 950: 132 Ind Cas 822 (FB).

——S. 436 — Proceedings on further enquiry.

A Sessions Judge has no power to make an order directing further enquiry by a particular Magistrate subordinate to a District Magistrate. What the Sessions Judge can do is to direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make the further inquiry thus leaving the District Magistrate to exercise a discretion as to the selection of any Magistrate subordinate to him. AIR (Vol 17) 1930 Mad 983: 1930 MWN 911: 1930 Cr C 1199: 32 MLW 782.

——S. 436 — "Further enquiry" under S. 436 is not restricted to proceedings under S. 202 and need not be of formal character. The Magistrate directed may issue process to the accused persons and take evidence before coming to the conclusion whether to discharge or not to discharge the accused. AIR (Vol 16) 1929 Pat 644: 126 Ind Cas 146: 9 Pat 155: 1929 Cr C 372: 31 Cr LJ 961.

——S. 436 — Further enquiry should begin from the stage under S. 202. The effect of an order dismissing a complaint under S. 203 is to restore the case to the stage under S. 202 and the further inquiry directed should be taken up from that point. AIR (Vol 15) 1928 Pat 12: 104 Ind Cas 633: 9 PLT 12: 28 Cr LJ 857: 9 AI Cr R 61.

### 8. Revision.

See also N. 6.

——S. 436 — Order of discharge by magistrate confirmed on revision by Court of Session — Whether can be set aside by District Magistrate.

The District Magistrate who has concurrent jurisdiction with the Court of Session has no jurisdiction to set aside an order of discharge passed by a magistrate after it has been confirmed on revision by the Court of Session. It can only be reversed on revision by the High Court. AIR (Vol 34) 1947 Pesh 19: 231 Ind Cas 228: 48 Cr LJ 750 (DB).

——S. 436 — Revision application by Police Inspector — If competent.

Obiter.— An application under S. 436, Cr. P. C., for revision of an order of discharge can be entertained at the instance of an Inspector of Police. Under the section, the question of personality or authorisation is not relevant. AIR (Vol 33) 1946 Sind 75: ILR (1946) Kar 177: 221 Ind Cas 616: 47 Cr LJ 221 (DB).

——S. 436 — Sessions Judge setting aside order of discharge and ordering committal.

Where a Sessions Judge sets aside the order of discharge passed by a committing Magistrate and orders a case to be committed to Sessions, the High Court will not interfere in revision unless the Sessions Judge's order is, in the circumstances of the case, shown to be unjustifiable. AIR (Vol 30) 1943 Oudh 233: 1943 OWN (CC) 33: 44 Cr LJ 309: 204 Ind Cas 594.

——S. 436 — Accused discharged by trial Court — Revisional Court ordering further enquiry.

Where the trial Court does not disbelieve the evidence in a case for possession of contraband opium and discharges the accused, and in revision, taking into consideration the conduct of the accused in running away saying that the search party would not find anything in the hut, orders further enquiry, this order will not be interfered with. AIR (Vol 24) 1937 Rang 120: 38 Cr LJ 709: 169 Ind Cas 63.

——S. 436 — Irregularity — No failure of justice.

The Court of the Judicial Commissioner will not interfere with an order of the lower Court even if irregular, when no actual or possible failure of justice occurs. AIR (Vol 24) 1937 Sind 86: 38 Cr LJ 596: 168 Ind Cas 777 (DB).

——S. 436 — Setting aside discharge — Third party can apply.

An order of discharge of an accused person may be interefered with at the instance of a third party when such an order has the effect of operating to the detriment of such third person. He has in such cases

a right to apply in revision against such an order. AIR (Vol 16) 1929 Cal 319: 33 CWN 468: 56 Cal 1023: 121 Ind Cas 678: 31 Cr LJ 315 (DB).

——**S. 436 — Revision against acquittal — Interference by High Court — Conditions.**

The jurisdiction of the High Court to revise an order of acquittal and direct a re-trial should be exercised only in exceptional cases and with caution. It should only be done in cases where the alleged offence is of a serious character and the Judge comes to the opinion that there has been a miscarriage of justice, where for instance the lower Court has misquoted the evidence; or where having the evidence before it, which prima facie is reasonable and credible, the Judge of the Court gives no ground for rejecting it and does not satisfactorily review it. Where the finding of the appellate Court was arrived at in a very summary fashion without reference to all the relevant law on the subject, the High Court in revision declined to accept it as a finding of fact. AIR (Vol 12) 1925 Oudh 321: 95 Ind Cas 934: 12 OLJ 63: 2 OWN 50: 28 OC 384: 27 Cr LJ 854.

——S. 436 — Whatever may be the powers of the District Magistrate to order a re-opening of a Criminal Case, unless there is some positive allegation of impropriety of conduct against the Trying Officer, an accused person who had been definitely acquitted should not be placed on his trial a second time for the offence. AIR (Vol 8) 1921 Pat 465: 72 Ind Cas 950 : 1 Pat LR Cr 28.

——**Ss. 436, 439 — Practice — High Court — Powers of revision — Civil remedy open — Exercise of revisional powers.**

The High Court will not exercise its powers of revision to consider whether an order is improper or illegal when a remedy can be easily obtained from a civil Court. (1902) 6 CWN 469 (471): 29 Cal 382 (DB).

——**S. 437.**

1. **Applicability and scope.**
2. **Grounds for interference.**
3. **High Court's powers.**
4. **Jurisdiction of inferior Court.**
5. **Notice.**
6. **Order of commitment.**
7. **Order of discharge.**
8. **Powers of Sessions Judge and District Magistrate.**
9. **Further enquiry.**

See also N. 2 and 7.

10. **Wrong dismissal of Complaint.**

**1. Applicability and scope.**

——**S. 437 — 'Improperly', meaning of.**

The word 'improperly' in S. 437, Criminal P. C., is a mild word and does not mean perverse. Nevertheless a discharge is not improper because the Magistrate has discharged the accused taking a lenient view of the evidence. Impropriety does imply that the order could not have been passed if the Magistrate had taken a reasonable view of all the circumstances of the case. ('37) 1937 MWN 1240.

——**S. 437 — Scope of — Whether covers case of discharge on any kind of charge.**

Section 437, Criminal P. C., differs in important particulars from S. 436, Criminal P. C. Section 437 is mainly intended to meet the case where a Magistrate wrongly considers that he has jurisdiction to try a certain case and proceeds to try that case, and where the Sessions Judge or the District Magistrate considers that the facts alleged show a case triable exclusively by the Court of Session and that the inferior Court has improperly discharged an accused person.

The language of S. 437, Criminal P. C., requires that the case should be triable exclusively by the Court of Session, but it does not go on to state that an accused person has been improperly discharged on such a charge. On the contrary, the section merely says that it requires that an accused person has been improperly discharged by the inferior Court. These words are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Session. AIR (Vol 22) 1935 All 366 : 1935 AWR 134 : 1935 ALJ 653 : 36 Cr LJ 1103 : 157 Ind Cas 205.

——**Ss. 437 and 556 — 'Try any case' meaning of.**

The words 'try any case' includes also any stage of a proceeding so that it includes also proceedings under S. 437. And a Magistrate who presided at a meeting which directed the prosecution of the accused is sufficiently personally interested to make him unfit to make an order for further inquiry under S. 437. (1911) 5 SLR 137 : 13 Cr LJ 30 : 13 Ind Cas 222 (DB).

——**Ss. 437, 119 — In case disposed of under S. 119 — No jurisdiction — "Discharged" in S. 437, meaning of — Cr. P. C. — Charge — Discharge — Meaning of.**

The jurisdiction given under S. 437, Cr. P. C., to order further inquiry cannot be applied to cases under Ch. VIII, Cr. P. C., at any rate where before making an order under S. 119, Cr. P. C., the Magistrate has called on the person into whose conduct the inquiry is made, to establish his defence.

Quaere: — Whether S. 437 will apply to cases disposed of under S. 119, Cr. P. C., before calling on the person to establish his defence? The word "discharged" in S. 437, is equivalent to "discharged within the meaning of Ss. 209, 253, 259, Cr. P. C." The meaning of the word "discharge" in S. 119, Cr. P. C., is non-technical and merely means permission to depart. The word "charge" as applied to offences is used in two senses in the Code. In Ch. XIX and in Ss. 210 and 254, it is the formal statement of the case which the accused has to meet; and in S. 253 it is used in the popular sense of "accusation." (1909) 11 Cr LJ 162 (164) : 20 MLJ 137 : 33 M 85 : 4 Ind Cas 1057.

——**Ss. 437, 203, 204 (3), 253 — Presidency Magistrates' order of discharge — Revisional powers of High Court.**

S. 437, Cr. P. C., does not apply to a Presidency Magistrate, and the High Court cannot revise the order of discharge by a Presidency Magistrate under the section. (1907) 6 CLJ 705 (707) (DB).

——**S. 437 — Ordering fresh inquiry in case of discharge — Nature of provision for — Enabling power.**

S. 437, Cr. P. C., is only an enabling section and an order under that section is not necessary for fresh proceedings being taken by a Magistrate discharging an accused. (1902) 6 CWN 633 (636) : 29 C 726 (FB).

**2. Grounds for interference.**

——S. 437 — Order under S. 437 can be made, though the record is before the Court in appeal. AIR (Vol 7) 1920 Pat 523 : 1 Pat LT 293 : 21 Cr LJ 660 : 57 Ind Cas 820.

——**S. 437 — Dismissal of complaint.**

S. 437 contemplates that where the complaint has been dismissed under S. 203, revisional juris-

diction of the District Magistrate can be invoked irrespective of consideration whether the dismissal is legal or illegal. AIR (Vol 5) 1918 Pat 270 : 3 Pat LJ 346 : 19 Cr LJ 874 : 47 Ind Cas 70 (DB).

——S. 437 — **Order for further inquiry — Necessity of reasons.**

A detailed examination of the evidence and elaborate reasons should not be given except so far as would indicate to the Court below in what manner its order was incorrect, whether on a point of law or in misappreciation of the evidence for want of a complete enquiry. The reasons for directing such enquiry should be made explicit in the interests of the accused. AIR (Vol 5) 1918 Upp. Bur 55 : 3 UBR 16 : 19 Cr LJ 14 : 42 Ind Cas 926.

——S. 437 — A Magistrate should not order a further enquiry merely because he comes to different conclusion on the evidence, when the accused had a fair trial according to law, and the trying Magistrate's discussion of evidence has been quite reasonable. AIR (Vol 4) 1917 Bom 227 : 19 Bom LR 350 : 18 Cr LJ 646 : 40 Ind Cas 294 (DB).

——S. 437 — **Warrants — Withdrawal of, by Magistrate — Power of Dist. Magistrate to set aside order and direct reissue of warrants — Duty of District Magistrates, further inquiry.**

On a Magistrate recalling warrants issued against the accused, the Dist. Magistrate has no jurisdiction to set aside the order of withdrawal of the warrants. He could order further inquiry as the circumstances required it, after the inquiry. AIR (Vol 4) 1917 Cal 185 : 26 CLJ 114 : 18 Cr LJ 1001 : 42 Ind Cas 729 (DB).

——Ss. 437 and 203 — **Madras Estates Land Act, Ss. 90 and 212 — Criminal trial — Findings of Revenue Officer inadmissible.**

When the accused was tried for the removal of crops pending distraint under S. 379, I. P. C. and S. 212 of the Mad. Estates Land Act the finding of a Revenue Officer under S. 90 of the latter Act is not evidence for any purpose and is no ground for further enquiry into the charge dismissed by Magistrate, under S. 203 Cr. P. Code. AIR (Vol 4) 1917 Mad 831 : 17 Cr LJ 406 : 35 Ind Cas 966.

——S. 437 — **Applicability to proceedings under S. 110.**

S. 437 applies to proceedings under Chapter VIII of the Code and a District Magistrate can revise an order of a subordinate Magistrate passed under Section 110. AIR (Vol 1) 1914 All 158 : 36 All 147 : 12 ALJ 167 : 15 Cr LJ 39 : 22 Ind Cas 183 (DB).

——Ss. 437 and 476 — **Order for further enquiry.**

An order for further enquiry during the continuance of an order made under Section 476 for prosecution of the complainant is bad. (1914) 15 Cr LJ 1 : 22 Ind Cas 145 (Cal) (DB).

——Ss. 437 and 109 — **Proceedings for taking security.**

S. 437 does not authorise the Dist. Magistrate to direct further inquiry into the case of a person against whom proceedings for security under Ch. VIII of the Code, are taken. AIR (Vol 1) 1914 Upp Bur 28 : 2 UBR 3 : 15 Cr L J 531 : 24 Ind Cas 843.

——S. 437 — **'Further inquiry' — Magistrate's power.**

A Magistrate has no absolute right to order further inquiry but only on a finding of illegality impropriety or irregularity in the proceedings of the Court below. (1912) 16 CWN 1078 : 13 Cr LJ 764 : 17 Ind Cas 76 (DB).

——S. 437 — **Further enquiry — Practice.**

Where the nature of the case is such that the Courts are liable to take different views of the evidence and the probabilities, no further enquiry should be directed under S. 437. (1911) 12 Cr LJ 45 : 9 Ind Cas 274 : 8 ALJ 45.

——S. 437 — **When further inquiry should be ordered.**

The mere possibility of another Magistrate seeing the facts and probabilities in other mutual proportions, is no reason for ordering further inquiry. (1911) 12 Cr LJ 110 : 9 Ind Cas 652 (Sind).

——Ss. 437, 436, 438, 439 — **Jurisdiction of District Magistrate to order further inquiry on the ground of misappreciation of evidence — Reference to High Court not necessary — High Court's powers under S. 437 compared with those under S. 439, Cr. P. C.: — (Per Wallis and Munro JJ. Sankaran Nair J. dissentiente.)**

The powers of interference of the High Court and the Sessions Judge or District Magistrate are co-extensive under S. 437, Cr. P. C., and are not limited to those grounds which justify a High Court in interfering under S. 439, Cr. P. C. The High Court has a freer hand in interfering under S. 437 than under S. 439, Cr. P. C., and misappreciation of evidence by the lower courts is a proper ground on which an order for further inquiry can be made by a District Magistrate, Sessions Judge or the High Court under S. 437 Cr. P. C.

The Sessions Judge or the District Magistrate cannot, in the exercise of the power to order further enquiry under S. 437, himself frame the charge or order the Magistrate to frame the charge or try the accused; the District Magistrate might make the further enquiry himself and frame the charge in course of it. The Sessions Judge or the District Magistrate is not bound to refer the case to the High Court in a case of difference of opinion owing to mere misappreciation of evidence by the lower court, but would be justified in ordering a reconsideration of the same evidence. The unsatisfactory manner in which a case had been dealt with by a Subordinate Magistrate would be a good ground for ordering further inquiry by another Magistrate. S. 437, Cr. P. C., does undoubtedly contemplate that further enquiry may be made by another Magistrate. (1909) 19 MLJ 157 : 32 M 220 (238) : 1 Ind Cas 228 : 5 MLT 233 : 9 Cr LJ 192 (FB).

### 3. High Court's powers.

——Ss. 437, 439 — **Accused committed to Sessions by competent Magistrate — Interference by High Court — Absence of evidence for commitment — Point of law — Quashing of commitment.**

Where a competent Magistrate, acting upon a discretion which the law confers, has committed an accused for trial by a Court of Session, and his proceedings are not on the face of them illegal or arbitrary or capricious, the practice of the High Court is that, as revisional Court, it would neither inquire into the reasons, nor interfere.

Where there is no question of law involved, it is only in exceptional cases that the High Court will exercise revisional powers after a valid order of commitment, to see if the commitment deserves to be quashed on the ground that the evidence does not make out a prima facie case. Where there is no evidence at all, the commitment may be quashed, because, absence of evidence for commitment is a point of law. But where there is some evidence, then the appreciation of that evidence

should be left to the jury, particularly in a case exclusively triable by the Sessions Court. AIR (Vol 21) 1934 Sind 27: 35 Cr LJ 884: 148 Ind Cas 1066 (DB).

——S. 437 — There is nothing in the Cr. P. Code which suggests that the District Magistrate should go further in case where the accused is charged by the trial Court than find that the order of discharge was improper. But, where a District Magistrate sets aside the order of discharge passed by a Committing Magistrate and orders a case to be committed to Sessions which is exclusively triable by a Court of Session, the High Court will not interfere in revision unless the District Magistrate's order is, in the circumstances of the case, shown to be unjustifiable. AIR (Vol 17) 1930 Oudh 415: 1930 Cr C 955: 7 OWN 749.

**——S. 437 — Power of High Court to order commitment should rarely be used in midst of trial.**

A High Court has itself power under S. 439, read with S. 423, to order commitment in a case, and it would obviously be the proper course for the High Court itself to order such commitment if the Sessions Judge's order is held to be a proper one; however, the action under S. 437 or S. 439 for ordering a commitment should rarely be taken in the midst of a trial, and certainly only when the failure of a Court to commit is shown, on the face of proceedings, to be improper. AIR (Vol 13) 1926 Oudh 194: 27 Cr LJ 417: 13 OLJ 490: 3 OWN 201: 93 Ind Cas 145.

**——S. 437—Grounds for interference — Discharge by Magistrate — Commitment by Dist. Magistrate — Power of High Court to revise.**

Where a District Magistrate reversed the order of discharge of a Magistrate and committed the accused to the Sessions, the High Court can under S. 437 of the Cr. P. Code interfere and can even go into facts. AIR (Vol 1) 1914 Mad 424: 15 Cr LJ 373: 23 Ind Cas 741.

**——S. 437 — Practice — Lower court having concurrent jurisdiction in revision with the High Court.**

Where the Magistrate of the district dismissed a complaint under the provisions of S. 203 of the Code of Criminal Procedure, the High Court declined to entertain an application by the complainant asking for further inquiry under S. 437 of the Code, when no application for that object had been made to the Sessions Judge. (1905) 1905 AWN 279: 28 A 268 (269).

**4. Jurisdiction of inferior Court.**

**——S. 437 — Order of the Sessions Judge to commit a case posted for further cross-examination — Power of Magistrate to proceed with the case.**

Where in the case of a complaint filed under S. 466, I. P. Code, a charge is framed under S. 465, I. P. Code and the case is posted for further cross-examination and at that stage the Sessions Judge passes an order in revision under S. 437, Cr. P. Code, directing the Magistrate to commit the case under S. 466, I. P. Code, the Subordinate Magistrate has no jurisdiction to proceed with the case on the adjourned date but only to commit the accused for an offence under S. 466. AIR (Vol 35) 1948 A 298: 1948 ALW 126: 49 Cr IJ 374: 1948 ALJ 244: 1948 AWR (HC) 116: 1948 OA (HC) 116 (DB).

**——Ss. 437, 403, 203, 259 — Dismissal of complaint under S. 203 or discharge of accused under S. 259 by Magistrate — Same Magistrate, his successor, or any other Magistrate of co-ordinate jurisdiction, whether can entertain second complaint on same facts although order of dismissal or discharge is not set aside.**

Section 437, Criminal P. C., is only an enabling section and does not take away, by implication, the jurisdiction vested in a Magistrate to hear the complaint again.

Hence where a Magistrate dismisses a complaint for default under S. 203 or discharges an accused under S. 259, Criminal P. C., it is competent for that Magistrate or to his successor-in-office, or to another Magistrate of co-ordinate jurisdiction to entertain a second complaint on the same facts although the order of dismissal or discharge, as the case may be, may not have been set aside by a higher Court.

When entertaining a second complaint, a Magistrate should, however, keep in mind the default committed in the earlier proceedings, for, this default may have a hearing not only upon any subsequent default committed but also upon the merits of the complaint. AIR (Vol 26) 1939 Sind 193: 40 Cr LJ 745: ILR (1940) Kar 74: 183 Ind Cas 283 (FB).

**(Overrules AIR (Vol 16) 1929 Sind 61 : 29 Cr L J 1097 : 112 Ind Cas 861.)**

——S. 437 — Charge under I. P. C., Ss. 304, Part II, 149, 325-149 — Magistrate after enquiry finding that offences fell under S. 325-149 — Complainant's application under S. 437 — Sessions Judge finding offence to be under S. 302 — Retrial ordered on ground of want of jurisdiction of trial Court:

Held, Magistrate had jurisdiction to decide nature of offence — Order for re-trial set aside. AIR (Vol 24) 1937 Lah 217: 39 PLR 444: 38 Cr LJ 992: 170 Ind Cas 780.

**——S. 437 — Case exclusively triable by Sessions Court — Magistrate, if can give benefit of doubt.**

The function of a Magistrate trying a case is different from the function of a Magistrate inquiring into a case exclusively triable by the Court of Session. It is not for a Magistrate making an inquiry into a case triable exclusively by the Court of Session to weigh the evidence or to give the accused the benefit of the doubt. The duty of the Magistrate in such circumstances is to see whether there is sufficient evidence to commit to the Court of Session, and if he finds that there is a sufficient evidence, then he should commit the case to the Court of Session. AIR (Vol 22) 1935 All 366: 1935 AWR 134: 1935 ALJ 653: 36 Cr LJ 1103: 157 Ind Cas 205.

**——S. 437 — Enquiry made over to a Magistrate—Jurisdiction.**

When a case is made over to a subordinate Magistrate by a Sessions Judge through District Magistrate the former has complete control over the case and either by dismissing the complaint or by acquitting or convicting the accused, he may dispose of the same. AIR (Vol 7) 1920 Pat 563: 5 PLJ 47: 21 Cr LJ 594: 57 Ind Cas 162.

**5. Notice.**

**(a) General.**

**(b) Cases of dismissal.**

**(a) General.**

**——S. 437 — Notice — Whether necessary.**

On the discharge of an accused he cannot be retried again without the issue of notice to show cause and the order of discharge cannot be interfered with without such notice. AIR (Vol 7) 1920 All 218: 21 Cr LJ 847: 58 Ind Cas 927.

**——S. 437 — Notice — Further inquiry — Notice to accused — Order of discharge.**

An order for further inquiry after discharge should not be passed without notice to the accused. Further inquiry should not be ordered unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete. AIR (Vol 7) 1920

Lah 380: 1 Lah 216: 21 Cr LJ 521: 109 PLR 1920: 56 Ind Cas 777.

——S. 437 — Notice — Order directing further enquiry — Notice to accused essential.

Before a District Magistrate takes action under S. 437 of the Cr. P. C. he must give notice to the accused. AIR (Vol 6) 1919 All 373: 20 Cr LJ 769: 53 Ind Cas 609.

——S. 437 — Notice — Order directing further enquiry — Notice to accused.

Before further enquiry can be ordered under S. 437 of the Cr. P. C. notice must be given to the person who has been discharged. AIR (Vol 6) 1919 All 402 (1): 20 Cr LJ 770: 53 Ind Cas 610.

——S. 437 — Notice — Order for further enquiry — Notice to accused whether necessary.

Before directing further enquiry under S. 137 of the Cr. P. C. the District Magistrate ought to give notice to the persons against whom he proposes to pass orders to show cause. AIR (Vol 6) 1919 All 396: 20 Cr LJ 831: 53 Ind Cas 831.

——S. 437 — Notice — Discharge — Order directing further enquiry.

Before setting aside an order of discharge and directing further enquiry under S. 437 of the Cr. P. Code notice should be given to the accused to afford him an opportunity to show cause why further enquiry should not be ordered. In this case the order was set aside and the Sessions Judge was directed to give notice to the accused and pass the order for further enquiry if necessary after hearing the accused. (1919) 1919 PLR 17.

——Ss. 437 and 253 — Notice — Further enquiry — Discharge.

Although a District Magistrate is not bound in law to issue any notice to the accused before ordering a further enquiry after discharge under S. 253 of the Cr. P. Code it is right and proper that such notice should be given. AIR (Vol 5) 1918 Pat 461: 4 Pat LW 220: 19 Cr LJ 399: 44 Ind Cas 751.

——S. 437 — Notice to show cause — Order to the prejudice of accused.

Before an order is made to the prejudice of an accused person, notice should be issued to him to show cause why the order should not be passed. (1917) 15 ALJ 627.

——S. 437 — Notice — Discharge — Retrial — District Magistrate — Notice to accused.

A District Magistrate before setting aside an order of discharge passed by the trying Magistrate and directing a retrial under S. 437 should give the accused an opportunity of being heard. The High Court will direct the District Magistrate to supply the omission of notice. AIR (Vol 4) 1917 Bom 17: 19 Bom LR 908: 19 Cr LJ 101: 43 Ind Cas 325 (DB).

——S. 437 — Notice — Further enquiry.

An order for further inquiry in a case when the accused were discharged under S. 253, without notice to the accused is irregular though not illegal. AIR (Vol 2) 1915 Mad 337: 16 MLT 285: 15 Cr LJ 619: 25 Ind Cas 627.

——S. 437 — Notice — Further inquiry — Discretion.

Where a man has been discharged after full inquiry by a competent Court, a revisional Court will exercise a proper discretion in allowing him an opportunity of showing cause before ordering a further inquiry or before directing or re-opening of the case. Where a Court is given a discretion, it is bound to exercise it judicially and fairly. AIR (Vol 2) 1915 Law Bur 132: 8 Bur LT 133: 16 Cr LJ 697: 30 Ind Cas 744.

——S. 437 — Notice — Order for further inquiry — Notice to the accused necessary.

No order for further inquiry should be made without notice to the accused. (1914) 15 Cr LJ 1: 22 Ind Cas 145 (Cal) (DB).

——S. 437 — Notice — Procedure without one — Legality.

An order to make further inquiries in a complaint already dismissed under S. 203 without notice to the accused is unfair and prejudicial to the accused though not quite illegal and should be upset, under Ss. 439 and 435. (1911) 12 Cr LJ 615: 12 Ind Cas 991: 1911 PWR (Cr) 44.

——S. 437 — Notice to accused.

Notice should be served on the accused and his objections heard before an order for further inquiry is passed under S. 437. (1911) 12 Cr LJ 110: 9 Ind Cas 652 (Sind).

——S. 437 — Notice not obligatory but necessary.

Notice should ordinarily be issued before an order is made under S. 437 though it is not obligatory and a District Magistrate should give sufficient reasons to show that the order is a proper one. (1909) 3 SLR 7: 9 Cr LJ 446: 1 Ind Cas 938 (DB).

(b) Cases of dismissal.

——S. 437 — Notice — Application — When further enquiry can be ordered.

The section applies to an order of discharge as well as to an order of dismissal. Before setting aside an order of dismissal under S. 203, no notice to the accused need be given and further enquiry can be ordered. AIR (Vol 7) 1920 Cal 542: 32 CLJ 44: 21 Cr LJ 663: 57 Ind Cas 823 (DB).

——Ss. 437, 203 and 204 — Notice to accused if necessary.

A party who is not being tried is not an accused person. An order of Sessions Judge under S. 437 of the Cr. P. Code directing a further enquiry in a case which has been dismissed under S. 203 is not bad on the ground that notice was not given to the accused. AIR (Vol 6) 1919 Pat 567: 4 Pat LJ 456: 20 Cr LJ 843: 53 Ind Cas 939 (DB).

——S. 437 — Notice to accused — Necessity for.

Before an order is made under S. 437 of the Cr. P. Code it is not necessary that notice should in all cases be served upon the accused. Notice is necessary only in those cases where the accused have already appeared & have been discharged. In cases where the accused have not appeared before the Magistrate and taken their trial, no such notice is necessary. 20 Cr LJ 835: 53 Ind Cas 931: AIR (Vol 6) 1919 Pat 361.

——Ss. 437 and 203 — Notice — Further enquiry — Notice to accused.

Where an accused person was not called upon to appear in the first instance and where an order was only made under S. 203 of the Cr. P. Code the issue of a notice is unnecessary when the order is set aside by the Sessions Judge. AIR (Vol 5) 1918 All 258: 40 All 138 : 16 ALJ 30: 19 Cr LJ 206: 43 Ind Cas 622.

——S. 437 — Notice — Discharge — Further enquiry — Judicial discretion.

Nothing in S. 437 of the Cr. P. Code requires previous notice to be given to any accused person who has been discharged before enquiry into his case is ordered by a competent authority, that is, by the High Court, or the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused who has been actually before the Court to answer the facts alleged against him. AIR (Vol 5) 1918 All 111: 40 All 416: 16 ALJ 298: 19 Cr LJ 401: 44 Ind Cas 929.

**——S. 437 — Notice — Order of retrial.**

In setting aside an order of dismissal under S. 203, and ordering a retrial notice to accused is not necessary. (1911) 12 Cr LJ 46: 9 Ind Cas 277 (All).

**——S. 437 — Notice to accused before order for further enquiry.**

The Criminal Procedure Code does not expressly require that notice to an accused person is necessary before an order under S. 437, can be passed, but as a matter of discretion, it is proper even necessary, that such notice should be given especially where the further inquiry directed is for the purpose of reconsidering the evidence already given. (1903) 5 Bom LR 877 (877) (DB).

**——S. 437 — Further inquiry in cases of dismissal under S. 203 — Necessity for notice to accused.**

Where a complaint is dismissed under S. 203, no notice need be given to the person complained against before an order for further inquiry is made under S. 437, Cr. P. C. 15 C 608, Ref. to. (1902) 6 CWN 638 (639, 640): 29 Cal 457 (DB).

**——S. 437 — Discharge — Further inquiry, necessity for.**

Section 437 does not require the issue of notice to the person discharged as a condition precedent to a direction for further enquiry. (1901) 3 Bom LR 703 (703, 704) (DB).

**6. Order of Commitment.**

——S. 437 — An order of the Magistrate to whom the accused are sent under S. 323, I. P. C., amounts to an order of discharge under S. 302/34, I. P. C., and the Sessions Judge can, in revision, pass an order for committing the accused to the Sessions Court. AIR (V 30) 1943 Pesh 89: 45 Cr LJ 167: 210 Ind Cas 10 (DB).

**——S. 437 — Essential point to be considered before acting under S. 437 — Case before Magistrate in middle of hearing — Order directing commitment is not justified.**

Section 437, Criminal P. C., contemplates a case in which there has already been a completed inquiry under the provisions of Chap. XVIII followed by an order of discharge in a case triable exclusively by the Court of Session. The object of S. 437 is to enable the Sessions Judge in such a case to order commitment for trial without the necessity of a fresh and unnecessary inquiry. Such a procedure as is contemplated by S. 437 may be either in a proceeding under Chap. XVIII or in a case in which the accused has been tried out and convicted or acquitted on other charges in a warrant case. Such discharge may be either express or by implication. The essential point either for a Magistrate acting under S. 347 or for a Sessions Judge acting under S. 437 is to make certain that the rights of the accused are in no way prejudiced.

In a case where the Magistrate has only framed charges in respect of certain offences and fixed a date for further cross-examination of the prosecution witnesses and thus the case is still in the middle of its hearing, an order under S. 437, Criminal P. C., directing commitment is not justified and must be set aside. AIR (V 28) 1941 Oudh 409: 1941 OWN 634: 42 Cr LJ 536: 194 Ind Cas 214.

**——S. 437 — Magistrate discharging accused after preliminary enquiry — After considering all evidence Sessions Judge not specifically finding prima facie case but taking different view — Ordering commitment.**

The Magistrate discharged the accused in a dacoity case after holding a preliminary enquiry in the case. The Magistrate gave perfectly adequate reasons in support of his conclusion that no prima facie case had been made out against the accused. In fact, he went to the length of saying that most of the important prosecution witnesses were totally unworthy of credit and that the prosecution evidence was on the face of it absolutely incredible. It was impossible to say that the Magistrate acted improperly in assessing the evidence that was put before him. The Sessions Judge's opinion about the evidence was different from that of the Magistrate. He had not specifically found that there was prima facie evidence of the commission of an offence exclusively triable by a Court of Session:

Held, that the Sessions Judge acted improperly in committing the accused for trial to the Court of Session. AIR (V 26) 1939 Mad 253: 1938 MWN 1311: 40 Cr LJ 392: 180 Ind Cas 576.

——S. 437 — The accused was placed on trial before a Magistrate for offences under Ss. 307 and 323, I. P. C. Charge was framed under S. 323 but the Magistrate omitted to say anything about S. 307. The accused was acquitted. The complainant applied to the Sessions Judge for revision with the result that the Sessions Judge ordered that the accused should be committed to Sessions on a charge under S. 308:

Held, that there was a case before the Magistrate under S. 307, and although he had not passed any orders in regard to that part of the case, it must be held that an order of discharge was implied. The Sessions Judge had, therefore, jurisdiction under S. 437 to direct that the accused should be committed for trial. AIR (V 21) 1934 All 141: 35 Cr LJ 865: 1934 ALJ 478: 4 AWR 1544: 56 All 529: 148 Ind Cas 999.

——S. 437 — Accused challaned under S. 304, Penal Code and charge framed under that section — Application under S. 437, Criminal P. C., to set aside implied order of discharge under S. 302, Penal Code — Application accepted and Sessions Judge directing commitment of case to him:

Held, that as the challan was not under S. 302, Penal Code no order of discharge under that section could be implied and order directing commitment was illegal. AIR (V 18) 1931 Lah 402(2): 32 Cr LJ 1029: 133 Ind Cas 638.

——S. 437 — An order of commitment made by a Sessions Judge under S. 437, when already he had at previous stage rejected an application for setting aside an order discharging the accused is not without jurisdiction. AIR (V 17) 1930 Cal 61: 121 Ind Cas 401: 33 CWN 974: 1930 Cr C 13: 31 Cr LJ 260 (DB).

——S. 437 — Under S. 436 the Sessions Judge has jurisdiction to commit an accused for trial in the Sessions Court if he is of opinion that the case against the accused is triable exclusively by the Court of Session, or it is intimately connected with a charge exclusively triable by the Sessions Court, and if it forms part of the same transaction and that the accused has been improperly discharged by an inferior Court. AIR (V 13) 1926 Cal 1090: 53 Cal 645: 27 Cr LJ 1139: 97 Ind Cas 659 (DB).

——S. 437 — Where the police chalan contains a mention of Ss. 147 and 304, I. P. C. but the Magistrate, after hearing the evidence for the prosecu-

tion, frames a charge under Ss. 147 and 325, the accused cannot be said to have been discharged within the meaning of S. 437 and the Sessions Judge is not authorized to order commitment under S. 437. AIR (V 13) 1926 Oudh 194: 27 Cr LJ 417: 3 OWN 201: 13 OLJ 490: 93 Ind Cas 145.

——S. 437 — The Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusions to which he did come on the materials before him. That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment; he must come to the conclusion that the finding of the Magistrate is not only wrong but perverse. AIR (Vol 12) 1925 Pat 599 : 86 Ind Cas 822 : 6 PLT 570 : 26 Cr LJ 886.

**7. Order of discharge.**

**(a) General.**
**(b) Further enquiry.**
**(c) Interference.**

**(a) General.**

——S. 437 — An order of the Magistrate to whom the accused are sent under S. 323 I. P. C., amounts to an order of discharge under S. 302 /34, I. P. C. AIR (Vol 30) 1943 Pesh 89: 45 Cr LJ 167 : 210 Ind Cas 10 (DB).

**——S. 437 — Setting aside order of discharge — Duty of Court.**

When an order of discharge is set aside, the Court, instead of merely criticising the order of discharge should give its own reasons for holding that prosecution evidence prima facie had established some particular offence. 1937 MWN 729.

**——S. 437 — 'Discharge', whether can be implied — Charge which ought to have been framed, not framed.**

'Discharge' in S. 437, Criminal P. C., means not only an express discharge but an implied discharge.

Where it was clear from the record of the case that the facts before the Magistrate were such as would have constrained him to frame a charge against the accused under S. 388, I. P. C., but he convicted the accused only under S. 392, I. P. C.:

Held, that it amounted to an implied discharge under S. 388, and the Sessions Court acting under S. 437, Cr. P. C., could take steps to commit the case in respect of the offence under S. 388, I. P. C. AIR (Vol 22) 1935 Sind 221 : 29 SLR 428 : 37 Cr LJ 80 : 159 Ind Cas 271 (DB).

**——S. 437 — 'Discharged', meaning of.**

The word "discharged" in S. 437, Criminal P. C., does not mean "absolutely discharged and set at liberty" but also "partially discharged" or in other words, not charged with an offence exclusively triable by the Court of Session. AIR (Vol 21) 1934 Lah 164 : 15 Lah 138 : 36 PLR 508 : 36 Cr LJ 466 : 153 Ind Cas 1029 (DB).

**——S. 437 — Order of discharge — Setting aside of, by Sessions Judge — Considerations.**

Before an order of discharge is set aside by the Sessions Judge, he should consider if the order of the inquiring Court was perverse or foolish. or manifestly against the weight of the evidence, or that the Magistrate had failed to record all the evidence. AIR (Vol 21) 1934 Pesh 52 : 35 Cr LJ 1282 : 151 Ind Cas 143 (DB).

——S. 437 — Where an order of discharge under S. 209 has been confirmed by a higher authority, it is not competent for a Magistrate to entertain a fresh complaint on the same charge. AIR (Vol 15) 1928 Sind 49 : 99 Ind Cas 89 : 28 Cr LJ 57 : 7 AI Cr R 225 : 21 SLR 127 (DB).

**——Ss. 437 and 110 — Order of discharge — Inquiry under S. 110 — District Magistrate — Further inquiry.**

Under S. 437 of the Cr. P. Code a District Magistrate has jurisdiction to direct further inquiry in a case where a person has been discharged in an inquiry under S. 110 of the Cr. P. Code. AIR (Vol 6) 1919 All 174 : 20 Cr LJ 704 : 52 Ind Cas 672.

**——S. 437 — Order of discharge of accused person — No charge framed — Revision — Order for further enquiry.**

Where the accused was charged with offences under Ss. 323 and 307, I. P. C. the Magistrate framed a charge under S. 323 only and said nothing about 307.

Held, that this was equivalent to saying that there was no evidence against him on the other charge, the effect of which was to discharge him. AIR (Vol 6) 1919 All 66 : 17 ALJ 1093 : 1 UPLR (HC) 193 : 20 Cr LJ 778 : 53 Ind Cas 618.

**——S. 437 — Order of discharge — Notice.**

Order of discharge may be considered under S. 437 in revision on the ground of misapprehension of evidence by the trying Court. Notice to the accused is not necessary. AIR (Vol 3) 1916 Sind 63 : 10 SLR 68 : 17 Cr LJ 349 : 35 Ind Cas 525 (DB).

**——Ss. 437, 209 and 337 (3) — Order of discharge — Discharge of some accused.**

Out of the five persons charged with dacoity, one was pardoned but he denied knowledge of the dacoity and the remaining four were discharged. He was then committed to Session for dacoity, on the ground that his statements incriminated him and others. On reference by the Sessions Court to High Court.

Held, that under S. 437 the High Court could direct further inquiry to be taken in the case of the discharged accused and if a charge be framed all of them be committed to Sessions and that S. 337 (3) applied. Though the approver's commitment is not quashed, the High Court can direct that his case be stayed till the final decision in the case of the other accused. (1913) 37 Bom 146 : 14 Bom LR 897 : 13 Cr LJ 842 : 17 Ind Cas 714 (DB).

**——Ss. 437, 494 and 495 — Order of discharge — Withdrawal of prosecution — Discharge of accused — Conviction for a subsequent offence — Inadequacy of sentence — No ground for setting aside the order of discharge and directing further inquiry.**

The accused was discharged under S. 494, the prosecution against him being withdrawn, but was subsequently convicted on a different charge by the Sessions Judge. The District Magistrate being of opinion that the sentence was inadequate, set aside the order of discharge passed under S. 494 and directed further inquiry.

Held, that order of discharge being not improper at the time it was passed the Dt. Magistrate could not set it aside and direct a fresh inquiry, and that if the sentence was inadequate, District Magistrate should have applied for enhancement and should not have set aside the order of discharge passed in another case. (1911) 2 MWN 74 : 12 Cr LJ 440 : 11 Ind Cas 624.

**——S. 437 — Order of discharge — Order amounting to acquittal if revisable.**

An apparent order of discharge on a summons case must be considered as one of acquittal and it is not revisable by the Sessions Judge. (1910) 8

MLT 78 : 11 Cr LJ 350 : (1910) MWN 444 : 6 Ind Cas 385.

——S. 437 — The word "discharged" in S. 437, is equivalent to "discharged within the meaning of Ss. 209, 253, 259, Cr. P. C." The meaning of the word "discharge" in S. 119, Cr. P. C., is non-technical and merely means permission to depart. The word "charge" as applied to offences is used in two senses in the Code. In Ch. XIX and in Ss. 210 and 254, it is the formal statement of the case which the accused has to meet and in S. 253 it is used in the popular sense of "accusation". (1909) 11 Cr LJ 162 (163) : 20 MLJ 137 : 33 M 85 : 4 Ind Cas 1057 (2).

### (b) Further enquiry.

**——S. 437 — Offence triable by Court of Session as well as by First Class Magistrate — Further enquiry, if can be ordered by District Magistrate.**

In the case of an offence under S. 304, Penal Code, which is triable not only by a Court of Session but also by a Magistrate of the First Class, the District Magistrate has no jurisdiction to order a further enquiry under S. 437, Criminal P. C. AIR (Vol 21) 1934 Oudh 327 : 11 OWN 818 : 35 Cr LJ 1151 : 10 Luck 187 : 150 Ind Cas 852.

**——S. 437 — Accused charged under Penal Code, Ss. 457 and 380 — Discharge under S. 209, Cr. P. C. — Sessions Judge cannot pass order under S. 437 but can order inquiry under S. 436.**

Section 437 relates only to cases triable exclusively by the Court of Session. Where, therefore, the accused, charged under Penal Code, Ss. 457 and 380, have been discharged by the trying Magistrate under Cr P. C., S. 209, the Sessions Judge, acting under S. 437 cannot pass an order against the accused directing that the order of discharge be set aside and that the trying Magistrate do commit the accused to take their trial at the Sessions. The correct procedure is to order further inquiry under Cr. P. C., S. 436. AIR (Vol 17) 1930 Mad 103 : 1930 Cr C 17 : 31 Cr LJ 459 : 1929 MWN 709 : 2 M Cr C 291 : 122 Ind Cas 788.

——S. 437 — The dictum that further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish "does not apply to a case in which a Magistrate is acting as a Court of enquiry and not a trial Court." AIR (Vol 17) 1930 Oudh 415 : 7 OWN 749 : 1930 Cr C 955.

**——S. 437 — Order of discharge — Further enquiry — Grounds for taking different view of the evidence.**

Where an accused has been discharged, unless the order of discharge is perverse or manifestly incorrect or there is other evidence forthcoming, no further enquiry should be directed. The mere fact that the evidence is such that two different Courts might take two different views of the evidence is not a sufficient ground. AIR (Vol 7) 1920 All 266 : 22 Cr LJ 49 : 18 ALJ 1135 : 59 Ind Cas 193.

**——S. 437 — Order of discharge — Further inquiry.**

After an order for discharge is made, further enquiry is not proper unless the order is foolish or based on incomplete evidence. AIR (Vol 7) 1920 Lah 54 : 21 Cr LJ 571 : 57 Ind Cas 91.

**——S. 437 — Order of discharge — Further enquiry — Evidence recorded and considered by Magistrate.**

Further enquiry into the case of discharged person should not be ordered, unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. The mere fact that the story of the prosecution is improbable is not a ground for ordering retrial. AIR (V 6) 1919 Lah 433: 20 Cr LJ 592 : 52 Ind Cas 203.

**——S. 437 — Order of discharge — Further inquiry — Order — Discharge — Acquittal.**

In a warrant case after the charge was framed the accused pleaded not guilty and the Magistrate passed an order 'Accused discharged.' On revision the District Magistrate set aside the order of the trying Magistrate and ordered a new trial.

Held, that the order of the District Magistrate was illegal. After the charge has been framed the Magistrate can either convict the accused or acquit him. Discharged under the circumstances means only an acquittal and a District Magistrate cannot in revision set aside the order of acquittal. AIR (Vol 5) 1918 All 335 : 16 ALJ 388 : 19 Cr LJ 596 : 45 Ind Cas 500.

**——S. 437 — Order of discharge — Power of Sessions Judge in the order of discharge.**

A Sessions Judge has no jurisdiction to order further enquiry in a case in which an order of discharge, amounting to an acquittal, was passed. AIR (Vol 4) 1917 Mad 359 : 17 Cr LJ 95 : 32 Ind Cas 687.

**——S. 437 — Order of discharge — Further enquiry — When ordered — Notice to accused.**

Where the whole evidence on the record is fully considered and the order of discharge is not manifestly perverse or foolish it is improper to make an order for further enquiry under S. 437. It is liable to be set aside on revision. Before making further enquiry though notice to the accused is not as a matter of law necessary, yet, an order to the prejudice of an accused should not ordinarily be passed without giving him an opportunity of being heard. AIR (Vol 2) 1915 Lah 455 : 4 PWR 1915 Cr : 16 Cr LJ 214 : 130 PLR (1915) : 27 Ind Cas 838.

**——Ss. 437 and 476 — Order of discharge — Further inquiry by Sessions Judge — Discharge of the accused and directing of complainant's prosecution — Jurisdiction — Procedure.**

A Sessions Judge cannot direct further enquiry in a case in which the Magistrate had discharged the accused and had under S. 476 directed the prosecution of the complainant The case ought to be referred to the High Court. AIR (Vol 1) 1914 Cal 312 : 15 Cr LJ 16 : 22 Ind Cas 160 (DB).

**——S. 437 — Order of discharge — Order not to be set aside without reasons.**

No Court could properly set aside an order of discharge without solid and sufficient reason therefor. An order for further inquiry without stating the grounds therefor is bad. AIR (Vol 1) 1914 Mad 676 : (1913) MWN 638 : 14 Cr LJ 572 : (1914) MWN 46 : 21 Ind Cas 172.

**——S. 437 — Order of discharge — Proper order to be passed.**

Where in setting aside an order of discharge the order concluded with 'The case is therefore reopened and the Police are at liberty to reconsider the whole position' :

Held, the order was not contemplated by S. 437, Cr. P. Code and the proper course was to direct the Magistrate below to make further inquiry into the case. 37 PWR 1913 Cr : 320 PLR 1913 : 14 Cr LJ 596 : 21 Ind Cas 468.

**——S. 437 — Order of discharge — Further inquiry — Power to order in case of person discharged under S. 119.**

A District Magistrate can under S. 437 order a fresh inquiry into the case of a person discharged by a Subordinate Magistrate under Ch. VIII. (1911) 35 Bom 401 : 13 Bom LR 505 : 12 Cr LJ 430 : 11 Ind Cas 614 (DB).

——Ss. 437, 435 — **Jurisdiction of — Sessions Judge to order further inquiry on the ground of misappreciation of evidence.**

A Sessions Judge has jurisdiction to direct further inquiry on the bare ground of misappreciation of evidence. (1909) 32 Mad 214 (218) : 5 MLT 356 : 10 Cr LJ 299 : 3 Ind Cas 488 (DB).

——S. 437 — **Further enquiry — Reasons to be stated — Notice.**

An order for further enquiry should contain reasons for the same. The mere opinion of the Magistrate that there should be a further enquiry will not do. (1905) 3 CLJ 43 (45) : 32 Cal 1090 (DB).

——S. 437 — **Further enquiry, order for, by Sessions Judge — Proper grounds not stated — Discharge in substance though not in form — Sessions Judge, competency of, to order further enquiry.**

Where an order was passed by a Deputy Commissioner which was in substance though not in form an order of discharge.

Held, that a Sessions Judge could, on the complainant's motion, direct a further enquiry under S. 437, Cr. P. C. An order of a Sessions Judge so passed not stating proper grounds for directing a further enquiry set aside as bad. (1904) 8 CWN 456 (458) (DB).

——S. 437 — **Further inquiry — Major offence — Acquittal — Component offences — Rioting — Hurt — Wrongful confinement — Penal Code, Ss. 147, 323, 342.**

Where an accused person was tried on a charge of being a member of an unlawful assembly with the common object of assaulting the complainant, but was acquitted of the offence of rioting, and subsequent thereto the District Magistrate directed a further inquiry into the offences under Ss. 323 and 342, I. P. C.. committed in the same occurrence:

Held, that the offence under S. 323, I. P. C., being one of the offences which formed the subject of the previous trial, the matter cannot be reopened until the order of acquittal shall have been set aside; that no order within the terms of Ss. 437, Cr. P. C., having been passed in respect of the offence under S. 342, I. P. C., the District Magistrate was not competent to order further inquiry in regard to that offence. (1901) 5 CWN 72 (73) (DB).

**(c) Interference.**

——S. 437 — An order of discharge passed by trial Court after a full enquiry and after recording all the evidence produced by the complainant should not be lightly interfered with. AIR (Vol 12) 1925 Lah 395 : 89 Ind Cas 272 : 7 LLJ 216 : 26 PLR 198 : 26 Cr LJ 1328.

——Ss. 437 and 439 — **Order of discharge — Interference — When proper.**

Though the powers of the Court of revision under Ss. 435 and 437 are wider than those under S. 439 yet the revisional Court ought not to ordinarily interfere under S. 437 with the order of discharge by the trying Magistrate unless it is possible to come to only one conclusion on the evidence, viz., that the accused is guilty. AIR (Vol 7) 1920 Mad 284 : 10 LW 630 : 20 Cr LJ 817 : 53 Ind Cas 817.

——S. 437 — **Order of discharge — Interference.**

Where an accused is discharged by a Magistrate after the consideration of the evidence on record and where his order is not manifestly perverse or foolish or based on an incomplete record of the evidence, the District Magistrate should not set aside the order of discharge merely because he himself thinks to the contrary. AIR (Vol 3) 1916 Lah 299 : 17 Cr LJ 161 : 20 PWR 1916 Cr : 33 Ind Cas 641.

——S. 437 — **Order of discharge — Interference.**

Where after the accused charged with offences under Ss. 342 and 357 I. P. C. were discharged by the Magistrate the Sessions Judge set aside the order of discharge and directed an enquiry into an offence of forgery under S. 467 I. P. C.

Held, that the Sessions Judge had no such jurisdiction under S. 437 and his order was illegal. (1909) 10 Cr LJ 554 : 4 Ind Cas 312 (All).

——Ss. 437 and 253 — **Order of discharge — Interference — When proper.**

Those who seek to disturb on revision an order of discharge passed by a Magistrate under S. 253 must make out a very strong case. (1909) 10 Cr LJ 160 : 2 Ind Cas 825 (Bom) (DB).

**8. Powers of Sessions Judge and Magistrate.**

——S. 437 — **Scope of the power of Sessions Judge to interfere with order of discharge in cases triable exclusively by a Court of Session.**

A Sessions Judge is entitled to look into the order of discharge in a case triable exclusively by a Court of Session to see whether on the evidence led by the prosecution there was a prima facie case against the accused and he might not interfere only in cases where the evidence is untrustworthy. AIR (V 35) 1948 A 405: 49 Cr LJ 692: 1948 ALJ 562: 1948 AWR (HC) 188.

——S. 437 — **Sessions Judge has to decide about common intention.**

A murder case is exclusively triable by a Court of Session. It is, therefore, within the competence of the Sessions Court to decide whether the common intention of the accused was to commit murder or to cause simple hurt. It is not for the Magistrate to decide this point. AIR (V 30) 1943 Pesh 89: 45 Cr LJ 167: 210 Ind Cas 10 (DB).

——S. 437 — **Magistrate refusing to commit and discharge accused — Duty of Sessions Judge in such case.**

In proceedings coming up before Magistrate by way of committal, the Magistrate's duty is to consider whether a conviction is possible in the case & in order to come to that conclusion he is entitled to appreciate the evidence. But he must appreciate the evidence from that point of view only, and it is not within his province to consider the evidence merely from the point of view of the possibility of a conviction resulting. It may be that a conviction is improbable. But if it is possible for a Court to take such a view of the evidence as to be able to found a conviction upon it, then it is the duty of the Magistrate to commit the accused for trial. If he refuses to commit, the grounds of the refusal should be (stated very generally) that no conviction is possible. The duty of the Sessions Court (stated very broadly) is to appreciate the evidence from the point of view of the correctness of the Magistrate's order of discharge; in other words, in order to see whether the basis of the Magistrate's order of discharge (namely the impossibility of any conviction resulting) is correct or not. AIR (V 26) 1939 Bom

372: 41 Bom LR 749: 40 Cr LJ 951: 184 Ind Cas 282 (DB).

——**Ss. 437, 209 — Discharge of accused by Magistrate — Order set aside by Sessions Judge and re-trial in Sessions Court ordered — Jurisdiction to set aside the order — "Improper", meaning of.**

Under S. 437, Cr. P. C., the Sessions Judge or the District Magistrate has jurisdiction to set aside the order of a Magistrate discharging the accused under S. 209, Criminal P. C., if he is of opinion that the order is improper. It is not necessary that the order should be perverse or manifestly contrary to the evidence in the case.

Per Beaumont, C. J.— The order of discharge may be set aside on the ground that the Magistrate has, however competently, taken upon himself the discharge of a duty, which under the Code is entrusted to the Sessions Court, that is to say, the duty of appreciation of evidence of doubtful credibility or in a proper case on the ground that he disagrees with the appreciation of evidence by the Magistrate.

Per Rangnekar, J. — In a case triable exclusively by the Court of Session, the Sessions Judge can set aside the order of discharge and commit the accused for trial (1) when he considers that the charge was not groundless, and (2) when he considers that there are sufficient grounds for commitment, both on facts and on legal grounds, or even when the proceedings before the inferior Court were not regular and that is the meaning of the expression "improperly discharged".

The result of a careful consideration of the sections and the cases is, as follows: (1) that it is competent to the committing Magistrate at any stage of the preliminary inquiry to discharge the accused if he considers the charge to be groundless for reasons to be recorded by him. (2) The committing Magistrate is entitled to weigh and appreciate the evidence led on behalf of the prosecution and on behalf of the defence, and if, on a consideration of this evidence he is of opinion that there are not sufficient grounds for committing the accused for trial, in other words, there is no case which would fairly justify or sustain a conviction at the trial or no evidence on which any reasonable person can hold the accused to be guilty, then it is his duty to discharge the accused. (3) If after a charge is framed and a list of further witnesses put in by the accused and the Magistrate after examining any such witnesses thinks that there are no sufficient grounds for committing the accused for trial, it is his duty to cancel the charge and discharge the accused. (4) The expression "sufficient ground" means, when credible witnesses make statements which, if believed, would sustain a conviction. (5) The Sessions Judge has jurisdiction to interfere in revision but such jurisdiction should be exercised only if he thinks that the order is illegal or incorrect or otherwise improper. (6) The expression "improper" in this connection means that in the opinion of the Sessions Judge, there were sufficient grounds before the Magistrate on which he ought to have made an order for committal. (7) The power in revision must not be used freely. (8) The Sessions Judge must give reasons for his interference, so that if the matter comes to the High Court, there may be material before it for deciding whether the Sessions Judge acted properly in interfering with the order of discharge. AIR (V 22) 1935 Bom 137 : 37 Bom LR 16: 59 Bom 125: 36 Cr LJ 643: 155 Ind Cas 101 (FB).

——**S. 437 — Trial Court's judgment full of surmises and special pleadings — Reference.**

Although ordinarily, District Magistrate should not refer cases of acquittal to the High Court on pure questions of fact, yet where the judgment of the trial Court is full of surmises and special pleadings, recommendations of the District Magistrate supported by the Sessions Judge should be accepted and re-trial ordered. AIR (V 21) 1934 All 714 : 3 AWR 564 : 35 Cr LJ 1289 : 151 Ind Cas 350.

——**S. 437 — Irregularity or illegality not revealed.**

Where the examination under S. 435, Criminal P. C., by the District Magistrate of the record prepared by the trying Magistrate, who first heard this case, has not revealed the commission of any irregularity or illegality by the Magistrate who had discharged the accused, it is not open to the District Magistrate to take any action under S. 437, Criminal P. C. AIR (V 21) 1934 Oudh 327 : 11 OWN 818 : 35 Cr LJ 1151 : 10 Luck 187 : 150 Ind Cas 852.

——S. 437 — If in a case the Sessions Judge really is of opinion that the case was triable by the Court of Session and that the accused had been improperly discharged, then he has two alternatives under S. 437, Criminal P. C., viz., (1) to order a fresh inquiry or (2) to direct the accused to be committed for trial on the ground that the order of discharge was an improper one. AIR (V 20) 1933 All 482 (2) : 1933 ALJ 1115 : 34 Cr LJ 1201 : 146 Ind Cas 160.

——S. 437 — An order under S. 437, Criminal P. C., must be passed on the examination of the record of any case as it stands when a Sessions Judge takes it up for consideration. AIR (V 20) 1933 Mad 247 : 1932 MWN 1162 : 34 Cr LJ 278 : 65 MLJ 6 : 38 LW 668 : 142 Ind Cas 138.

——**S. 437 — Powers of Sessions Judge.**

A Sessions Judge has a wide discretion under S. 437 to go into the merits of the case and commit the accused to the Sessions though the Magistrate has discharged him after preliminary enquiry. 1930 MWN 683.

——**S. 437 — Sessions Court making complaint under S. 476 to 1st Class Magistrate — Complaint dismissed — That Sessions Court cannot hear proceedings against dismissal under S. 437.**

The Sessions Judge who files the complaint under S. 476 is disqualified from hearing the applications made to him under Ss. 435 and 437 owing to the complaint under S. 476 having been dismissed, and from making an order directing the persons against whom the complaint was initially made to be committed to the Sessions Court presided over by himself.

Per Fawcett, J. — The Judge or Magistrate who proceeds under the provisions of S. 476 is a party to the case in which he is a complainant, within the meaning of S. 556. AIR (V 14) 1927 Bom 35 : 28 Bom LR 1302 : 28 Cr LJ 53 : 7 AI Cr R 227 : 99 Ind Cas 85 (DB).

——**S. 437 — No opportunity of showing cause against commitment given — Order should be set aside.**

Where some of the accused were not made respondents to the revision petition to District Magistrate against order of discharge and no notice had been ordered to be served upon them and where they had no opportunity of showing cause why an order of commitment should not be made against them.

Held, that the order of the District Magistrate was clearly wrong, and must be set aside so far as those accused were concerned. AIR (V 12) 1925 Mad 1061 : 49 MLJ 155 : 48 Mad 874 : 22 MLW 755 : 26 Cr LJ 1570 : 90 Ind Cas 530.

——S. 437 — A Magistrate of the first class acquitted certain persons who were charged before him under Ss. 424 & 506 (2) of the Penal Code. The complainant afterwards made several applications to the Magistrate to frame a charge against the accused under S. 395 of the Penal Code and commit the accused to Sessions. The Magistrate recorded the applications but declined to entertain them. Upon this the District Magistrate was moved by the complainant and acting under S. 437 of the Cr. P. C., framed a charge against the accused and committed them to take their trial before the Sessions Court. It was contended in revision that the District Magistrate's order was illegal because the accused had been acquitted and not discharged,

Held, that the First Class Magistrate's order was substantially one discharging the accused in respect of an alleged offence under S. 395 of the Penal Code and that the District Magistrate had jurisdiction to pass the order in question. AIR (V 12) 1925 Sind 190 : 25 Cr LJ 1363 : 19 SLR 353 : 82 Ind Cas 760 (DB).

——S. 437 — A District Magistrate cannot, when acting under S. 437, direct a re-trial by himself. AIR (V 7) 1920 All 266 : 2 UPLR (All) 374 : 22 Cr LJ 49 : 18 ALJ 1135 : 59 Ind Cas 193.

**——S. 437 — Powers of Court.**

The powers of the Court under S. 437 are wide and are not limited to the powers which might be exercised by an Appellate Court. (1911) 12 Cr LJ 184 : 9 Ind Cas 1007 (Sind).

**——S. 437 — Order of Sessions Judge.**

District Magistrate cannot disregard the order of the Sessions Judge directing a new trial. (1909) 5 LBR 49 : 10 Cr LJ 77 : 2 Ind Cas 541.

**——Ss. 437, 435 — Application before District Magistrate for calling for records — Order for further enquiry — Sessions Judge — No jurisdiction to call for records and refer order to High Court.**

After an application is made to a District Magistrate under S. 435, Criminal P. C., the Sessions Judge has no jurisdiction to entertain a similar application under the same section and to call for the records and refer the District Magistrate's order for further enquiry to the High Court. (1907) 17 MLJ 153 (153) : 2 MLT 24 : 5 Cr LJ 132 (DB).

**——S. 437 — Order of acquittal — "Discharge".**

A Sessions Judge is not competent to set aside an order of acquittal passed by a Magistrate, although such order might have been passed without any charge having been framed on the evidence. (1904) 1 ALJ 415 (416).

**——S. 437 — Power to order inquiry.**

See (1902) 6 CWN 163 (164).

**——S. 437 — District Magistrate's power to order further inquiry in a case tried by himself.**

Section 437 is not confined to cases in which the inquiry was held by Magistrates subordinate to the District Magistrate, but applies also to cases where the case was originally tried by the District Magistrate himself. (1901) 28 C 102 (104) (DB).

### 9. Further enquiry.

See also N 2 and 7.

**——S. 437 — Costs — Further enquiry — Order on terms as to costs.**

The Court ordered further inquiry on applicant paying into Court the costs of Crown and of the accused in the event of the acquittal. AIR (V 1) 1914 Sind 44 : 8 SLR 196 : 16 Cr LJ 174 : 27 Ind Cas 558.

**——Ss. 437 and 439 — Further enquiry.**

The prosecution is entitled to a decision on the case put forward by it. (1912) 12 MLT 664 : 14 Cr LJ 45 : 18 Ind Cas 269 (DB).

**——S. 437 — Procedure on further inquiry — Sessions Judge — Order for further inquiry — Release by Magistrate.**

No Magistrate can release a prisoner without further enquiry if the Sessions Judge has ordered one under S. 437, Cr. P. C. (1909-10) 5 LBR 49 : 10 Cr LJ 77 : 2 Ind Cas 541.

**——Ss. 437 and 438 — Procedure on further enquiry — Revisional powers of District Magistrate.**

A District Magistrate exercising revisional powers in orders of discharge can go into the evidence and commit the accused for trial. (1909) 9 Cr LJ 366 : 1 Ind Cas 686 (Mad).

**——S. 437 — Procedure on further inquiry.**

A Sessions Judge should pursue the evidence and state the grounds when he directs a further inquiry as regards an accused person. (1909) 13 CWN 76 : 9 Cr LJ 303 : 1 Ind Cas 415 (DB).

### 10. Wrong dismissal of complaint.

**——S. 437 — Wrong dismissal of complaint on report of president of panchayat.**

A Magistrate dismissed a complaint of assault and theft merely on the report of the president of the Panchayat without giving petitioner an opportunity to substantiate his case and the order of dismissal referred to one of the charges only of the complaint.

Held, that there should be a further enquiry into the complaint. AIR (V 6) 1919 Cal 725 : 23 CWN 575 : 20 Cr LJ 794 : 53 Ind Cas 624 (DB).

**——S. 437 — Wrong dismissal of complaint — Revisional jurisdiction.**

The section contemplates that though a complaint is dismissed under S. 203 the revisional jurisdiction of the District Magistrate can be invoked irrespective of its illegality. AIR (V 5) 1918 Pat 270 : 3 PLJ 346 : 19 Cr LJ 874 : 47 Ind Cas 70 (DB).

**——S. 437 — Wrong dismissal of complaint — Complaint dismissed at the instance of complainant — If can be reinstituted.**

A complaint under Ss. 420 and 409 dismissed at the instance of the complainant himself can be reinstituted in the Court of another Magistrate having jurisdiction. AIR (V 2) 1915 All 50 : 16 Cr LJ 73 : 26 Ind Cas 665.

**——S. 437 — Wrong dismissal of complaint — Remedy after dismissal of complaint under S. 253.**

Though a Magistrate can entertain a complaint after it has once been wrongly dismissed, under S. 253 the appropriate remedy for complaints wrongly dismissed is vested solely in the higher grades of Magistrates and the Sessions Judge under S. 437, Cr. P. C. (1910) 4 SLR 53 : 11 Cr LJ 582 : 8 Ind Cas 203 (DB).

**(Also (1910) 4 SLR 52 : 11 Cr LJ 582 : 8 Ind Cas 202.)**

**——S. 437 — Refusal of further inquiry does not bar revival of complaint.**

See (1909) 13 CWN 193 : 36 C 415 (417) : 2 Ind Cas 293 : 9 Cr LJ 563.

**——S. 438.**

See also, Cr. P. C., S. 435.

1. **Court entitled to refer.**
2. **Duty of referring Court.**
3. **Enhancement of sentence.**
4. **Grounds of reference.**
5. **Jurisdiction.**

**6. Powers of High Court.**
See also, Cr. P. C., S. 439.
**7. Procedure.**
**8. Scope.**
See also, Cr. P. C., Ss. 435 and 439.

**1. Court entitled to refer.**

**——Ss. 438, 439 — Acquittal — No appeal — District Magistrate is competent to make reference to High Court — High Court, if can entertain revision.**

Even if no appeal is preferred by the Local Government against an order of acquittal under S. 417, Criminal P. C., the District Magistrate is competent to make a reference to the High Court under S. 438 and there is no legal bar to the entertainment of the revision by the High Court.

Even if the District Magistrate could not make a reference, the High Court can interfere under S. 439, as the matter has been brought to its knowledge. AIR (Vol 29) 1942 Oudh 443: 1942 OWN 432: 43 Cr LJ 763: 1942 AWR (CC) 285: 201 Ind Cas 506.

——S. 438 — A Court which has power to refer the case for orders to the High Court under S. 438 is not a Court of reference within meaning of S. 522 (3). AIR (Vol 27) 1940 Lah 95 : 43 PLR 534 : ILR (1941) Lah 377 : 41 Cr LJ 458 : 187 Ind Cas 407.

**——S. 438 — Reference by District Magistrate questioning propriety of judgment of Sessions Judge, legality of.**

A District Magistrate cannot make a reference direct to the High Court questioning the propriety of an order passed by a Sessions Judge. AIR (Vol 20) 1933 Lah 433(2): 34 Cr LJ 371: 142 Ind Cas 622(1).

**——S. 438 — Power of District Magistrate to directly refer case to High Court.**

Under S. 438, Criminal P. C., the Sessions Judge and the District Magistrate have concurrent jurisdiction. Consequently, it is open to the District Magistrate to directly refer a case to the High Court under S. 438. AIR (Vol 21) 1934 Sind 154: 36 Cr LJ 27: 152 Ind Cas 339 (DB).

——S. 438 — Where a Sub-Divisional Magistrate submits a case to the Sessions Judge under S. 123, Criminal P. C., and a suspect is liable to imprisonment for a longer period than one year, the Court should deal with the case as a Court of first instance and not as an Appellate Court. The Court is also vested with all such subsidiary powers as may be necessary to enable it to finally dispose of the case. No appeal being provided in a case of this nature, the Sessions Judge has no jurisdiction to deal with it as an appeal or to order a retrial. In certain fit cases, the Sessions Judge may refer the case to the High Court under S. 438 with a recommendation to quash the proceedings and order a retrial. AIR (Vol 19) 1932 Sind 88: 26 SLR 200: 33 Cr LJ 898: 139 Ind Cas 783 (DB).

**2. Duty of referring Court.**

**——S. 438 — Reference under — Contents — Duty of the Judge.**

A reference to the High Court under S. 438, Cr. P. Code, should contain the recommendations of the learned Sessions Judge making the reference and he should go into all the questions that were raised by him and send all the reference to the High Court with his own recommendations as to the decision on each point. AIR (Vol 39) 1952 All 365: 1950 AWR 406: 1950 ALJ 242.

——S. 438 — When a District Magistrate makes a reference in respect of an order of discharge passed by Subordinate Magistrate, he should not permit himself to be associated with criticism by a Police officer of the order. He should himself consider the case with greater care before he commits himself to the reference. AIR (Vol 23) 1936 Sind 243: 38 Cr LJ 117: 30 SLR 368: 165 Ind Cas 950 (DB).

——S. 438 — In making reference under S. 438, referring Court must always bear in mind the limits which the High Court has in practice put upon its own discretion and they should not make a reference where the only objection is to the finding of Court below upon the merits. AIR (Vol 18) 1931 Cal 619: 58 Cal 1081: 35 CWN 374: 32 Cr LJ 1237: 134 Ind Cas 915 (DB).

**——S. 438 — Report.**

Although it is unusual for a Judge to make a reference regarding the validity of his own order there is nothing in S. 438 to preclude him from doing so. AIR (Vol 17) 1930 All 817: 1930 ALJ 1076: 1930 Cr C 1201.

**——S. 438 — Report — Contents.**

The trying Magistrate is not entitled to make any suggestion or representation in the explanation which he may submit to the High Court of anything which is not founded on the record before him. The Magistrate is not the prosecutor. AIR (Vol 17) 1930 Cal 379: 34 CWN 256: 1930 Cr C 643: 127 Ind Cas 672 (DB).

**——S. 438 — Reference to High Court — Contents.**

Reference to H. C. under S. 438 should contain a brief abstract of the case and grounds of reference. (1909) 9 Cr LJ 502: 2 Ind Cas 159 (Mad).

**——S. 438 — Reference by Sessions Judge — Duty of.**

When a Court of Session reports a case to the High Court, it does so under S. 438, Cr. P. C., and its report should contain a recommendation that the sentence be reversed or altered. There is no section in the Code of 1898 empowering a Court of Session to send a question for the opinion of the High Court. (1904) 1904 AWN 154: 27 A 25 (26).

**3. Enhancement of sentence.**

**——Ss. 438 and 439 — Enhancement of sentence — Power of High Court — Interference with discretion of trial magistrate — Grounds.**

The High Court will not generally interfere to enhance punishments unless it considers that they are grossly inadequate. A magistrate in such matters must have some discretion in the matter of punishment, and the High Court must not lightly interfere with the exercise of his discretion. AIR (Vol 33) 1946 Sind 62: ILR (1945) Kar 409: 47 Cr LJ 578: 224 Ind Cas 225 (DB).

**——S. 438 — Accused is entitled to show cause against conviction — High Court can examine actual evidence to decide propriety of conviction.**

Where, in a reference under S. 438, Criminal P. C., the District Magistrate recommends that the sentence should be enhanced, the accused is entitled to show cause against his conviction, and the High Court can itself examine the actual evidence in the case in order to decide whether the conviction was a proper one or not. AIR (Vol 28) 1941 Cal 90: 72 CLJ 59: 42 Cr LJ 383: 193 Ind Cas 288 (DB).

——S. 438 — References from the District Magistrate can be accepted by the High Court direct, though, if the Court considered that there was a

'prima facie' case for alteration of sentence, it should issue notice to the Advocate General. 1941 NLJ 551.

——S. 438 — The trial Magistrate sentenced the accused to six months' rigorous imprisonment under S. 457, I. P. C. witout giving due consideration to the previous conviction. But the last conviction against the accused was prior to two years and a half from the date of the present offence.

Held, that the sentence need not be enhanced. AIR (Vol 16) 1929 All 270: 1929 ALJ 397: 10 LRA Cr 76: 11 AI Cr R 513: 30 Cr LJ 529: 115 Ind Cas 868 (DB).

——S. 438 — **Prosecution negligent in bringing facts justifying enhanced sentence to Court's notice — High Court should not enhance.**

In a case where material justifying enhanced sentence was within the knowledge of the prosecution before the conclusion of the trial and was not brought, by the negligence of the prosecution, to the notice of the trial Court, High Court would not interfere, on reference, for enhancing the sentence. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence would simply be to put a premium on the negligence of the prosecution. AIR (Vol 16) 1929 All 267: 10 LRA Cr 73: 11 AI Cr R 503: 30 Cr LJ 505: 115 Ind Cas 614 (DB).

——S. 438 — Kori branded his wife with hot iron tongs in three places. He was convicted and fined. The District Magistrate reported the case to the High Court for enhancement of sentence. But the parties had compromised their differences and an application was made to High Court signed by the husband and the father of the wife, a minor girl, for permission to compound the offence under S. 345 (2). Compromise was effected in mutual interest of husband and wife.

Held, that the case was a fit case to be compounded in view of the nearness of relationship between parties. AIR (Vol 16) 1929 Nag 278: 30 Cr LJ 960: 1929 Cr C. 454: 113 Ind Cas 681.

——S. 438 — **Sentence considered inadequate — District Magistrate or Sessions Judge should be moved by police at earliest moment.**

In all cases where the sentence is considered by the prosecution to be inadequate the District Magistrate or the Sessions Judge, as the case may be, should be moved by the police at the earliest possible moment after the trial and certainly, where possible, before the accused has served his sentence although the fact that the sentence has expired before such action is taken is no reason for refusing to interfere. AIR (Vol 15) 1928 Pat 201: 9 PLT 831: 29 Cr LJ 261: 9 AI Cr R 523: 107 Ind Cas 536 (DB).

——S. 438 — **District Magistrate is not superior to Sessions Court.**

The Court of the Sessions Judge is not an inferior Criminal Court to that of a District Magistrate. Therefore the latter cannot make a reference for enhancing the sentence passed by the Sessions Judge. AIR (Vol 11) 1924 Lah 437: 5 Lah 11: 25 Cr LJ 928: 81 Ind Cas 544 (D).

——S. 438 — Where an accused pleaded guilty and was convicted and the District Magistrate made a reference to the High Court recommending enhancement of sentence,

Held, that if an accused pleads guilty, it is open to the Magistrate in his discretion to take further evidence, and it is also open to the Crown to suggest that this may be done. AIR (Vol 8) 1921 Cal 260: 25 CWN 212: 22 Cr LJ 574: 62 Ind Cas 590 (DB).

——S. 438 — **Enhancement of sentence — Power of District Magistrate to make reference to High Court in cases tried by Sessions Judge.**

It is very much doubtful if a District Magistrate is entitled as a matter of law to make a reference to High Court for enhancement of sentence in a case tried by the Sessions Judge. At any rate the procedure would be extremely inconvenient. AIR (Vol 1) 1914 All 156: 36 All 378: 15 Cr LJ 407: 12 ALJ 519: 23 Ind Cas 1007.

——S. 438 — **Reference — Enhancement of sentence — Reference cannot be made without upholding the conviction.**

The Sessions Judge is not competent to refer a case for enhancement of sentence unless he has tried the appeal filed against the conviction. He can only refer the case under the provisions of S. 438, Cr. P. C., when he is satisfied as to the propriety of the conviction. (1909) 6 ALJ 421 (422): 2 Ind Cas 475(1).

——S. 438 — Reference to High Court — Enhancement of sentence by appellate court. (1907) 30 M 48 (49): 1 MLT 403: 5 Cr LJ 88.

——S. 438 — **Revision — Practice — Sentence reduced by Sessions Judge — Application by District Magistrate asking for enhancement.**

As a general rule of practice the High Court will not entertain a reference from a District Magistrate which has for its objection the enhancement of a sentence which has been reduced by the Sessions Judge. (1905) 1905 AWN 198 (199): 2 ALJ 589: 28 All 91 (DB).

**4. Grounds of reference.**

**(a) General.**
**(a-1) Difference of opinion.**
**(b) Illegal proceeding.**
**(c) Interference necessary.**
**(d) Question of fact.**
**(e) Question of law.**

**(a) General.**

——S. 438 — Interlocutory order — Reference to High Court. See AIR (Vol 32) 1945 Nag 286 : ILR (1945) Nag 995.

——S. 438 — **Criminal Rules of Practice and Orders of Madras High Court, R. 263 — Reference against acquittal.**

Rule 263 of the Criminal Rules of Practice and Orders of Madras High Court, has been framed for the guidance of District Magistrates in suitable cases. The Rule cannot be read as saying that the District Magistrate shall never refer an acquittal to the High Court. If the Rule is construed in the opposite way, it would be ultra vires the powers of the High Court. AIR (Vol 25) 1938 Mad 349: (1938) MWN 209: 47 LW 314 : (1938) 1 MLJ 344 : ILR (1938) Mad 675 : 174 Ind Cas 428 (FB).

(Overrules (1900) 23 Mad 24.)

——S. 438 — It is not open to a Magistrate hearing a transfer application to cancel an order dispensing with personal attendance of accused. Proper course would be to refer the case to High Court through District Magistrate. 1937 MWN 182 (DB).

——**S. 438 — Reference against acquittal.**

In the case of an acquittal where the Local Government does not appeal or where District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference direct under S. 438, Criminal P. C. AIR (Vo 18) 1931 Lah 533 : 32 Cr LJ 1128: 32 PLR 789: 134 Ind Cas 208.

——**S. 438** — A reference under S. 438 should not ordinarily be entertained where the object is to set aside an order of acquittal passed by a lower Court. AIR (Vol 11) 1924 Lah 451: 81 Ind Cas 547: 5 Lah 16: 25 Cr LJ 931 (DB).

——**S. 438 — Reference — Question of fact.**

Under S. 438 Cr. P. Code the Sessions Judge made a reference to the High Court recommending that a conviction under S. 323, I. P. C. should be set aside on the merits. The High Court accepted the reference and set aside the conviction. (1920) 24 CWN 549 (DB).

**(a-1) Difference of opinion.**

——**S. 438 — Reference to High Court — Disagreement between Sub-Divisional Magistrate and Trial Magistrate.**

References to the High Court are not desirable merely because the Sub-Divisional Magistrate disagrees with the Trial Magistrate, especially where the accused has a right of appeal if he felt that he had been wrongly convicted. AIR (Vol 36) 1949 Mad 493: 50 Cr LJ 768: 1948 MWN 814 (2): (1948) 2 MLJ 557.

——**S. 438 — Ground that Additional Sessions Judge took different view on question of credibility of witnesses in pending suit.**

High Court will not interfere on a reference made by Additional Sessions Judge in a pending proceeding on the ground that he took a different view on the credibility of witnesses. AIR (Vol 23) 1936 Pat 626: 17 PLT 794: 3 BR 104: 38 Cr LJ 2 : 165 Ind Cas 931.

——**S. 438 — Reference by Sessions Judge on his own interpretation of evidence — Question of law.**

It is not open to the Sessions Judge to make a reference upon his own view of the evidence on the record. In making a reference under S. 438, Criminal P. C. or in recommending an application for revision, the Court of Session and the High Court are bound by the findings of fact arrived at by the trial Magistrate, and in such cases, the order of the Magistrate can only be reversed on a pure question of law arising out of the findings of fact arrived at by the trial Court. It is not open to the Court of Session to give a different interpretation or a different meaning to the evidence on the record. The view of the evidence taken by the trying Magistrate must be accepted in revision by the Sessions Judge and if, upon that view of the evidence any question of law arises which necessitates the reversal of the order of the trying Magistrate, then and then only should a revision be allowed or a reference made to the High Court for setting aside the order of the trying Magistrate. AIR (V 21) 1934 Oudh 280 : 35 Cr LJ 951 : 11 OWN 719 : 149 Ind Cas 364.

——**S. 438 — Question of law — Reference contrary to findings of facts of trial Court.**

The High Court will not accept any reference or revision which involves no question of law. The Sessions Judge should not, therefore, make any reference to the High Court or submit any application for revision of any order contrary to the findings of facts arrived at by the trial Court.

Where, in an application for maintenance, the trying Magistrate finds that the husband was residing within his jurisdiction, it must be accepted as correct and it is not open to the Sessions Judge to hold anything to the contrary. AIR (V 21) 1934 Oudh 278 : 36 Cr LJ 838 (1) : 11 OWN 718 : 155 Ind Cas 726 (1).

**(b) Illegal proceeding.**

——Ss. 438 and 439 — Finding of fact — Finding of possession — Magistrate committing mistake of record and misreading documents and relying on irrelevant evidence — Interference in revision. See (1946) PWN 278: AIR (Vol 34) 1947 Pat 175.

——**S. 438 — Reference by District Magistrate, recommending setting aside of acquittal by Bench Magistrates — No suggestion of illegality or irregularity — High Court if can accept reference.**

Where the District Magistrate makes a reference under S. 438, Cr. P. Code, recommending the setting aside of an acquittal by Bench of Magistrates and ordering of a re-trial, but no illegality or irregularity in the proceedings is suggested, the High Court will not accept the reference as its object in invoking the revisional power of the High Court could and ought to have been sought by means of an appeal against the finding of acquittal which was always open to the Crown. AIR (V 34) 1947 A 142: ILR (1947) A 293: 229 Ind Cas 296: 48 Cr LJ 371: 1947 A Cr C 40: 1947 ALW 85: 1947 ALJ 8: 1947 AWR (HC) 17.

——**S. 438 — Interlocutory order of trial Court — If can be referred to High Court.**

Where the Court in revision considers that the order of the trial Court was improper and prejudicial to the accused, it should refer the matter to the High Court though the order of the trial Court was interlocutory. AIR (Vol 32) 1945 Nag 286: ILR (1945) Nag 995: 1945 NLJ 380.

——**S. 438 — Acquittal.**

Where reference under S. 438 is received asking for interference against an order of acquittal, the High Court is very reluctant to accept such a reference. In cases of acquittal, the Provincial Government has a right of appeal. If the Provincial Government does not choose to file an appeal and if a reference is made asking the High Court to interfere with an order of acquittal the High Court will interfere only if there be radical and incurable irregularity or a complete disregard of the law and procedure or a manifest injustice which has got to be cured. AIR (Vol 27) 1940 Nag 357: 1940 NLJ 399: 41 Cr LJ 919: 190 Ind Cas 467.

——**S. 438 — Quashing commitment.**

Magistrate takes cognizance of an offence on a complaint filed before him but a Sessions Judge can take cognizance of a case only when a case has been properly committed to his Court. If the commitment is wholly illegal and is not merely irregular so that the defect cannot be cured by him, the Sessions Judge has no option but to refer the case to the High Court. AIR (Vol 21) 1934 All 963: 36 Cr LJ 137: 1934 ALJ 965: 4 AWR 524: 57 A 412: 152 Ind Cas 667 (FB).

——S. 438 — Under S. 438, the Sessions Judge need only report the result of his examination "if he thinks fit", but he must exercise a judicial discretion and if, in his opinion, a material irregularity or illegality has occurred, he should report the matter. AIR (Vol 18) 1931 Lah 107: 32 Cr LJ 653: 32 PLR 130 (2): 12 Lah 471: 131 Ind Cas 108.

——**S. 438 — Report — Grounds for.**

A case should not be reported on the ground that a conviction is bad on the merits unless it is very clear that the conviction is wrong and that there can be no reasonable doubt of the matter. AIR (Vol 14) 1927 All 475: 49 All 551:

25 ALJ 379: 8 LRA Cr 51: 100 Ind Cas 1055: 28 Cr LJ 399: 7 AI Cr R 343.

——S. 438 — Magistrate empowered under S.30 trying a case which he is not competent to try — Sessions Judge finding it, should report.

A Magistrate empowered under S. 30 is not legally competent to try either the offence of murder or the offence of culpable homicide not amounting to murder punishable under the first part of S. 304, I. P. C., and therefore where a Sessions Judge is of opinion that a Magistrate so empowered has in fact tried a case which he is not competent to try, he should send the case to the High Court for an order that the accused be committed for trial to the Court of Session on a charge which he was not competent to try. AIR (Vol 13) 1926 Lah 575 : 95 Ind Cas 766 : 27 Cr LJ 846.

——Ss. 438 and 439 — Lower Court's irregularity in procedure — Interference.

The High Court can interfere in the case of acquittal either upon the application of a private individual or on a reference under S. 438. When a Dist. Magistrate referred a case to the High Court under S. 438 to set aside the order of acquittal on the ground that the trying Magistrate did not honestly and impartially apply his mind to the actual evidence before him, the High Court held that it ought not to interfere unless it was satisfied that the opinion of the Dist. Magistrate was correct which could only be done by an investigation into all the facts. This could be done only in an appeal. The proper course was for the Government to appeal. AIR (Vol 4) 1917 Cal 159: 44 Cal 703: 21 CWN 250: 18 Cr LJ 309: 38 Ind Cas 421 (DB).

(c) Interference necessary.

——S. 438 — If District Magistrate considers that order passed by Magistrate subordinate to him, under S. 145, Criminal P. C., should be interfered with, his duty is to refer it to High Court under S. 438, Criminal P. C. AIR (Vol 28) 1941 Pat 105: 7 BR 492 Cr LJ 340: 192 Ind Cas 784.

——S. 438 — Trial of accused under S. 409, I. P. C. — Application by them to be committed to Sessions after prosecution case closed — Jurisdiction of Sessions Judge to order Magistrate to commit accused — Sessions Judge can only make reference to High Court if interference is necessary. AIR (Vol 25) 1938 Cal 416: 39 Cr LJ 569: 75 Ind Cas 521 (DB).

(d) Question of fact.

——S. 438 — Reference under — Reference not justified on questions of fact.

No Court is justified in making a reference to the High Court on questions of fact. AIR (V 33) 1946 Oudh 108 : 1946 OWN 57 : 222 Ind Cas 532.

(e) Question of law.

——S. 438 — Reference to High Court on questions of law raised during the course of proceedings in a lower Court — Competency.

It is not the function of the High Court to give opinions on questions of law raised during the course of proceedings in the lower Court and therefore a reference to the High Court by a District Magistrate on such questions would be incompetent. The Legislature has not chosen to give power to a District Magistrate to refer questions of law arising interlocutorily during the course of an enquiry or trial. AIR (Vol 36) 1949 Mad 11: ILR (1949) Mad 598 : 50 Cr LJ 83 : 61 LW 530 : 1948 MWN 569: 1948-2 MLJ 126.

——S. 438 — Reference for ruling on point of law.

There is no provision in the Criminal P. C. under which a Magistrate can refer a case to the High Court for a ruling on a point of law, but it is open to the High Court to treat the case as one which has come to its knowledge under S. 439, Criminal P. C. AIR (V 24) 1937 Pesh 73 : 38 Cr LJ 838 : 169 Ind Cas 681 (DB).

——S. 438 — No question of law involved.

A reference can only be made to the High Court if, after accepting loyally the finding of facts arrived at by the trial Magistrate, some question of law arises which necessitates interference with the order passed by the trial Court. When no question of law is involved, the reference is to be rejected. AIR (V 21) 1934 Oudh 276 : 11 OWN 717 : 36 Cr LJ 842 (1) : 155 Ind Cas 724.

——S. 438 — When the Sessions Court does not really dissent from the actual decision arrived at, a reference merely with the object of obtaining a ruling on a question of law ought not to be made. AIR (V 12) 1925 All 318 : 86 Ind Cas 801 : 23 ALJ 189 : 26 Cr LJ 865 : 47 All 409.

——S. 438 — A reference can only be made in criminal matters to the High Court in respect of an error on a point of law. AIR (V 12) 1925 Cas 1068 : 85 Ind Cas 939 : 26 Cr LJ 651 (DB).

——S. 438 — Pending case — Reference by Dist. Magistrate — Validity.

Dist. Magistrate cannot make a reference under S. 438 of the code, on a point of law actually arising in a pending case before him. AIR (V 1) 1914 Mad 100 : 15 Cr LJ 472 : 24 Ind Cas 352.

——S. 438 — Reference by Sessions Court — Conviction proper.

If the Sessions Judge is satisfied as to the propriety of a conviction, he should make a reference under S. 438. (1909) 6 ALJ 421 : 10 Cr LJ 27 : 2 Ind Cas 475.

5. Jurisdiction.

(a) Powers and duties of Additional Sessions Judge.
(b) Powers and duties of District Magistrate.
(c) Powers and duties of Sessions Judge.

(a) Powers and duties of Additional Sessions Judge.

——S. 438 — Transfer of appeal by one accused to Additional Sessions Judge — Accepting of appeal and reference to Chief Court in respect of another accused who had appealed in the same case — Competency of reference.

A filed an appeal against his conviction in the Court of the Sessions Judge. This appeal was transferred by the Sessions Judge to the Additional Sessions Judge for disposal. The Additional Sessions Judge allowed the appeal of A, and made a reference to the Chief Court recommending that B who had been convicted along with A should also be acquitted:

Held, that in view of the provisions of cl. 2 of S. 438, Criminal P. C., as the case of B was not transferred to the additional Sessions Judge, he was not competent to make the reference. AIR (V 21) 1934 Oudh 86 : 35 Cr LJ 396 (1) : 11 OWN 66 : 147 Ind Cas 382.

——S. 438 (2) — Revision — Jurisdiction — Powers of an Additional Sessions Judge.

Held, that an Additional Sessions Judge has jurisdiction to exercise the powers of a Sessions Judge under Chapter XXXII of the Code of Criminal Procedure, only in respect of cases transferred to him by the Sessions Judge. (1903) 1903 AWN 28 (28, 29) (DB).

(b) Powers and duties of District Magistrate.

——S. 438 — Reference from District Magistrate involving criticism of orders of Sessions Judge.

Ordinarily, the High Court cannot accept references from District Magistrates which involve a criticism of the orders of the Sessions Court. AIR (V 24) 1937 Sind 203 : 38 Cr LJ 961 : 31 SLR 409: 170 Ind Cas 676 (DB).

——S. 438 — Acquittal by Magistrate — Power of Dt. Magistrate.

A District Magistrate and the Local Government are two distinct and non-interchangeable terms, and the District Magistrate not being the person entitled to appeal against the acquittal by a Magistrate, the mere fact that he may be able in his executive capacity to move the Local Government to appeal under S. 439 (5) cannot bar his taking action under S. 438. AIR (V 17) 1930 All 741 : 1930 Cr C 997.

——S. 438 — Procedure — District Magistrate should not merely forward the Prosecuting Inspector's notes en bloc to the High Court.

Where a Prosecuting Inspector being dissatisfied with the trial Court's order moves the District Magistrate for referring the case to High Court, the District Magistrate should examine the notes of the Prosecuting Inspector for himself, and if there is any portion of them that contains material which he thinks to be of value he should embody that material in his own order. It is improper to accept en bloc the Prosecuting Inspector's criticisms and simply attach them to his letter. AIR (V 16) 1929 All 273 : 116 Ind Cas 25 : 51 All 663 : 1929 ALJ 361 : 10 LRA Cr 66 : 11 AI Cr R 486 : 30 Cr LJ 562 (DB).

——S. 438 — Quashing of proceedings.

Where the District Magistrate deals with a matter in the exercise of his revisional powers he cannot, under the law, quash the proceedings, but if he thinks the contention of the defence to be made out, the only course open to him is to make a reference to the High Court for final order. AIR (V 16) 1929 Cal 204 : 49 CLJ 62 : 115 Ind Cas 95 : 30 Cr LJ 401 : 12 AI Cr R 373 (DB).

——S. 438 — Where the District Magistrate is moved against any order of a Magistrate under S. 132 and the contention is that a Court altogether outside the district has jurisdiction to try the case, the District Magistrate deals with the matter only in his revisional powers. AIR (Vol 16) 1929 Cal 204: 115 Ind Cas 95: 49 CLJ 62: 30 Cr LJ 401: 12 AI Cr R 373 (DB).

——S. 438 — A District Magistrate has no power to order further inquiry in a case where an application under S. 145 has been rejected. All that the District Magistrate has power to do in revision is to make a reference to the High Court under S. 438. AIR (Vol 15) 1928 Rang 292: 30 Cr LJ 709: 117 Ind Cas 59.

——S. 438 — A District Magistrate is not empowered to have a reference submitted to the High Court through the Sessions Judge invoking the revisional powers of the High Court in respect of an order passed by the Sessions Judge nor can he submit such reference direct to the High Court on the refusal of the Sessions Judge to forward it. AIR (Vol 14) 1927 All 279: 49 All 443: 25 ALJ 191: 8 LRA Cr 43: 28 Cr LJ 281: 7 AI Cr R 275: 100 Ind Cas 361 (DB).

——S. 438 — A District Magistrate is not empowered to make a reference to the High Court questioning the propriety of a judgment by a Sessions Judge. AIR (Vol 14) 1927 Lah 85: 26 PLR 801: 27 Cr LJ 430: 93 Ind Cas 158.

——S. 438 — Remarks in Sessions Judge's judgment — District Magistrate cannot refer.

The Sessions Judge is not a Criminal Court inferior either to the District Magistrate or the Subdivisional Magistrate, neither of whom is empowered by law to make reports to the High Court taking exception to certain remarks of the Sessions Judge in the course of his judgment. AIR (Vol 14) 1927 Sind 45: 21 SLR 48: 27 Cr LJ 1253: 98 Ind Cas 101 (DB).

——S. 438 — The District Magistrate cannot himself set aside the decision of the lower Court under S. 145, Cr. P. Code. He must refer the case to the High Court. AIR (Vol 12) 1925 Cal 1234: 88 Ind Cas 526: 26 Cr LJ 1166 (DB).

——S. 438 — Revision by Dist. Magistrate.

District Magistrate should not make the work of persons entitled to appeal difficult by calling for proceedings and taking action upon them within the period of appeal. AIR (Vol 4) 1917 Upp Bur 2: (1916) 2 UBR 124: 18 Cr LJ 355: 10 Bur LT 166: 38 Ind Cas 739.

——S. 438 — Reference against Sessions Judge's order — Power of District Magistrate.

A District Magistrate cannot make a reference under S. 438 to the High Court and question the orders passed by the Sessions Judge in his revisional jurisdiction. AIR (Vol 3) 1916 Bom 158: 41 Bom 47: 18 Bom LR 796: 17 Cr LJ 529: 36 Ind Cas 577 (DB).

——S. 438 (1) — Pending appeal — Jurisdiction of Magistrate.

A District Magistrate is incompetent to report an appeal pending before him to the High Court under S. 438 (1), on the ground that he entertains some doubt as to the correctness of the rulings of the High Court. AIR (Vol 1) 1914 Lah 266: 7 PWR 1914 Cr: 62 PLR 1914: 15 Cr LJ 485: 24 Ind Cas 573 (DB).

——S. 438 — District Magistrate — Report wrong — Order of Sessions Judge to High Court.

A District Magistrate cannot report proceedings of Court of Sessions to the High Court. He can, however, move the Public Prosecutor to bring it before the High Court. (1912) 23 MLJ 732: 12 MLT 170: (1912) MWN 812: 13 Cr LJ 714: 16 Ind Cas 522.

——S. 438 — Reference to the High Court — District Magistrate — Inadequacy of sentence.

When a District Magistrate finds that a sentence passed by a Magistrate of the first class and confirmed on appeal by the Sessions Judge is inadequate, it is only open to him to bring the fact to the notice of the local Government or to instruct the Government Pleader to move the High Court in the matter. It is not competent to him in such a case, to report the case for the orders of the High Court under S. 438 of the Criminal Procedure Code. (1904) 6 Bom LR 1099 (1099) (DB).

### (c) Powers and duties of Sessions Judge.

——S. 438 — Reference by Sessions Judge to set aside conviction — Subsequent order on revision application — Legality of.

Where a Sessions Judge passed an order recommending that the conviction and sentences passed upon the accused by a Bench of Magistrates should be set aside and subsequently rejected an application for revision made by the accused :

Held, that after having passed the order of reference on the prior date, the Sessions Judge was functus officio and had no power to revise or review his own order and by a separate order, reject the application for revision and hence the proceedings which ended in the subsequent order were ultra vires and illegal. AIR (Vol 21) 1934 Oudh 85: 35 Cr LJ 417 (2): 11 OWN 75: 147 Ind Cas 516.

——S. 438 — Order of discharge under S. 107, Cr. P. Code — Interference by Sessions Judge.

Where a Magistrate has discharged the accused under S. 107, Cr. P. Code, the Sessions Judge has no jurisdiction under S. 436 to set aside the order

of discharge and to direct a further enquiry. The only section under which he can take action is under S. 438 by making a report to the High Court. AIR (Vol 18) 1931 All 53: 1930 ALJ 1475: 32 Cr LJ 570: 53 All 148.

——S. 438 — Review.

Section 423 (1) (d) does not permit a Sessions Judge to review a wrong order by his predecessor, the only proper course for him, in such case being to refer the case to the High Court. AIR (Vol 16) 1929 Bom 309: 121 Ind Cas 588: 31 Cr LJ 309: 31 Bom LR 593: 53 Bom 578: 1929 Cr C 130 (DB).

——S. 438 — Report — Effect of refusal.

A Sessions Judge, who once refused to make a reference under S. 438 to the High Court, is not debarred from making another reference in the same case considering the facts which came to his knowledge subsequently. AIR (Vol 14) 1927 Bom 360: 104 Ind Cas 912: 29 Bom LR 480: 28 Cr LJ 896: 9 AI Cr R 27 (DB).

——S. 438 — Institution of proceedings.

An order refusing to take action under S. 107 cannot be reversed by the Sessions Judge nor can he direct the Magistrate to draw up proceedings under the section. AIR (Vol 12) 1925 Cal 262: 81 Ind Cas 167: 25 Cr LJ 679 (DB).

——S. 438 — Powers of Sessions Judge.

A Sessions Judge has power under S. 438 to refer to the High Court the judgment of the District Magistrate in the exercise of his appellate jurisdiction as a District Magistrate when exercising appellate jurisdiction in an inferior Criminal Court to the Sessions Judge within the meaning of S. 435 of the Code. AIR (Vol 9) 1922 Lah 85: 68 Ind Cas 609: 3 Lah 23: 23 Cr LJ 577: 4 Lah LJ 448.

——S. 438 — Revision — Second Class Magistrate — Second revision to Sessions Judge.

A Sessions Judge has no power to revise an order of a District Magistrate setting aside an order of a third class Magistrate refusing to sanction a prosecution under S. 211, I. P. C. The only court to which an appeal lies from an order of a third class Magistrate is the District Magistrate, and he alone can revise his orders. (1907) 4 ALJ 805 (807): 30 A 109.

——S. 438 — Sanction — Prosecution — Reference by Sessions Judge — Stay — Magistrate not subordinate to Sessions Judge.

A Sessions Judge who has referred a sanction order passed by a subordinate court to the orders of the High Court has no power to stay prosecution instituted in pursuance of the sanction in a court which is not subordinate to the Sessions Judge. Quaere:—As to whether he could stay proceedings even when the Magistrate is subordinate to him. (1903) 26 M 137 (139): 2 Weir 196.

### 6. Powers of High Court.

See also, Cr. P. C., S. 439.

——S. 438 — Order based on serious error of record — Interference in revision.

Where the Magistrate commits a serious error of record by misreading certain documents and relying on wrong references as to possession of disputed property contained in those documents, his finding cannot be held as good in law and must be set aside in revision. AIR (Vol 34) 1947 Pat 175: 1946 PWN 278.

——S. 438 — Powers exercised by High Court under — Nature of — If revisional — Order on reference — Judgment.

The powers which the High Court exercises in a reference under S. 438, are clearly revisional powers under S. 439, Cr. P. Code, because the matter "has been reported for orders" of the High Court, and any order passed on such reference is a "judgment" under S. 369, Cr. P. Code, and is final in the sense that it cannot be altered or reviewed. AIR (Vol 33) 1946 Bom 276: ILR (1946) Bom 207: 225 Ind Cas 229: 47 Cr LJ 700: 48 Bom LR 41 (DB).

——S. 438 — Acquittal — Interference — Charge under Ss. 420 and 467, I. P. Code — Acquittal under former and conviction under latter — Appeal by accused against conviction — Power of appellate Court to consider facts in appeal irrespective of fact of acquittal under S. 420. AIR (Vol 32) 1945 Mad 240: ILR (1945) Mad 894: 46 Cr LJ 744.

——S. 438 — Conviction under S. 323, if can be altered to one under S. 325, Penal Code.

High Court has no power in a reference under S. 438, Criminal P. C., to alter a conviction under S. 323 to one under S. 325, Penal Code. AIR (Vol 28) 1941 Cal 90: 72 CLJ 59: 42 Cr LJ 383: 193 Ind Cas 288 (DB).

——S. 438 — Order of District Magistrate not judicial one — Interference by High Court under S. 438.

The word "proceeding" used in S. 438 must be a proceeding as referred to in S. 435, that is to say, a proceeding before any inferior Criminal Court. The High Court will not interfere where the Magistrate or other officer is acting in an executive and not in a judicial capacity. It is only when an order has been made, and for non-compliance of that order, some penalty has been exacted that the High Court will interfere:

Held, that the High Court could not interfere under S. 438 as the order of the District Magistrate was not a judicial order and secondly, because the order was not enforceable and no penalty had been exacted under it. AIR (Vol 27) 1940 Cal 30: ILR (1939) 2 Cal 532: 41 Cr LJ 442: 187 Ind Cas 310 (DB).

——S. 438 — Incompetent reference — Power of High Court.

Assistant Sessions Judge accepting verdict of jury and convicting accused — Additional Sessions Judge finding himself unable to interfere under S. 432 (2) as there was no misdirection, making reference to High Court instead of referring the case to Local Government for orders:

Held, that the reference was incompetent. But the record having come before it though under incompetent reference, the High Court could interfere, if a case for interference was made out. AIR (Vol 24) 1937 Pat 440: 16 Pat 413: 3 BR 734: 38 Cr LJ 919: 18 PLT 607: 170 Ind Cas 464 (DB).

——S. 438 — Evidence — High Court would not go into merits unless there is material departure from legal principles.

The High Court would decline to go into the merits of a case on the revisional side unless there is something to show that there has been a material departure from the legal principles according to which the case ought to have been dealt with and it would go into facts only if something is shown which particularly indicates that it is desirable to enter into those facts. AIR (Vol 16) 1929 All 273: 116 Ind Cas 25: 51 All 663: 1929 ALJ 361: 10 LRA Cr 66: 11 AI Cr R 486: 30 Cr LJ 562 (DB).

——S. 438 — Revisional powers of High Court are sparingly used.

A reference under S. 438 recommending revision of orders of acquittal stands on no higher footing than applications of private prosecutors for such revision. So, just as in the case of revision at the instance of private persons, so also in the case of reference under S. 438, revisional powers of the High Court are to be sparingly used. Where the reference is entirely on the merits, the Sessions Judge, having been inclined to take a view of the evidence different from that of the Magistrate, the High Court should not interfere under S. 438. AIR (Vol 16) 1929 Cal 169: 49 CLJ 129: 33 CWN 258:

116 Ind Cas 164: 30 Cr LJ 579: 56 Cal 924: 12 AI Cr R 456 (DB).

——S. 438 — It is not the duty of the High Court in a reference made by the Sessions Judge against an order of the Sub-Divisional Officer under S. 145, Cr. P. Code, to examine the evidence to consider whether it might have come to a different finding. AIR (Vol 15) 1928 Pat 88: 105 Ind Cas 229: 28 Cr LJ 901: 9 PLT 18.

**——S. 438 — No dishonest intention.**

Where an offence under S. 62 of the Indian Stamp Act was found by the trying Magistrate not to have been committed intentionally the High Court setting aside the order of conviction ordered the applicants to be acquitted under S. 438, Cr. P. Code. AIR (Vol 14) 1927 All 238: 99 Ind Cas 598: 8 LRA Cr 31: 28 Cr LJ 166: 25 ALJ 401: 7 AI Cr R 205.

**——S. 438 — Revision — Grounds — Case referred — Interference by High Court in revision.**

There must be some substantial error of law to justify the Court, exercising its exceptional powers of revision. That the evidence before the lower Court has not been properly appreciated is no ground for interference in revision. AIR (Vol 14) 1927 Mad 434: 38 MLT 15: 28 Cr LJ 207: 99 Ind Cas 943.

——S. 438 — The High Court will not interfere in revision with an order of acquittal, passed by a Magistrate of competent jurisdiction, on a prosecution for an alleged offence under S. 225-B of the Penal Code, irregularly instituted on a report sent in by a Munsif which was treated as a complaint. AIR (Vol 12) 1925 All 318: 86 Ind Cas 301: 23 ALJ 189: 26 Cr LJ 865: 47 All 409.

——S. 438 — The High Court will not set aside a conviction and order re-trial at the instance of the Crown on the ground that the Crown has since discovered fresh evidence which would require the infliction of a severer sentence on the accused. AIR (Vol 12) 1925 Alll 292: 26 Cr LJ 654: 6 LRA Cr 16: 85 Ind Cas 942.

——S. 438 — Admission — If, upon the proceedings before the Judge upon which the reference is made admissions of fact should be made by either party, then those admissions of fact ought to be accepted by High Court for the purpose of the reference. AIR (Vol 12) 1925 Cal 1020: 91 Ind Cas 805: 27 Cr LJ 133: 30 CWN 359 (DB).

——S. 438 — Where a Magistrate acquits an accused of an offence under I. P. C., S. 447 on the ground that the immoveable property in question was not in anybody's possession, the High Court will not interfere with the acquittal in revision. AIR (Vol 12) 1925 Lah 336: 7 Lah LJ 42: 26 Cr LJ 689: 26 PLR 38: 86 Ind Cas 65.

——S. 438 — It is not in accordance with the practice of Allahabad High Court to interfere on a reference by a Sessions Judge where the Government could have appealed under S. 417 of the Code of Criminal Procedure and has not done so. AIR (Vol 11) 1924 All 624: 83 Ind Cas 687: 5 LRA Cr 120: 26 Cr LJ 127.

**——S. 438 — Reference — Quashing not recommended — Power of High Court.**

Though in a report to the High Court a Sessions Judge has not asked the High Court to quash the proceedings against the accused yet whereas the consequence of his report, the facts of the case are brought to the knowledge of High Court, it has jurisdiction under S. 439, Cr. P. Code to stop further proceedings if it is satisfied that they are barred. AIR (Vol 8) 1921 Sind 137: 66 Ind Cas 657: 16 SLR 1 (DB).

**——Ss. 438 and 439 — Revision on report — Interference.**

The High Court has jurisdiction to entertain a revision against an order of acquittal on a report for orders by the Sessions Judge under S. 438 of the Cr. P. Code. But the order of acquittal will not be interfered with unless serious injustice has been caused by error of law. AIR (Vol 6) 1919 Mad 653: 42 Mad 109: 35 MLJ 665: 25 MLT 22: 20 Cr LJ 49: 9 LW 201: 48 Ind Cas 817 (DB).

**——S. 438 — Interference with acquittal on reference by the District Magistrate.**

Criminal P. C., provides for an appeal against acquittal by Government and therefore the High Court will not interfere under S. 438 with such acquittal, nor the High Court can in revision convert an acquittal into conviction. (1910) 8 MLT 280: (1910) MWN 517: 11 Cr LJ 622: 8 Ind Cas 293.

**——S. 438 — Acquittal of an accused — Reference by District Magistrate questioning an order of acquittal.**

Any reference under S. 436, the object of which is to induce the High Court to set aside an acquittal, cannot be entertained on the revisional side. (1902) 1902 AWN 200 : 25 A 128 (128).

See also (1902) 24 A 346 (348) : 1902 All WN 89.

**——S. 438 — High Court (Bombay) — Reference of a murder case by the Collector of Khandesh as Political Agent for the Mehwasi Estates — Murder in Scheduled District.**

The High Court of Bombay has jurisdiction to entertain and dispose of a reference by the Collector of Khandesh in which he, acting as the Political Agent for the Mehwasi Estates, convicted the accused of murder committed in a village in the Scheduled Districts and sentenced him to transportation for life. (1901) 25 B 667 (675) (DB).

**7. Procedure.**

**——S. 438 — Reference by revisional Court concerned — Magistrate's explanation — Necessity of obtaining — Latter's duty to give explanation.**

When a revisional Court refers the case to the High Court under S. 438, Cr. P. Code, it is bound under R. 6 of Ch. X of the General Rules (Criminal, All.) to send the papers to the concerned Magistrate for his explanation and the latter is expected to give his explanation if he has any or if he has none to offer, he need only say that. (1949) 1949 AWR 549 (1).

——S. 438 — Court recording statement of accused on plea of guilty and forthwith asking them if they wished to further cross-examine prosecution witnesses — No reasons recorded — Complainant directed to produce his witnesses — On his failure, accused acquitted:

Held, that the procedure was illegal and High Court could interfere even upon a reference under S. 438, Criminal P. C. made upon the complainant's application for revision. AIR (V 30) 1943 Oudh 157 : 1942 OWN 786: 44 Cr LJ 174: 1942 AWR (CC) 361 : 204 Ind Cas 262.

**——S. 438 — Order of acquittal without jurisdiction — Reference under S. 438 — Order to be passed.**

On a reference under S. 438 to set aside an order of acquittal on the ground that it was without jurisdiction:

Held, that ordinarily, an order passed without jurisdiction should be set aside and the Magistrate ordered to continue the proceedings from the point where the illegal order was passed; but as this course might unduly harass the accused against whom evidence was very little and who should be given the benefit of the doubt it was not necessary to interfere with the order of acquittal. AIR (V 29) 1942 Mad 657 (1) : 1942 MWN 491 : (1942) 2 MLJ 277 : 55 LW 757 (2) : 44 Cr LJ 91 : 203 Ind Cas 500.

——S. 438 — Reference recommending setting aside of acquittal — Notice to accused before reference, if necessary.

There is no provision of law for issuing a notice to the accused before making a reference to the High Court under S. 438 recommending that an order of acquittal should be set aside. The District Magistrate or the Sessions Judge simply makes a recommendation to the High Court and the final orders are passed by it. The accused cannot be prejudiced because before the final orders are passed, the High Court is bound to give notice under the provisions of S. 439 (2), Criminal P. C. AIR (V 29) 1942 Oudh 443 : 1942 OWN 432 : 43 Cr LJ 763 : 1942 AWR (CC) 285 : 201 Ind Cas 506.

——S. 438 — Appeal before Deputy Commissioner undisposed of — No reference can be made even with respect to one accused.

The Deputy Commissioner to whom an appeal has been preferred cannot make a reference without disposing of the appeal before him. Even if the letter of reference can be taken to amount to a disposal of the appeal so far as the particular appellant in respect of whom the reference is made, the reference is not competent unless the appeal of the remaining appellants has been disposed of. AIR (V 29) 1942 Pat 64: 42 Cr LJ 862: 8 BR 23 : 196 Ind Cas 402 (DB).

——S. 438 — Reference to be decided on basis of position on date of proceedings.

A reference made under S. 438, Criminal P. C., is to be decided on the basis of the position as it was on the date when the proceedings began. AIR (V 27) 1940 Pat 313: 6 BR 226: 41 Cr LJ 217: 185 Ind Cas 630.

——S. 438 — Appeal pending.

Where an appeal was pending before the Sessions Judge from a conviction, and the Judge, without deciding the appeal referred the case to the High Court purporting to act under S. 438, Criminal P. C. :

Held, that the procedure was incorrect and that the reporting Court should decide the appeal, and if it considers that it has been unable to do substantial justice, it may then report the case on the revision side with recommendations as to suggested action which as an Appellate Court it was not able to take itself. AIR (V 23) 1936 Pesh 81 : 37 Cr LJ 470 : 161 Ind Cas 320.

——S. 438 — Patna High Court General Rules and Circular Orders (Criminal), Part 1, Chap. XIII, Page 31 — Compliance with — Desirability.

Under S. 438, the record of reference must show that the explanation from the Magistrate concerned was called for as that would show the propriety of the procedure followed by him, specially in cases where the Public Prosecutor is not instructed to support the order in revision. AIR (V 21) 1934 Pat 316 (1) : 15 PLT 288 : 35 Cr LJ 1020 : 149 Ind Cas 839.

——S. 438 — Powers of District Magistrate — Proceedings under S. 144 drawn up by Magistrate — District Magistrate cannot direct proceedings under S. 145 to be drawn up — Reference.

The Sub-Divisional Magistrate on a police report drew up proceedings under S. 144. The District Magistrate set them aside holding they were wrongly drawn up and directed the Sub-Divisional Magistrate to draw up proceedings under S. 145.

Held, that though under S. 144 (4) he was entitled to set aside an order of the Sub-Divisional Magistrate there was no provision in law whereby he could direct the Sub-Divisional Magistrate to draw up proceedings under any other section. The proper course for District Magistrate in such case was to make a reference to the High Court under S. 438. AIR (V 16) 1929 Cal 751 : 1929 Cr C 385 : 33 CWN 723 (DB).

——S. 438 — Notice — District Magistrate sitting in revision must give notice to opposite side.

Where the contention on behalf of the defence is that a Court altogether outside the district had jurisdiction to try the case, the District Magistrate sitting in revision, must give notice to the complainant and bring on record all the materials which both the parties may desire to adduce, before he arrives at a proper conclusion. AIR (V 16) 1929 Cal 204: 49 CLJ 62 : 115 Ind Cas 95 : 30 Cr LJ 401 : 12 AI Cr R 373 (DB).

——S. 438 — Judicial proceedings.

The Code of Criminal Procedure does not contemplate that a representation made by the police to the District Magistrate in the form of an official letter should be taken into consideration by the High Court as embodying the grounds for setting aside an order by a criminal Court. AIR (V 14) 1927 All 727 : 105 Ind Cas 658 : 8 LRA Cr 138 : 8 AI Cr R 335 : 28 Cr LJ 946 : 26 ALJ 76.

——S. 438 — Report — Scope.

A reference asking to confirm a part of the order under S. 145 and quash the rest is not in proper form. AIR (V 14) 1927 Cal 261 : 99 Ind Cas 1010: 44 CLJ 593 : 28 Cr LJ 210 : 7 AI Cr R 383 (DB).

——S. 438 — Report form of.

Reference to the Calcutta High Court under S. 438, Cr. P. Code, should always be made in the form prescribed by the General Rules and Circular Orders of the Calcutta High Court, Criminal App. Side, Ch. I, R. 139. AIR (V 13) 1926 Cal 316 : 87 Ind Cas 975 : 26 Cr LJ 1055 : 30 CWN 646 (DB).

——S. 438 — Dismissal of complaint.

A Court should not lightly set aside in revision an order of dismissal of complaint but should only do so when it is clear that there has been a miscarriage of justice. AIR (V 12) 1925 Pat 447 : 86 Ind Cas 802 : 3 Pat LR Cr 33 : 26 Cr LJ 866.

——S. 438 — Reference under S. 438, Cr. P. Code, made in the form of a letter to the Registrar of the High Court, is not appropriate. Such reference should be made by a judicial order. AIR (V 11) 1924 Rang 295 : 82 Ind Cas 471 : 3 Bur LJ 27 : 25 Cr L J 1303.

——S. 438 — Application direct to High Court is not in order — But if rule is granted it will be disposed of.

Ordinarily an application for revision by a person, whose appeal has been disposed of by a first Class Magistrate empowered to dispose of appeals from the decisions of 2nd and 3rd class Magistrates under S. 407 (2), to the High Court, without going to the Sessions Judge and asking him to make a reference to High Court is not in order. But where the rule had already been granted and application heard, the High Court disposed of the rule on merits. AIR (V 10) 1923 Caal 674 : 77 Ind Cas 990 : 50 Cal 423 : 25 Cr L J 526 (DB).

——S. 438 — Summary procedure.

Where summary procedure was adopted when it should not have been adopted, two totally different offences were tried together and the service of the warrant was illegal,

Held, that the conviction should be set aside and re-trial should not be ordered. AIR (V 8) 1921 Lah 236 : 59 Ind Cas 849 : 3 Lah LJ 346 : 22 Cr L J 145.

8. Scope.

See also Cr. P. C., Ss. 435 & 439.

——Ss. 438 and 523 — Reference under S. 438 — If confined to cases of conviction, bail and so on — Reference in respect of an order under S. 523 — Competency.

Section 438 of the Criminal P. C. is in very wide terms and there is no warrant for restricting the operation of that section to cases of conviction, bail and so on. An order under S. 523, Cr. P. C., can be the subject-matter of a reference under S. 438 as it is a judicial order and not a mere administrative one. AIR (V 35) 1948 Pat 180.

——S. 438 — Even after the accused had claimed to be tried under S. 272, Criminal P. C., the Judge can instead of proceeding to choose jurors and trying the case, refer the same to the High Court under S. 438. AIR (V 32) 1945 Bom 413 : 47 Bom LR 138 : 47 Cr LJ 138 : 221 Ind Cas 266 (DB).

——S. 438 — Where proceedings are submitted to the Sub-Divisional Magistrate under S. 380, Criminal P. C., he can only dispose of the case in the manner provided by S. 380. The reference to the District Magistrate under S. 435 is incompetent, nor is it a proper case for submission to the High Court under S. 438, Criminal P. C. ('40) 191 Ind Cas 149 : 51 LW 480 : 1940 MWN 244 (1) : 42 Cr LJ 89.

**——S. 438 — Reference by District Magistrate upon Appellate order of Sessions Judge.**

The powers of reference conferred on a District Magistrate by S. 438, Criminal P. C., relate only to proceedings taken by an inferior Court and the Court of the Judicial Commissioner will not interfere with an appellate order of a Sessions Judge on a reference by the District Magistrate. The fact that the order of reference was made in ignorance of the existence of an appellate order makes no difference, since the principles involved are similar. AIR (V 24) 1937 Pesh 6 : 38 Cr LJ 335 : 166 Ind Cas 881.

——Ss. 438 and 439 — The Court should not resort to the powers conferred by Ss. 438 and 439, Criminal P. C., and direct additional evidence to be taken for the purpose of filling up a gap in the prosecution case when the necessary evidence was easily available to the prosecutor at the hearing and ought to have been then produced. AIR (V 22) 1935 Mad 325 : 1935 MWN 183 : 68 MLJ 336 : 41 MLW 434 : 37 Cr LJ 99 : 159 Ind Cas 432 (DB).

——S. 438 (2) — Sessions Judge cannot authorise an Additional Sessions Judge to take up a case in revision suo motu.

A Sessions Judge can transfer cases generally or specially. He cannot transfer or delegate his own powers of deciding whether there shall be a case. 1935 MWN 459.

——S. 438 — The proper course for the District Magistrate is to move the Government to appeal against the acquittal and not to proceed by way of revision. 1934 MWN 927.

——S. 438 — Though the Court of Special Magistrate under Ordinance II of 1932 is a Court inferior to Sessions Court, that part of S. 51 of Ordinance which deprives other Courts of any jurisdiction of any kind in respect of any proceedings of any Court constituted under the Ordinance save as therein provided, has the effect of depriving the Sessions Judge of the right of referring the case for orders of High Court under S. 438 (1) where a person has been convicted by a Special Magistrate under the Ordinance. AIR (V 20) 1933 Cal 401 (402) : 34 Cr LJ 579 : 60 Cal 851 : 143 Ind Cas 238 (DB).

**——S. 438 — Sessions Judge referring his own order with recommendation that it be altered.**

Section 438 (1), Criminal P. C., contemplates action by the Sessions Judge or District Magistrate upon examination of the proceedings of a Subordinate Court. It does not authorize the Sessions Judge or District Magistrate to refer his own order with a recommendation that it be altered. AIR (V 20) 1933 Pat 697 : 35 Cr LJ 22 (2) : 13 Pat 150 : 14 PLT 759 : 146 Ind Cas 370.

——S. 438 — Where a Magistrate discharges a person against whom an application has been made under S. 107, the only section under which the Sessions Judge might take action is under S. 438 by making a report to the High Court. AIR (Vol 18) 1931 All 53: 32 Cr LJ 570: 53 All 148: 1930 ALJ 1475: 130 Ind Cas 630.

**——S. 438 — Reference by District Magistrate to revise order of Sessions Judge.**

The District Magistrate is not empowered himself to make a reference to the High Court under S. 438, Criminal P. C., for the enhancement of a sentence passed by the Sessions Judge as the powers conferred on him by that section are limited to proceedings before an inferior Court.

The proper procedure in references for enhancement of sentences passed by a Sessions Judge in Upper Burma, as in appeals against orders of acquittal, is for the District Magistrate as Deputy Commissioner to obtain the orders of the Local Government before instructing the Public Prosecutor, Mandalay, as Government Advocate to make the application. AIR (Vol 18) 1931 Rang. 251: 9 Rang 352: 32 Cr LJ 1125: 134 Ind Cas 220.

——S. 438 — Although it is unusual for judge to make a reference regarding the legality of his own order, yet there is nothing in S. 348 to preclude him from doing so. The words " or otherwise" are wide enough to cover such a reference. AIR (Vol 17) 1930 All 817: 1930 ALJ 1076: 1930 Cr C 1201.

**——S. 438 — Reference by Sessions Judge, and Reference by District Magistrate — Considerations.**

A reference under S. 438 by the Sessions Judge, recommending that an erroneous acquittal by a Subordinate Court be set aside, is acceptable even in ordinary cases, for an appeal against such acquittal under S. 417 by the Local Government is restricted to only exceptional cases. However, such references by the District Magistrate, who has means to communicate with and move the Local Government under S. 417, may not be acceptable. AIR (Vol 16) 1929 Pat 139: 7 Pat 579: 116 Ind Cas 768: 30 Cr LJ 673: 13 AI Cr R 112 (DB).

——S. 438 — Section 438 must be read with S. 435. AIR (Vol 14) 1927 Sind 45: 98 Ind Cas 101: 27 Cr LJ 1253: 21 SLR 48 (DB).

——S. 438 — A commitment can only be quashed on a question of law. The question whether the evidence already on the record is sufficient to establish the charge is a question connected more with the propriety of a conviction rather than with the propriety of a commitment. AIR (Vol 9) 1922 Oudh 109: 65 Ind Cas 431: 23 Cr LJ 79: 8 OLJ 627.

**——S. 438 — Criminal — Review — Reference to High Court.**

Where a Sub-Divisional Magistrate erroneously dismisses an appeal as time-barred it is not open to him to review his own order and admit the appeal again. The only course open to him is to submit the case to the High Court for revision. (1904) 6 Bom LR 360 (360) (DB).

**——S. 439.**

See also (1) Criminal P. C. Ss. 423, 435 and 438.
(2) Government of India Act, 1915, S. 107.

1. Abatement.
2. Acquittal.

See also Criminal P. C. Ss. 417 and 423.

3. Competency of revision.
See also Note 15.
4. Compounding Offences.
See also Criminal P. C. S. 345.
5. Conviction.
6. Discharge.
7. Discretion.
8. Enhancement of sentence.
See also Criminal P. C. S. 423.
9. Evidence.
10. Expunging remarks.
11. Finding of fact.
12. Grounds for.
13. Interference.
See Note 23.
14. Interlocutory Order.
15. Jurisdiction.
16. Jurisdiction under S. 115 Civil P. C.
See Note 27.
17. Jury trial.
See Criminal P. C. S. 297.
18. Limitation.
19. New plea.
20. Notice.
21. Orders in revision.
22. Pending proceedings.
23. Power of High Court.
24. Private Complaint.
See also Note 2.
25. Proceedings under Criminal P. C., S. 144.
26. Proceedings under Criminal P. C. S. 145.
27. Proceedings under Criminal P. C., Ss. 195 and 476.
28. Quashing proceedings.
See also Note 22.
29. Question of Law.
30. Records of case.
See N. 23.
31. Reduction of sentence.
32. Remand.
33. Retrial.
34. Scope.
35. Sentence, Interference with.
See Note 23.
36. Stay of proceedings.
37. Wrong procedure.

### 1. Abatement.

——S. 439 — **Accused dying during pendency of revision against sentence of fine.**

Where the accused dies pending the revision against the sentence of fine, the revision continues. AIR (Vol 27) 1940 Lah 274: 42 PLR 215: 41 Cr LJ 729: 189 Ind Cas 343.

——S. 439 — **Abatement — Revision against sentence of fine.**

A revisional application against a sentence of fine will not abate by reason of the death of the applicant. Under the provisions of S. 70, Penal Code, the death of an offender does not discharge any property, which would, after his death, be legally liable for his debts, from liability to discharge any fine due from him. AIR (Vol 24) 1937 Oudh 320: 13 Luck 306: 38 Cr LJ 509: 1937 OWN 587: 168 Ind Cas 177.

### 2. Acquittal.

See also Cr. P. C., Ss. 417 & 423.

(a) General.
(a-1) When set aside.
(b) Presumption.
(c) Misreading evidence and miscarriage of justice.
(d) Error of Law.
(e) When no appeal by Government.
(f) When civil remedy available.
(g) Private person.

#### (a) General.

——S. 439 — Where first Class Magistrate convicted under S. 326, Indian Penal Code, and on appeal, the Sessions Judge altered the conviction to one of voluntarily causing simple hurt to the complainant and reduced the sentence to six months' rigorous imprisonment.

Held, it must be taken that the accused were acquitted under S. 326 and that under the powers given to the Court under S. 439 a finding of acquittal cannot be converted to one of conviction. AIR (Vol 11) 1924 Bom 456: 48 Bom 510: 26 Bom LR 438: 26 Cr LJ 830: 86 Ind Cas 478 (DB).

——S. 439 — **High Court cannot convert acquittal into conviction.**

A High Court cannot even in revision convert an acquittal, even what has been called a "partial acquittal" into a conviction. AIR (Vol 26) 1939 Sind 57: 32 SLR 18: 40 Cr LJ 375 (2): 180 Ind Cas 418 (DB).

——S. 439 — **Bar in S. 439 (4), if applies to partial acquittal.**

The bar in sub-s. (4) of S. 439, Criminal P. C., applies to a partial as well as to a total acquittal. Where, therefore, an accused charged with murder is convicted under S. 304(1), I. P. C., and thus acquitted of offence under S. 302, he cannot be convicted under S. 302 in revision. AIR (Vol 25) 1938 Sind 202: 40 Cr LJ 93: ILR (1938) Kar 75: 178 Ind Cas 520 (DB).

——S. 439 — In revision the High Court has no jurisdiction to alter an acquittal into a conviction. AIR (Vol 23) 1936 Pesh 172: 37 Cr LJ 1039: 164 Ind Cas 899 (DB).

——S. 439 — **Revision against acquittal — Practice.**

Although the High Court has power to interfere in revision with an original or appellate judgment of acquittal it will ordinarily not do so. (1904) AWN 278: 27 A 359 (360).

——S. 439 — Order of acquittal — District Magistrate should first move Local Government to prefer appeal. AIR (Vol 10) 1923 Lah 601: 6 LLJ 50: 26 Cr LJ 337: 84 Ind Cas 641.

——S. 439 — **Acquittal means complete acquittal.**

To alter the conviction from one under S. 304 to one under S. 302 and to pass an appropriate sentence under the latter section does not amount to altering an acquittal into conviction. Where a person has first been tried under S. 302, and convicted under S. 304, this does not mean, for purposes of S. 439, that he has been acquitted under the former section. Acquittal means a complete acquittal and disharge of all the allegations and facts charged, and not an acquittal on one charge and a conviction on another. AIR 1922 All 487, Not foll. AIR (V 14) 1927 Lah 369 : 8 Lah 136 : 28 Cr LJ 508 : 8 AI Cr R 149 : 101 Ind Cas 892 (DB).

——S. 439 — **Acquittal — Jurisdiction.**

The Appellate Court can acquit the accused when other co-accused who have appealed are acquitted, even though he does not appeal. AIR (Vol 7) 1920 Pat 471: 21 Cr LJ 705: 1 PLT 241: 5 PLJ 430: 58 Ind Cas 49; 14 PWR 1909 Cr: 11 Cr LJ 99: 4 Ind

Cas 980 (DB); AIR (Vol 7) 1920 Cal 617 : 31 Cal LJ 305 : 21 Cr LJ 554 : 56 Ind Cas 858 (DB).

**——S. 439 — Acquittal — Revision.**

The High Court in practice will not ordinarily interfere in revision with an acquittal as an appeal will lie at the instance of the Local Government. AIR (Vol 2) 1915 Oudh 203: 2 OLJ 190: 16 Cr LJ 352: 28 Ind Cas 736; AIR (Vol 1) 1914 All 76 : 12 ALJ 255: 15 Cr LJ 304: 23 Ind Cas 512.

**——S. 439 — Acquittal — Ordinarily revision is not entertained.**

Per Beaumont, C. J.— The High Court does not really entertain applications in revision against an order of acquittal. AIR (Vol 31) 1944 Bom 107: 46 Bom LR 70: 45 Cr LJ 612: ILR (1944) Bom 302: 212 Ind Cas 396 (FB).

**——S. 439 — Grounds for interference.**

In case of revision against an order of acquittal in a petty case of 'marpit' which does not raise any difficult or interesting question of law, the High Court will not interfere with the order of acquittal. The mere fact that the High Court would have taken different view of the evidence if it were sitting as an Appellate Court is no ground for interference in revision. AIR (Vol 30) 1943 Oudh 451: 1943 OWN 319: 45 Cr LJ 75: 1943 AWR (CC) 88: 209 Ind Cas 114.

——S. 439 — Although the High Court will not ordinarily interfere in cases of acquittal, yet there is no legal bar if a proper case comes before it. AIR (Vol 29) 1942 Oudh 443: 1942 OWN 432: 43 Cr LJ 763: 1942 AWR (CC) 285: 201 Ind Cas 506.

**——S. 439 — Acquittal of persons whose names do not appear in application cannot be touched.**

Where the names of certain persons who have been acquitted do not appear in the revision application against acquittal, the acquittal cannot be touched in revision. AIR (Vol 28) 1941 Pat 287: 22 PLT 237: 7 BR 814: 42 Cr LJ 622: 194 Ind Cas 660.

**——S. 439 — Acquittal, if can be interfered with.**

The High Court has no power to interfere in revision with the order of acquittal. AIR (Vol 25) 1938 Lah 339 : 40 PLR 61 : 39 Cr LJ 621 : 175 Ind Cas 548 (DB).

**——S. 439 — Determination of case depending on facts — Necessity of going into facts before it can be said acquittal is bad.**

Acquittals should not, except in exceptional circumstances, be interfered with 'suo motu' by an Appellate Court without a full investigation of the facts. There should be a certain integrity about acquittals which prevents them from being lightly interfered with.

Per Henderson, J. — It would be a most dangerous thing to say that whenever a Magistrate happens to be so unfortunate as to make mistake in law, the accused person should be put in peril again; for it may well be that although the Magistrate has decided a law point wrongly in favour of the accused, he may also have decided the facts wrongly in favour of the prosecution. Clearly an acquittal is not to be set aside merely because bad reasons are given for it. Before the High Court in revision can be induced to take such a course, they must be satisfied that the acquittal is wrong altogether apart from the reasons given by the trial Magistrate.

Where, therefore, the determination of the case largely depends upon the weight to be given to the document executed by the opposite party and the circumstances in which this was done, it is impossible for the High Court to say whether the acquittal is a bad one without going into the fact, and in such cases, the High Court must decline to interfere in revision. 40 CWN 931: 37 Cr LJ 1081: (1936) 164 Ind Cas 996 (DB).

——S. 439 — Where the view taken by the trying Magistrate, is not palpably unreasonable or by any means perverse the mere fact that the Court of Revision is inclined to take a different view of the evidence from that of the trying Magistrate does not justify it, under S. 436 of the Criminal P. C., to interfere with an order of acquittal. AIR (Vol 22) 1935 Oudh 176 : 11 OWN 810 : 35 Cr LJ 1236 : 10 Luck 192: 150 Ind Cas 951.

**——S. 439 — High Court, if can go through evidence.**

In revision from an acquittal an appellant is not permitted to take the High Court through the evidence to show that the weight of evidence is against the finding of acquittal. AIR (Vol 21) 1934 All 846: 4 AWR 246 : 36 Cr LJ 490 : 154 Ind Cas 315.

——S. 439 — A Court of revision does not ordinarily interfere with an order of acquittal though it be wrong. AIR (Vol 15) 1928 Lah 185: 9 AI Cr R 321: 29 Cr LJ 34: 106 Ind Cas 450.

——S. 439 — High Court will not interfere in revision against acquittal for which a special procedure has been provided by the Cr. P. Code; the proper course for the complainant is to approach the Government to appeal in regular form against the acquittal. AIR (Vol 15) 1928 Pat 193: 29 Cr LJ 1017: 11 AI Cr R 270: 112 Ind Cas 345.

——S. 439 — High Court will not ordinarily interfere with applications in revision against acquittal in view of the fact that the Legislature has provided a special channel for appeals against acquittal being filed. AIR (Vol 14) 1927 Nag 210: 28 Cr LJ 511: 8 AI Cr R 175: 101 Ind Cas 895.

——S. 439 — High Court cannot convert acquittal into conviction unless it is acting both as appellate and revisional Court. AIR (Vol 13) 1926 Rang 154: 4 Rang 140 : 5 Bur LJ 80 : 27 Cr LJ 1393 : 98 Ind Cas 705 (DB).

——S. 439 — Circumstances of assault not truly disclosed by complainant — Acquittal proper. AIR (Vol 12) 1925 Pat 321: 2 Pat LR Cr 250: 26 Cr LJ 516: 85 Ind Cas 356 (DB).

——S. 439 — Ordinarily the High Court will not interfere in revision against an order of acquittal. AIR (Vol 11) 1924 All 778: 22 ALJ 820: 5 LRA Cr 143: 26 Cr LJ 98: 83 Ind Cas 658.

——S. 439 — When no prejudice is caused. High Court will be very reluctant to interfere with the acquittal of persons who have undergone a trial in a court of competent jurisdiction or with the order of such a competent Court under S. 250. AIR (Vol 11) 1924 All 674: 5 LRA Cr 93.

**——S. 439 — Acquittal — Revision.**

As a general rule the High Court will not in revision interfere with an order of acquittal but it has power to do so and this power may be properly exercised in certain circumstances. UBR (1911) 1, 100: 13 Cr LJ 457: 15 Ind Cas 89.

(a-1) When set aside.

——S. 439 — Revision against acquittal — Interference by High Court — Principles governing.

The High Court will not ordinarily interfere with an order of acquittal in revision unless interference is urgently called for in the interests of public justice. Even in such cases the High Court should be slow to interfere because it is always open to an aggrieved complainant to move the authorities for an appeal against an order of acquittal by the Government. AIR (V 37) 1950 Ajmer 35(1): 51 Cr LJ 1218.

——S. 439 — Revision against acquittal — Interference by High Court — Principles governing.

The High Court will not ordinarily interfere with an order of acquittal in revision unless interference is urgently called for in the interests of public justice. Even in such cases the High Court would be slow to interfere because it is always open to an aggrieved complainant to move the authorities for an appeal against the order of acquittal by government. AIR (Vol 37) 1950 Ajmer 32(2): 51 Cr LJ 1130.

——S. 439 — Revision against acquittal — Re-trial — When may be ordered.

The power to interfere with acquittal in revision can never be disputed. But as the High Court cannot convert a finding of acquittal into one of conviction it can only order retrial. So it follows that it should interfere only in a case where re-trial is the proper remedy. The remedy of retrial is appropriate only when there has been no valid or proper trial. If there is flaw in the trial, the only way of setting right a judgment of a subordinate Court which is erroneous either on facts or on law is by proceeding under S. 417. A revision should not be treated as an easy substitute for an appeal under S. 417. The High Court should not order retrial in such circumstances as would make that order in effect one of conviction. AIR (V 37) 1950 A 266 : 51 Cr LJ 505 : 1949 AWR 570.

——S. 439 — Acquittal — Revision against — Power of High Court.

The power to interfere in revision with an order of acquittal is to be exercised only in exceptional cases where it appears that the Judge has made an obvious mistake which has resulted in a failure of justice. The High Court may interfere with an order of acquittal, for instance, where the Judge has tried the case without jurisdiction or where the trial has been irregular in that he has not allowed the prosecution to produce material evidence or to address arguments before judgment was delivered. But the High Court will not interfere when the Judge has tried the case in a regular way and passed an order of acquittal upon a consideration of all the material evidence on the record, on the ground that the conclusions arrived at by him are not correct. Such findings of facts are not interfered with in revision even in the case of a conviction; much less ought they to be interfered with in the case of an acquittal. AIR (V 37) 1950 All 42 : 51 Cr LJ 329 : 1950 ALJ 329.

——S. 439 — Revision against acquittal — Retrial — When may be ordered.

An order of acquittal cannot be altered into one of conviction by the High Court except where an appeal by the Provincial Government has been presented under S. 417, Cr. P. Code, but the High Court can, in exercise of its powers of revision, set aside an order of acquittal and order a retrial. In cases where the order of acquittal is passed by a Court not having jurisdiction or is based on an incomplete record of evidence, or is against any provision of law, no difficulty arises because in such cases the order of acquittal can be set aside & a retrial ordered without any prejudice being caused to the accused person. In cases where the order of acquittal is passed by a Court of competent jurisdiction and in which the entire evidence of the prosecution has been recorded, the High Court should be reluctant to order a retrial in revision, because such an order means practically a direction to the subordinate Court to which the case is sent, to convict though, because of the absence of an appeal under S. 417, Cr. P. C., the High Court itself would not be competent to alter the acquittal into conviction. AIR (V 37) 1950 Lah 165: 51 Cr LJ 1343: Pak LR (1950) Lah 381 (DB).

——S. 439 — Revision against acquittal — One alone of the three witnesses as to discovery of stolen property examined — His turning hostile — Acquittal without examining other witnesses — Liability to be set aside.

Where out of three search witnesses as to the discovery of stolen property only one was examined and he turned hostile and was admittedly won over by the accused, and the accused were acquitted without the examination of the other search witnesses.

Held, in revision, that the acquittal should be set aside and retrial ordered. AIR (Vol 37) 1950 Kutch 46(1) : 51 Cr LJ 1080.

——S. 439 — Revision against acquittal — Interference.

The High Court can interfere in revision with an order of acquittal, where to allow the case to stand would be to allow a very bad precedent. AIR (V 36) 1949 Cal 658 : 51 Cr LJ 33 (DB).

——S. 439 — Acquittal — Revision against — Interference.

The High Court can interfere in revision with an order of acquittal, where to allow the case to stand would be to allow a very bad precedent. AIR (V 36) 1949 Cal 658: 51 Cr LJ 33 (DB).

——S. 439 — Acquittal — Interference in revision by High Court — Principles governing.

There is no doubt that in the exercise of its powers under S. 439, Cr. P. Code, the High Court can in appropriate cases set aside an order of acquittal and order re-trial. But it will do so only when the case is of a serious nature. From this point of view offences under Ss. 482, 483 and 486 cannot be regarded as serious, having regard to the punishment provided therein. AIR (V 35) 1948 A 339: 49 Cr LJ 457 : 1948 ALW 149 : 1948 ALJ 96 : ILR (1948) All 222: 1948 OA (HC) 43: (1948) AWR (HC) 43.

——S. 439 — Appellate judgment of acquittal.

The High Court has power to interfere in revision with an appellate judgment of acquittal, and though that power should be sparingly exercised, it would be wrong to refuse to exercise it in cases where there has been a failure of justice by reason of the Appellate Court not having brought its judicial mind to bear upon the evidence. AIR (V 25) 1938 Cal 613 : 67 CLJ 571 : 43 CWN 25 : 39 Cr LJ 988 : 178 Ind Cas 56 (DB).

——S. 439 — **Case under Act not authorising Police to take action — Principles as to setting aside of acquittals should not be applied strictly.**

In a case under an Act (Child Marriage Restraint Act) under which the Police can take no action and the Legislature has, in a sense, made the members of the public litigants under it, Courts should not apply strictly the principles with regard to setting aside of acquittals. AIR (V 22) 1935 Pat 474: 16 PLT 629: 2 BR 164: 37 Cr LJ 227: 160 Ind Cas 116.

——S. 439 — Trial by Bench of Magistrate — One member of Bench that passed order not present throughout proceedings:

Held, the order was invalid. According to S. 350A, Criminal P. C., the High Court has power to interfere with an order of acquittal in revision. AIR (V 19) 1932 All 191: 1932 ALJ 166: 54 All 413: 33 Cr LJ 885: 140 Ind Cas 122.

——S. 439 — **Acquittal — Setting aside — Modes of.**

An improper order of acquittal can be set aside by the High Court either on a regular appeal by the Local Government when ordinarily moved by the District Magistrate or in revision ordinarily on a reference by the Sessions Judge. Where the first alternative is not available, there can be no legal bar to the adoption of the second alternative. But the power is to be exercised in exceptional cases only where there has been either denial of the right of a fair trial or a flagrant failure of justice. AIR (V 17) 1930 Lah 159: 123 Ind Cas 841: 31 Cr LJ 584: 1930 Cr C 167: 12 LLJ 5.

——S. 439 — Acquittal should be set aside in exceptional cases. AIR (V 14) 1927 All 193: 49 All 254 : 25 ALJ 100 : 8 LRA Cr 5 : 27 Cr LJ 1407 : 7 AI Cr R 35 : 98 Ind Cas 719.

——S. 439 — The High Court will not interfere in revision with orders of acquittal unless there are very special circumstances calling for interference. AIR (V 12) 1925 Lah 490: 90 Ind Cas 668: 7 LLJ 367: 26 PLR 644: 26 Cr LJ 1596.

——S. 439 — **Acquittal — Miscellaneous.**

Where from the facts proved it was difficult to say what was the offence committed by the accused,

Held, that the alteration of one section into another by the Sessions Judge could not be said to be a case of acquittal under the original section, within the meaning of cl. 4. AIR (V 12) 1925 Mad 480: 48 MLJ 190: 86 Ind Cas 339: 26 Cr LJ 755: 48 Mad 774: 21 MLW 174: 1925 MWN 118.

——S. 439 — Though the High Court does not ordinarily interfere with orders of acquittal it will so interfere where the appeal ordering acquittal has been heard by a Sub-Divisional Magistrate without giving notice to District Magistrate. AIR (V 10) 1923 Bom 74: 73 Ind Cas 812: 24 Bom LR 1150: 24 Cr LJ 700 (DB).

——S. 439 — The High Court can convict an accused under S. 182, I. P. C., even though acquitted by the lower appellate Court; S. 439(4) does not come in the way, for, the meaning of that clause is that, where an accused person has been acquitted on all charges he is not to be convicted. If he has been convicted at all, S. 439 (4) does not apply to him. AIR (V 10) 1923 Oudh 4: 69 Ind Cas 81: 9 OLJ 342: 23 Cr LJ 641: 26 Cr C 44.

——S. 439 — Where a person is acquitted of an offence as a result of an alleged composition of the offence which turns out to be invalid, it is open to the High Court to interfere in revision and set aside the acquittal. AIR (V 9) 1922 Pat 618: 71 Ind Cas 248: 24 Cr LJ 120.

——S. 439 — **Acquittal — Revision — Question of principle — Interference.**

Per Curiam:— As a rule the High Court does not interfere with an order of acquittal. But when a case is not a criminal one in the strict sense of the term, and concerns the interest of a public body, it interferes. AIR (V 7) 1920 Cal 929 : 24 CWN 415 : 31 CLJ 127: 21 Cr LJ 363: 55 Ind Cas 731 (DB).

——S. 439 — **Acquittal — Revision against — Criminal trespass — Trial and conviction — Reversal of by Appellate Court — Civil matter.**

When the trial Court has tried out a case on the merits and come to the conclusion that accused was guilty of criminal trespass, it is not competent for a Court of Appeal without going into the case or discussing the evidence or coming to any conclusion thereon, to acquit the accused on the ground that the matter is of a civil nature. The High Court in such a case, can interfere in revision with the order of acquittal. AIR (V 6) 1919 Cal 928: 27 CLJ 226: 19 Cr LJ 321: 44 Ind Cas 337 (DB).

——S. 439 — **Acquittal — Alternative charges.**

Where a charge was of two separate offences laid in an alternative form under Ss. 399 and 402 was treated not alternatively but as additional, acquittal under the former section does not involve an acquittal under the latter and conviction thereunder is not vitiated by repugnancy, but even if it were, the High Court can alter the finding of acquittal into one of conviction maintaining the sentence. AIR (V 1) 1914 Cal 456: 41 Cal 350: 18 CWN 498: 15 Cr LJ 385: 23 Ind Cas 985 (DB).

——S. 439 (5) — **Acquittal — Death in course of fight — Case compromised by relatives.**

A person was alleged to have been killed in a fight and the relatives of the deceased put in a compromise; the Magistrate accepted it and the accused were acquitted. Held, that it was a case in which the Court ought to interfere on the merits & that under S. 439, Cl. 5 the Court should set aside the order of acquittal passed without a full trial in the case. AIR (V 1) 1914 Sind 134 : 7 SLR 200 : 15 Cr LJ 553 : 24 Ind Cas 961 (DB).

——S. 439 — **Order of acquittal — Revision against.**

A criminal revision against an order of acquittal is not generally entertained, but it may be entertained at the instance of one towards whom the accused acted most arbitrarily and in a most high-handed manner. (1905) 15 MLJ 225 (225) : 2 Cr LJ 382 (DB).

(b) **Presumption.**

——S. 439 — **Duty of High Court.**

In revision against acquittal, the order of acquittal has to be judged in the light of the complaint actually preferred and not on hypothetical premises. 1942 NLJ 329.

——S. 439 — **Acquittal based on wrong presumption.**

It is always very difficult for the High Court to interfere with an order of acquittal merely because the Magistrate has wrongly drawn or wrongly re-

fused to draw a presumption. AIR (Vol 27) 1940 Cal 531: ILR (1940) 1 Cal 585: 44 CWN 648: 42 Cr LJ 100: 191 Ind Cas 184 (DB).

**(c) Misreading evidence and Miscarriage of justice.**

**——S. 439 — Acquittal — Interference in revision — Principles governing.**

It is only in a case of a very serious kind where there has been a serious miscarriage of justice that the High Court would interfere with an order of acquittal in a case in which all the evidence has been led and has been considered by the trial Court. The mere fact that the reasons given by the trial Court for doubting the evidence of certain witnesses do not commend themselves to a superior Court is no ground for interfering with an order of acquittal. AIR (Vol 36) 1949 All 264: 50 Cr LJ 460: 1948 ALJ 511: 1948 AWR (HC) 272.

**——S. 439 — Acquittal — Revision against — Interference — Grounds — Order of acquittal by Presidency Magistrate — Statement of reasons very brief — If justifies interference.**

An order of acquittal can be interfered with in revision by the High Court if the main issues in the case had not been properly dealt with by the lower Court. The mere fact that the High Court would not hold the same opinion as the lower Court would not be a ground for interference.

Having regard to the fact that a Presidency Magistrate is not bound to write any judgment in certain cases, and need not give reasons for an order of acquittal, the mere fact that the statement of reasons given by him is very brief, is not by itself sufficient to justify interference in revision or to indicate that the magistrate has not considered all the issues or has failed to apply his mind. AIR (Vol 35) 1948 Cal 1: 230 Ind Cas 154: 48 Cr LJ 552.

**——S. 439 — Interference only when there is miscarriage of justice.**

The High Court will interfere in exceptional circumstances in revision, against an order of acquittal, where there has been a miscarriage of justice. AIR (Vol 29) 1942 Oudh 318: 1942 OWN 161: 17 Luck 663: 1942 AWR 112: 43 Cr LJ 578: 199 Ind Cas 757.

——S. 439 — In revision, the power of interference with the order of acquittal should be most sparingly exercised and that only in cases where it is urgently demanded in the interest of public justice. (1942) 21 Pat 102: 22 PLT 803 (DB).

**——S. 439 — Interference.**

The High Court will not, on an application in revision against an acquittal, treat the case before it as a case of appeal. It will not be prepared to interfere unless there are exceptional matters compelling it to do so, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering the evidence, where he has entirely left evidence out of consideration or has relied upon evidence which is not to be found on the record. It is going too far to say that the High Court must accept loyally the findings of facts of the trial Court or the lower Appellate Court, as the case may be, but at the same time, it is obvious that the power to interfere is one to be exercised most sparingly and only when there appears to have been a miscarriage of justice or a perverse and unreasonable decision. The High Court cannot be asked to set aside the order of acquittal and direct a re-trial merely on the ground that it would take a different view of the evidence from that which has been taken by the Magistrate who tried the case and had the witnesses before him. AIR (Vol 28) 1941 Oudh 7: 1940 OWN 757: 41 Cr LJ 891: 1940 AWR 373: 190 Ind Cas 266 (DB).

**——S. 439 — Interference.**

High Court always acts with great reluctance in allowing a petition for revision against an order of acquittal and only when it is shown that such interference is essential to avoid or remedy a clear failure of justice, specially when there is a regular procedure for challenging an acquittal by a Criminal Court through the means of an appeal, by the Local Government. AIR (Vol 28) 1941 Pat 362: 22 PLT 327: 7 BR 875: 195 Ind Cas 107.

**——S. 439 — Magistrate misreading evidence of witness.**

A single mistake on the part of the Magistrate of misreading the evidence of a witness would not justify the use of the extraordinary power which the High Court has in revision of setting aside an order of acquittal. AIR (Vol 26) 1939 Pat 28: 39 Cr LJ 968: 5 BR 45: 177 Ind Cas 999.

**——S. 439 — Acquittal on good and irrefutable reasons — Appeal dismissed — Interference in revision.**

The High Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice. Where the District Magistrate has given good and irrefutable reasons to acquit the accused on appeal and the Sessions Judge has dismissed the appeal against the acquittal, there cannot be said to be any failure of justice to justify interference in revision. AIR (V 20) 1933 Oudh 421 : 10 OWN 903 : 35 Cr LJ 118 : 146 Ind Cas 577 (DB).

**——S. 439 — Acquittal — Interference.**

Misappreciation of evidence can afford no ground for setting aside an order of acquittal. AIR (Vol 18) 1931 Nag 102: 121 Ind Cas 51: 31 Cr LJ 194.

**——S. 439 — Interference — Principles.**

Though the High Court has jurisdiction to interfere on revision with an acquittal, it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. The fact that the High Court sitting as a Court of Appeal might possibly have come to a different conclusion from the learned District Magistrate is no ground for exercising the revisional jurisdiction of the High Court against the order of acquittal made by him. AIR (Vol 18) 1931 Rang 94: 8 Rang 663: 32 Cr LJ 928: 132 Ind Cas 545.

**——S. 439 — Private prosecutions.**

In private prosecutions where the Crown does not think it proper to move against the order of acquittal the High Court should not ordinarily interfere and it does so only when it is satisfied that there has been an error of law committed by the acquitting Court or where there has been a gross miscarriage of justice or in public interest. AIR (Vol 16) 1929 Cal 639: 33 CWN 576: 30 Cr LJ 1013: 119 Ind Cas 130: 1929 Cr C 357 (DB).

——S. 439 — A High Court has power under S. 439 to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction.

But this power should be used very sparingly. High Court will interfere in revision at the instance of a private individual only in the most serious cases and in the event of grave miscarriages of justice. AIR (Vol 8) 1921 All 76: 62 Ind Cas 869: 19 ALJ 382: 22 Cr LJ 597.

**——S. 439 — Acquittal — Interference with.**

High Court will interfere with a judgment of acquittal if the Judge has considered only irrelevant matters instead of deciding the case on merits. AIR (Vol 7) 1920 All 232: 2 UPLR (All) 182: 18 ALJ 846: 21 Cr LJ 564: 57 Ind Cas 84.

——S. 439 — Unless the setting aside of an order of acquittal is urgently demanded in the interests of justice the High Court will not set it aside in revision. AIR (Vol 7) 1920 Cal 725: 59 Ind Cas 37: 22 Cr LJ 5: 47 Cal 818 (DB).

**——S. 439 — Acquittal — Revision against acquittal — Powers of High Court.**

Under S. 439, Cr. P. Code, the High Court can set aside an order passed by an Appellate Court quashing a conviction by the latter Court where the judgment is very summary and contains a very inadequate discussion on the evidence. In this case the High Court sent the case back to retrial by the Sessions Judge on a due consideration of the evidence on record. AIR (Vol 5) 1918 Cal 392: 18 Cr LJ 519: 39 Ind Cas 487 (DB).

**——S. 439 — Acquittal — Retrial when to be ordered.**

Where an accused is acquitted by a competent Court after full trial, retrial should not be ordered unless there is cogent evidence of miscarriage of justice. AIR (Vol 3) 1916 All 36: 14 ALJ 1075: 17 Cr LJ 459: 36 Ind Cas 139.

**——S. 439 — Acquittal — Power of High Court to interfere — Power of Sessions Judge to stop prosecution.**

Ordinarily a High Court should interfere on revision with an order of acquittal sparingly and only where such interference is urgently demanded in the interests of justice. The power of a Court to stop a case if it thinks it a waste of time to go on with it, is undoubted. Where in a Sessions case two of the important witnesses for the prosecution were disbelieved by the Judge and the Assessors and the prosecution was stopped, there was no such patent miscarriage of justice as to call for interference by the High Court. It is very doubtful if a private party, should as a matter of right be allowed to move the High Court in such cases. 14 M 363: 26 MLJ 160, Diss. AIR (Vol 3) 1916 Mad 1106: 17 MLT 457: 28 MLJ 690: (1915) MWN 411: 16 Cr LJ 558: 29 Ind Cas 830.

**——S. 439 — Acquittal — Revision — Notice of appeal — Failure to serve on District Magistrate — Irregularity.**

The High Court will not interfere in revision with an order of acquittal where the question is one as to appreciation of evidence or where there is no patent error or defect in the order of acquittal by the Lower Court which has resulted in grave injustice. Failure to serve notice of the appeal on the District Magistrate is only an irregularity and the High Court is not bound to set aside the order of acquittal when there is no reason to believe that justice has suffered. AIR (Vol 3) 1916 Mad 931: 39 Mad 505: 28 MLJ 692: 16 Cr LJ 600: (1915) MWN 540: 30 Ind Cas 152.

(d) Error of Law.

**——S. 439 — Revision against acquittal — Interference — Clear and serious error of law.**

The High Court does not interfere with acquittals unless it is satisfied that there has been a clear violation of the legal principles involved in the case and it is necessary to set aside the decision in order to prevent irreparable injury. Where the acquittal is due to clear and serious error of law that a rival claimant can enter and forcibly take away property in the peaceful possession of another, it cannot be allowed to stand and should be set aside. AIR (Vol 37) 1950 A 653: 51 Cr LJ 1167.

**——S. 439 — Acquittal — Interference in revision by High Court — Principles governing — Power of High Court to review evidence.**

It is the practice of the High Court not to interfere with orders of acquittal in revision on the ground that the State Government can be moved to file an appeal against the acquittal under S. 417, Cr. P. Code. But where the State Government has declined to take action, the discretion of the High Court cannot be allowed to be fettered in any way and where there has been an error of law, the High Court would interfere in order to prevent a miscarriage of justice. The correct principle in dealing with such cases, is to review at large the evidence upon which the order of acquittal is founded and to reach the conclusion that upon that evidence, the order of acquittal deserves to be reversed. AIR (V 37) 1950 H P 44.

**——S. 439 — Acquittal — Revision against — Interference — Power of High Court.**

The High Court has the power to interfere in revision with acquittals in which by reason of a gross error of law or of procedure there has been a failure of justice. AIR (Vol 35) 1948 Nag 243: 49 Cr LJ 322: ILR (1947) Nag 899: 1947 NLJ 569.

**——S. 439 — Acquittal on erroneous view of law.**

Revision of an order of acquittal may be allowed when the order of acquittal is based on an erroneous view of the law. AIR (Vol 25) 1938 Lah 739: 40 Cr LJ 131: 178 Ind Cas 791.

**——S. 439 — Acquittal owing to wrong view of law.**

Ordinarily, the High Court will not interfere with an order of acquittal, especially in a case under S. 323, I. P. C., but it will interfere when the trial Magistrate has acquitted the accused owing to a wrong view of the law. AIR (Vol 24) 1937 Oudh 283: 38 Cr LJ 329: 1937 OWN 281: 166 Ind Cas 987 (1).

**——S. 439 — Acquittal based on misconception of law.**

Where an order of acquittal passed by a Magistrate proceeded on a misconception of law on the material points involved in the case, the High Court will set aside the order of acquittal in revision and order a retrial. AIR (Vol 21) 1934 All 190: 4 AWR 569: 1934 ALJ 541: 35 Cr LJ 998: 149 Ind Cas 612.

**——S. 439 — Practice — Oudh Chief Court.**

It is not the practice of the Oudh Chief Court to interfere with an order of acquittal, unless the judgment of the Court below is manifestly wrong. AIR

(Vol 20) 1933 Oudh 372: 10 OWN 742: 35 Cr LJ 66: 146 Ind Cas 431 (DB).

——S. 439 — The powers possessed by the High Court under S. 439, Criminal P. C., are very wide and although the Court cannot convert an order of acquittal into one of conviction, yet there is nothing to bar the setting aside of the order of acquittal when the order is one wholly without jurisdiction. AIR (Vol 19) 1932 Oudh 251 (1): 9 OWN 319: 33 Cr LJ 511: 137 Ind Cas 625.

——S. 439 — Interference.

Case ending in conviction but no prejudice to accused — High Court will not interfere — A fortiori there will be no interference in case of an acquittal.

Only three Magistrates of the Bench hearing evidence and trying case — Judgment of acquittal, however, signed by seven Magistrates :

Held, that there was illegality vitiating proceedings warranting interference, though the judgment was one of acquittal. AIR (Vol 18) 1931 Mad 494: 1930 MWN 770: 32 Cr LJ 971: 133 Ind Cas 4.

——S. 439 — Acquittal based on erroneous view of law — No revision lies. AIR (Vol 16) 1929 Nag 87: 11 NLJ 242: 115 Ind Cas 169: 30 Cr LJ 405: 12 AI Cr R 297.

**——S. 439 — Interference with acquittals where injustice is caused.**

High Court has jurisdiction to interfere with acquittals in revision, though this is not encouraged where serious injustice has been caused by an error of law. Where the accused were acquitted on account of wrong appreciation of a point of law with the result that an assault on an officer of Court, while on duty, had been allowed to go unpunished, the acquittal was set aside. AIR (Vol 15) 1928 Lah 844: 10 AI Cr R 228: 109 Ind Cas 362: 29 Cr LJ 538.

**——S. 439 — Court of Sessions entertaining appeal without jurisdiction — High Court would interfere.**

Where an accused having pleaded guilty was convicted on the charge under S. 19 (c) of the Arms Act, by the 1st Class Magistrate and the Sessions Court acquitted him,

Held, that as, under S. 412, Cr. P. Code, no appeal lay from the conviction, and the order of acquittal made by the Court of Session was made without jurisdiction and must be set aside. AIR (Vol 15) 1928 Rang 49: 5 Rang 710: 106 Ind Cas 707: 29 Cr LJ 115.

**——S. 439 — Revision will not lie unless there is an error of law on the face of the record.**

An acquittal under S. 247 stands on the same footing as an acquittal ordered in any other circumstances, as for instance under S. 258 and upon an application in revision an acquittal should very rarely be set aside. High Court will not interfere in revision when there is no error of law on the face of the record. AIR (Vol 14) 1927 Mad 473: 52 MLJ 173: 100 Ind Cas 238: 7 AI Cr R 414: 28 Cr LJ 270 : 1927 MWN 274 : 38 MLT 203.

——S. 439 — High Court will interfere where referring Court does not want to change acquittal into conviction but to point out erroneous view of law taken by lower Court — Accused acquitted under I. P. C., S. 147 by order under Cr. P. Code, S. 345 — High Court should interfere. AIR (Vol 12) 1925 Lah 464: 86 Ind Cas 62: 26 Cr LJ 686: 26 PLR 35.

**——S. 439 — Acquittal can be revised, but only in exceptional cases — Grave error of procedure justifies revision but improper admission of evidence not essential to the result, does not.**

The final report in the diary of an investigating officer not called as a witness for the prosecution might be used to suggest means of further elucidating a point which needs clearing up, but only for elucidating by legal evidence. But using the final report for the purpose of evidence is a legal error. Such error cannot, however, justify interference by the High Court, for setting aside an acquittal. An error of procedure of a grave character would justify interference by the High Court but not a mere error of improper admission of evidence which was not essential to a result which might have been come to independently of it. AIR (Vol 12) 1925 Pat 165: 82 Ind Cas 274: 25 Cr LJ 1266.

——S. 439 — The High Court clearly has power on the revision side, to set aside even an order of acquittal and may well do so when the order is based on a misapprehension of law. AIR (Vol 11) 1924 Lah 286: 69 Ind Cas 379.

**——S. 439 — Acquittal under S. 247, Cr. P. Code.**

High Court will not ordinarily interfere in revision in the case of an acquittal, since the Local Government can appeal, but this rule does not properly apply to an acquittal under S. 247, Cr. P. Code, and in any case the rule will not prevent interference by this Court when the acquittal is the result of an improper clutching at jurisdiction. AIR (Vol 11) 1924 Oudh 64: 26 OC 282: 81 Ind Cas 314: 25 Cr LJ 794.

**——S. 439 — Acquittal — Revision against — Chief Court.**

A revision to the Chief Court against an order of acquittal may be allowed when legal points alone are involved. AIR (Vol 5) 1918 Lah 188: 8 PR Cr 1918: 17 PWR Cr 1918: 19 Cr LJ 399: 44 Ind Cas 751.

**——S. 439 — Acquittal — Setting aside by High Court in revision.**

Though the High Court does not generally interfere in revision with acquittals, yet, when a Magistrate has without exercise of discretion acquitted on an erroneous view of the law in a case involving public tranquillity, there is good reason for the High Court to set aside such an acquittal. AIR (V 3) 1916 Pat 152 : 20 CWN 862 : 1 PLJ 264 : 18 Cr LJ 151 : 2 PLW 409 : 37 Ind Cas 519 (DB).

**——Ss. 439 and 258 — Acquittal — Procedure defective.**

The trying Magistrate in his judgment by which he acquitted the accused while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution. On the application of the complainant the High Court set aside the order of acquittal on the merits and directed a retrial by another Magistrate. AIR (Vol 2) 1915 Cal 235: 18 CWN 1244: 15 Cr LJ 722: 26 Ind Cas 170 (DB).

**——S. 439 — Acquittal — Re-trial — Cheating — Penal Code, S. 415 — Error of law.**

Where the facts admitted and proved constituted the offence of cheating, but the Magistrate illegally

acquitted the accused, the High Court should interfere in revision under S. 439, Cr. P. Code and direct his retrial. AIR (Vol 2) 1915 Lah 381: 18 PWR Cr (1915): 16 Cr LJ 657: 30 Ind Cas 641.

**——S. 439 — Acquittal — Revision against.**

The High Court can in revision reverse an order of acquittal and direct that further inquiry be made or the accused be retried or committed for trial. (27 C. 320 F.). But this procedure ought to be followed sparingly and generally only when there is an error of law patent on the face of the judgment. (1912) 6 SLR 120: 13 Cr LJ 771: 17 Ind Cas 403 (DB).

**——S. 439 (4) (5) — Acquittal — Interference — When proper.**

The High Court in its revisional powers will interfere only in exceptional cases when all other remedies are exhausted and in cases of revision against acquittals the High Court will not order retrial unless it is shown that the trial has been so illegal or so radically or incurably irregular as to occasion a failure of justice. (1909) 5 NLR 4: 9 Cr LJ 211: 1 Ind Cas 238.

**——S. 439 — Revision against acquittal.**

Although the High Court does not ordinarily interfere with orders of acquittal in revision, yet it cannot be expected that it would hesitate to do so when the acquittal is based not upon an appreciation of doubtful evidence, but upon a manifest error in law appearing on the face of the judgment. (1907) 9 Bom LR 156 (158): 5 Cri LJ 171 (DB).

**(e) When no appeal by Government.**

**——S. 439 — Acquittal — Interference with in revision by private party — Principles governing — No appeal by Government.**

The fact that the charge to the jury was in certain respects defective is by itself no ground for interference in revision against any order of acquittal and a direction for retrial. Where the verdict of the jury has been a unanimous one of not guilty and where the Government has not cared to prefer an appeal, the High Court would be slow to interfere with the verdict in revision. AIR (Vol 34) 1947 Oudh 35: 21 Luck 559: 225 Ind Cas 439: 47 Cr LJ 725: 1946 AWR (CC) 169: 1946 OWN 319: 1946 OA (CC) 169: 1946 A Cr C 129.

**——S. 439 — Local Government not appealing — Interference, if proper.**

Where it is open to the Local Government on being moved to appeal against acquittal but no appeal has been preferred, it is not the practice of the High Court to interfere in revision except in very unusual cases.

(Held, no interference was called for). AIR (Vol 24) 1937 Lah 132: 17 Lah 604: 38 PLR 1015: 38 Cr LJ 432(1): 167 Ind Cas 559.

——S. 439 — The Local Government has the right under S. 417 of Criminal P. C. to prefer appeals from acquittals. The High Court will not, therefore, interfere with the order of acquittal in revision even if the trial Court has come to a wrong conclusion, where the sole question in the case is one of appreciation of evidence. (1934) 35 PLR 730.

——S. 439 — Right of appeal against an acquittal vests in Local Government and the High Court will not interfere in revision. 1933 MWN 878.

——S. 439 — Ordinarily the High Court does not entertain application in revision from orders of acquittal when the Crown has preferred no appeal, but that it has jurisdiction in such cases cannot be doubted, and the High Court will interfere where there is some glaring defect either in the procedure or in the view of the evidence taken by the lower Court. The parties are entitled to ask for the exercise of such jurisdiction where the lower Court has fallen into an apparent error of law and has, in consequence, failed to exercise a jurisdiction vested in it by law. AIR (V 18) 1931 Oudh 273 : 8 OWN 341 : 32 Cr LJ 328 : 132 Ind Cas 50 (DB).

**——S. 439 — Section 439 need not be read subject to S. 417.**

Section 439 need not be read subject to S. 417 and reference can be entertained when the Local Government has been moved to prefer an appeal or having been moved has declined to prefer such appeal. AIR (Vol 17) 1930 Lah 159: 123 Ind Cas 841: 31 Cr LJ 584: 1930 Cr C 167: 12 LLJ 5.

——S. 439 — Order of a Magistrate allowing a complainant to withdraw a case under S. 161, amounts to an acquittal and can be appealed against by the Local Government. It cannot therefore be interfered with in revision. AIR (Vol 15) 1928 Lah 843: 29 Cr LJ 672: 110 Ind Cas 224.

——S. 439 — The High Court no doubt has jurisdiction under S. 439 to entertain an application in revision of an order of acquittal when the Crown has preferred no appeal. But the Court would not move in such a case unless there was glaring defect either in the procedure or in the view of the evidence taken by the Court below. AIR (V 14) 1927 Oudh 345: 4 OWN 729: 104 Ind Cas 228: 28 Cr LJ 788 (DB).

——S. 439 — Where no appeal is made, Court ordinarily does not set aside acquittal. AIR (Vol 11) 1924 Rang 98: 76 Ind Cas 830: 1 Rang 604: 2 Bur LJ 224: 25 Cr LJ 270.

——S. 439 — Per Macleod, C. J.—If in a case tried by a Sessions Judge sitting with assessors, the Government do not exercise their right of asking the High Court to admit an appeal from the order of acquittal, the High Court would not be justified in interfering in revision at the instance of the complainant. 9 Bom LR 156, Dist.

Per Crump, J.—It would be only in the most exceptional cases that the High Court would be justified in interfering under S. 439 when there is no appeal by the Local Government under S. 417. AIR (Vol 10) 1923 Bom 455: 73 Ind Cas 974: 25 Bom LR 488: 24 Cr LJ 734.

——S. 439 — Appeal not preferred by Government — Unless there is error of law or procedure on the face High Court will not interfere in revision. AIR (Vol 9) 1922 Sind 22: 66 Ind Cas 999: 15 SLR 171: 23 Cr LJ 343 (DB).

——S. 439 — Courts of revision as a matter of practice refuse to entertain applications directed against an order of acquittal, the ground being that there is a special provision of the law by which the Local Government may appeal against an acquittal order. However, the law gives the power to Courts of revision to interfere even with an order of this kind, and although interference is not usual, it may be resorted to in certain exceptional circumstances.

AIR (Vol 8) 1921 Oudh 121: 63 Ind Cas 334: 24 OC 157: 8 OLJ 646: 22 Cr LJ 638.

——S. 439 — Acquittal, revision against — Delay.

Where the Government did not appeal against an acquittal, the High Court will not interfere with an acquittal in revision at the instance of the complainant especially where there is long delay. AIR (Vol 5) 1918 All 233: 16 ALJ 373: 19 Cr LJ 607: 45 Ind Cas 511.

——Ss. 439 and 417 — Acquittal — Revision against — Interference.

The High Court is reluctant to take up in revision cases of acquittal in which there has been public prosecution and which have not been brought before it on appeal by the local Government. AIR (Vol 5) 1918 All 174: 40 All 84: 15 ALJ 897: 19 Cr LJ 145: 43 Ind Cas 433.

——S. 439 — Acquittal — Revision.

Even though the Local Government has not appealed from an order of acquittal which was based on a mistaken view of law, the High Court can interfere in revision and such interference is not only justified but demanded. (1909) 6 ALJ 758: 10 Cr LJ 417: 3 Ind Cas 908.

**(f) When civil remedy available.**

——S. 439 — The High Court shall always be reluctant to interfere with an order of acquittal specially when the real dispute between the parties can be properly decided in a civil action. AIR (V 27) 1940 Cal 531: 42 Cr LJ 100: ILR (1940) 1 Cal 585: 44 CWN 648: 191 Ind Cas 184.

——S. 439 — Interference, principles of.

It is a general rule that judgments of acquittal should not ordinarily be interfered with in revision and the rule applies with greater force to cases where the offence is one like defamation in respect of which there is a civil remedy available. Nevertheless if the interests of justice require it, the High Court will declare the judgment of acquittal to be wrong though it may not set it aside. 1937 MWN 19.

——S. 439 — Powers of High Court.

The High Court has power to interfere with orders of acquittal but it will interfere only where exercise of the jurisdiction is urgently demanded in the interest of public justice. An order of acquittal was allowed to stand, where the dispute was essentially one of civil nature, both accused and complainant claiming ownership of the property in respect of which the crime was alleged to have been committed. AIR (Vol 12) 1925 Mad 375: 83 Ind Cas 349 : 25 Cr LJ 1389.

——S. 439 — Cheating — High Court will not interfere with order of acquittal.

A sold a land to B without disclosing a prior incumbrance. The sale deed contained a clause that the property was unencumbered. Subsequently the incumbrancer sued on his mortgage and got a decree under which B has to pay the mortgage money with interest to save the property from sale. B filed a complaint against A under Penal Code, S. 417 but A was acquitted,

Held, that the question is not of any public interest and the parties had a remedy in Civil Courts and therefore no interference with the order of acquittal is necessary. AIR (Vol 10) 1923 Lah 601: 84 Ind Cas 641: 6 LLJ 50: 26 Cr LJ 337.

**(g) Private person.**

**——S. 439 — Acquittal — Revision against — Application by private complainant — Interference— Powers of High Court.**

The High Court is competent to entertain an application for revision against an order of acquittal at the instance of a private complainant but this is subject to the limitation imposed by S. 439 (4), Cr. P. Code. The High Court will not set aside an order of acquittal unless there are exceptional circumstances that would justify a second trial. AIR (Vol 35) 1948 Nag 276: 49 Cr LJ 394: 1947 NLJ 459: ILR (1947) Nag 844.

**——S. 439 — Revision against acquittal by private person, when can be entertained.**

A revision at the instance of a private person against an order of acquittal is an extraordinary remedy. Even if the judgment of the lower Court be wrong, the High Court will not, on an application in revision against an acquittal, treat the case before it as a case for appeal and it will not interfere unless there are exceptional matters compelling it to do so, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering evidence, where he has entirely left evidence out of consideration or has relied upon evidence which is not to be found on the record. AIR (Vol 29) 1942 Oudh 130: 1941 OWN 1290: 43 Cr LJ 280: 1941 AWR (CC) 397: 197 Ind Cas 839.

**——S. 439 — Interference at instance of private party.**

High Court declines to interfere in revision with orders of acquittal except where interference is urgently demanded in the interest of public justice at the instance of private person. Defamation cases, however, may perhaps form an exception to this general rule. The reason is that in cases of defamation, which, from their very nature, affect private parties and not the Public, Government would usually be unwilling to interfere. In such revisions, the Government Pleader has, strictly speaking, no locus standi to appeal in view of S. 439 (5), Criminal P. C. AIR (Vol 28) 1941 Bom 410: 43 Bom LR 737: 43 Cr LJ 174: 197 Ind Cas 502 (DB).

**——S. 439 — Revision against acquittal by private person.**

In all cases of application by private person for setting aside an appellate order of acquittal the power is one to be exercised only in exceptional cases and with caution, but where there are signs of a possible failure of justice and where the Sessions Judge has not exercised a proper judicial mind and has come to a decision without a proper review of the evidence, the order of acquittal must be set aside and a re-hearing of the appeal ordered. AIR (Vol 28) 1941 Oudh 182: 1941 AWR (CC) 9: 1940 OWN 1257: 42 Cr LJ 190: 191 Ind Cas 538 (DB).

**——S. 439 — Revision by private prosecutor.**

The High Court is not precluded from interfering with an order of acquittal at the instance of a private prosecutor. The High Court can interfere if circumstances justify it.

The accused were acquitted of a charge of breach of a bye-law framed by the Municipality as the Honorary Magistrates who tried the case were doubtful whether the bye-law was ultra vires or not, & they gave the accused the benefit of the doubt. They also erroneously considered the question of intention to break the bye-laws. The main object of the Municipality in applying for revision was that the doubt cast on the validity of their bye-laws should be dispelled. The District Magistrate having been moved to ask the Local Government to appeal refused to do so as the case was not likely to reach the Local Government within a month and a half from the date of the order of acquittal and advised the Committee to apply suo motu. In revision, the High Court had not to

go into the evidence and had only to find whether the bye-laws were valid:

Held, that the High Court would interfere with the order of acquittal. AIR (Vol 23) 1936 Nag 40: 31 NLR 261: 36 Cr LJ 1336: 157 Ind Cas 781.

**——S. 439 — Interference — Principles — Private complainant — Erroneous view of law.**

Under S. 439, Criminal P. C. the High Court may set aside an acquittal but this power should not be exercised on the ground that the evidence found to be insufficient by the trial Court justifies a conviction. The High Court may, however, set aside a finding of acquittal if that finding is based on an erroneous view of the law and if the findings of fact would justify a conviction if a correct view of the law is taken, that should not prevent interference by High Court. AIR (Vol 20) 1933 Nag 36: 28 NLR 298: 34 Cr LJ 145: 141 Ind Cas 273.

**——S. 439 — Revision application by private person.**

The High Court will not, except perhaps in very special circumstances, interfere on an application for revision by a private person with an order of acquittal. When the Magistrates had the evidence before them and without any appearance of perversity, they considered the evidence and came to the conclusion that it was untrue, the High Court will not interfere in revision.

There is no provision in the Criminal P. C. that there should be a list of witnesses along with a complaint.

In some cases, a Court might refuse to take proceedings on the ground that an application was unduly delayed, but this is a matter of discretion to be exercised in the circumstances of each case. AIR (Vol 20) 1933 Oudh 430: 10 OWN 1037: 35 Cr LJ 121: 146 Ind Cas 638.

**——S. 439 — No appeal by Government — Revision, competency of.**

It is open to the High Court to interfere with an order of acquittal in revision at the instance of a private complainant to the extent of setting aside the order of acquittal and directing re-trial. AIR (Vol 19) 1932 Oudh 31: 8 OWN 1333: 33 Cr LJ 280: 136 Ind Cas 249 (DB).

**——S. 439 — Private person.**

It is not open to a private person to have an acquittal set aside in revision. Even High Court should use the power sparingly. (1931) 8 OWN 1336.

**——S. 439 — Acquittal — Private party.**

A finding of acquittal cannot be changed into one of conviction except through medium of an appeal by the Local Government. A revision by the complainant for the purpose does not lie. AIR (Vol 16) 1929 Nag 128: 116 Ind Cas 79: 12 AI Cr R 353: 30 Cr LJ 552.

——S. 439 — The proper course for a complainant who is aggrieved by an order of acquittal by a magistrate is to move the District Magistrate to initiate an appeal by Government under S. 417. The High Court will not interfere, by way of revision, with the order although it involves irregularities of procedure. AIR (Vol 15) 1928 Sind 176: 114 Ind Cas 110: 30 Cr LJ 251: 12 AI Cr R 200 (DB).

——S. 439 — Although High Court has jurisdiction under S. 439 to set aside the order of acquittal, it has become a settled practice that it will not ordinarily interfere, in revision at the instance of a private prosecutor. AIR (Vol 14) 1927 Nag 170: 23 NLR 40: 102 Ind Cas 219: 28 Cr LJ 523.

——S. 439 — Applications by private parties to revise orders of acquittal ought to be discouraged unless interference is urgently demanded in the interest of public justice. Where the purpose of a revision application is simply to serve personal ends and not to secure administration of justice, it should not be entertained. AIR (V 13) 1926 Nag 115: 26 Cr LJ 1348: 23 NLR 99: 89 Ind Cas 388.

——S. 439 — Although the High Court has power to revise orders of acquittal, it is only in rare and most exceptional cases that acquittals are set aside in revision on the application of private persons. Where the Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view, and there was no legal point or question of jurisdiction involved,

Held, that there was no ground for interference. AIR (Vol 12) 1925 Rang 193: 85 Ind Cas 255: 3 Bur LJ 323: 26 Cr LJ 511.

——S. 439 — Ordinarily the High Court will not proceed in revision of an acquittal at the instance of a private party. But where it is satisfied that a question of public importance relating to the personal status of a substantial part of a community is raised, it will interfere. AIR (V 10) 1923 Mad 171: 43 MLJ 663: 71 Ind Cas 65: 45 Mad 986: 16 MLW 626: 1922 MWN 662: 24 Cr LJ 17 (DB).

**——S. 439 — High Court — Jurisdiction of.**

High Court has jurisdiction to interfere in revision with an acquittal but it should ordinarily exercise the jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. This view does not leave an aggrieved complainant without remedy; it would always be open to him to move the Government to appeal under section 417. Where there is an appeal by the Public Prosecutor or the Crown from an acquittal, the Court sets its face against revision; but where a private prosecutor having no power of appeal comes to the Court in revision, it is certainly open to the Court to hear him. AIR (V 9) 1922 Mad 502 : 68 Ind Cas 615 : 45 Mad 913 : 16 MLW 413: 1922 MWN 579: 31 MLT 342: 43 MLJ 369: 23 Cr LJ 583 (FB).

**——S. 439 — Acquittal — Powers of interference.**

As a general rule, it is inexpedient to interfere in revision at the instance of a private person with an acquittal after trial by a competent tribunal. S. 439 of the Cr. P. Code undoubtedly confers power on the High Court to set aside an order of acquittal at the instance of a private prosecutor, especially in a case of defamation where the offence is of so essentially a personal character, that the Local Government would seldom be willing to appeal from an acquittal. AIR (Vol 6) 1919 Nag 64: 20 Cr LJ 708: 52 Ind Cas 788.

**——S. 439 — Acquittal — Revision against — Application by private person — High Court powers of.**

Per Teunon, J. (Contra, Huda, J.) No hard and fast rule can be laid down that applications to the High Cout by complainants for setting aside acquittals are to be discouraged. AIR (Vol 5) 1918 Cal 701: 18 Cr LJ 849: 41 Ind Cas 817 (DB).

**——S. 439 — Acquittal.**

A High Court will interfere in revision with an acquittal very sparingly and only where it is urgently demanded in the interests of justice. By a long established practice the Bombay High Court does not entertain revisional applications, against orders of acquittal by private petitioners, except in some exceptional cases where public justice demands it. 42 C 612, Foll. AIR (V 4) 1917 Bom 226 : 41 Bom 560 : 19 Bom LR 354 : 18 Cr LJ 668 : 40 Ind Cas 316 (DB).

**——S. 439 — Acquittal — Retrial — When to be ordered — Application by private prosecution.**

An order directing the retrial of an accused person is prima facie inappropriate when there has already been a full enquiry and no further evidence is likely to be forthcoming. Applications by private persons to set aside orders of acquittal should be entertained only when the interests of public justice demand it. AIR (Vol 4) 1917 UB 7: 3 UBR (1917) 19: 18 Cr LJ 970: 42 Ind Cas 330.

——S. 439 — Acquittal.

High Court would revise an acquittal order, even at the instance of a private person, but only when the order is seriously unjust. AIR (Vol 3) 1916 Mad 1048: 2 LW 1244: 17 Cr LJ 1: 32 Ind Cas 129.

——S. 439 — Acquittal — Revision against — Practice.

Per Jenkins, C. J., and Fletcher J. A High Court has jurisdisdiction to set aside in revision an order of acquittal at the instance of a private prosecutor, but it should ordinarily exercise this jurisdiction sparingly and only when it is urgently demanded in the interests of public justice.

Per Teunon J. A High Court has ample jurisdiction under S. 439 to interfere with an acquittal and remedy the wrong, if wrong has been done. 42 Cal 612: 19 CWN 184: 21 CLJ 53: 16 Cr LJ 122: 27 Ind Cas 186: AIR (Vol 2) 1915 Cal 388 (FB).

——S. 439 — **Acquittal.**

The High Court may interfere with order of acquittal even though moved by a private person. (1911) 38 Cal 786: 12 Cr LJ 609: 12 Ind Cas 985 (DB).

——S. 439 — **Revision against acquittal.**

Case where a High Court interfered in revision on the application of a private prosecutor with an order of acquittal passed on an erroneous view of the Law. (1910) 11 Cr LJ 213 (213): 11 CLJ 113: 5 Ind Cas 721 (DB).

### 3. Competency of revision.

See also Criminal P. C., S. 439.

(a) **General.**
(b) **When not.**
(c) **By party not appealing.**

#### (a) General.

——S. 439 — **Powers of High Court — Order under S. 494, consenting to withdrawal and acquitting accused — Interference — Grounds.**

An order of acquittal or discharge under S. 494 Cr.P. Code, consequent on the withdrawal of the Public Prosecutor from the prosecution of any person, with the consent of the Court is a judicial order and liable to revision by the High Court, if the discretion vested in the Magistrate to give consent has been improperly or arbitrarily exercised. Ordinarily the High Court is reluctant to interfere with the discretion of the trial Court, but has undoubted power to do so and will do so in special circumstances where the withdrawal appears to be manifestly improper. 28 Pat 49: AIR (Vol 36) 1949 Pat 262: 50 Cr LJ 528 (DB).

——Ss. 439 (5) and 423 (1) (b) — **Order on appeal setting aside conviction for want of proper cognizance of offence — Nature of — Revision by Crown — If lies.**

Where an appellate Court sets aside a conviction and sentence on the ground that the lower Court had not taken cognisance of the offence on a report of a public servant as required by R. 130 of the Defence of India Rules, and deliberately refrains from recording an order of acquittal, the order of the appellate Court is either an order of discharge such as is contemplated by S. 423 (1) (b), Cr. P. Code, or an order of a kind not contemplated by the Code at all. It is certainly not an order of acquittal, and a revision at the instance of the Crown is not therefore barred by the provisions of S. 439 (5), Cr. P. Code. ILR (1947) 1 Cal 409 (DB).

——Ss. 439 and 435 — Jurisdiction — "Offence" — Violation of Forest Rules framed under C. P. Land Revenue Code — Order of fine by Deputy Commissioner — Revision to High Court — Competency. See C. P. Code, S. 115. 13 Cut LT 14: AIR (Vol 34) 1947 Pat 381.

——S. 439 — **Order under Ss. 443 and 446 — Interference — Power of High Court.**

The High Court has power to interfere in revision with an order accepting claim under S. 443, Cr. P. Code, and an order of commitment under S. 446, Cr. P. Code. S. 215, Cr. P. Code, is a limiting rather than an empowering section, and there is nothing in it to take away the ordinary power of the High Court to interfere in revision. ILR (1946) Nag 627: 223 Ind Cas 119: 47 Cr LJ 364: AIR (Vol 33) 1946 Nag 225.

——S. 439 (5) — Bar of revision under — Exercise of power by Session Judge. See 47 Cr LJ 27: AIR (Vol 32) 1945 Oudh 20.

——S. 439 — **Revision admitted and records called for — Objection to its maintainability.**

Ordinarily, applicants in revision ought first to move those lower Courts which have the power to make a reference to the High Court, but once an application in revision has been admitted and the record called for, an objection on the ground of departure from the practice of not interfering in revision unless lower Courts of revision have first been moved should not thereafter be entertained. AIR (Vol 28) 1941 Pat 444: 7 BR 501: 42 Cr LJ 347: 22 PLT 273: 192 Ind Cas 893.

——S. 439 — **Judicial matter.**

Magistrate's action in taking cognizance and transferring the case to another Magistrate for trial is a judicial matter open to scrutiny by Courts of Revision under S. 439. AIR (Vol 28) 1941 Pat 395: 22 PLT 348: 7 BR 681: 42 Cr LJ 504: 194 Ind Cas 94.

——S. 439 — **Order under S. 13 (2), Sind Frontier Regulations (III of 1892).**

A Sessions Judge passed an order under S. 13 (2) Sind Frontier Regulations, staying proceedings so that the case might be referred to Council of Elders. It was subsequently found that the case could not be so referred as the offence committed was not one under S. 8 of the Regulations:

Held, that the order could be set aside in revision under S. 439, Criminal P. C. AIR (Vol 28) 1941 Sind 97: ILR (1942) Kar 246: 42 Cr LJ 645: 195 Ind Cas 14 (DB).

——S. 439 — **Order under S. 494—Aggrieved party.**

An order by Magistrate under S. 494 can be set aside in revision even where the revision application is made by a witness in the case, who is the aggrieved person. AIR (Vol 27) 1940 Sind 233: 42 Cr LJ 182: ILR (1941) Kar 32: 191 Ind Cas 440 (DB).

——S. 439 — **Other remedy is available.**

Where the applicants have a separate remedy, the High Court should not interfere in revision. AIR (Vol 21) 1934 Sind 78 (1): 35 Cr LJ 1251: 151 Ind Cas 60 (1) (DB).

——S. 439 — **Accused not preferring appeal — Application for revision by Bar Association.**

The powers of revision given to the High Court under S. 439, Criminal P. C., are wide enough to empower it to entertain a petition for revision at the instance of a third party, e. g., the Secretary of the Bar Association even though the accused person has not preferred an appeal. The restriction mentioned in S. 439, Cl. 5 only stands in the way of interference at the instance of a party who

could have appealed but did not appeal. AIR (Vol 19) 1932 Lah 559: 33 Cr LJ 831: 33 PLR 911: 139 Ind Cas 696.

——**S. 439 (5) — Party aggrieved having right of appeal but not filing appeal — Revision by third party.**

Where a party aggrieved has a right of appeal which he has deliberately elected to leave unused, the High Court will, as a rule, be slow to interfere in revision either on its own motion or at the instance of any unauthorised third person. AIR (V 19) 1932 Sind 211 : 26 SLR 345 : 34 Cr LJ 67 : 140 Ind Cas 697 (DB).

——**S. 439 — Application by third party.**

The High Court has jurisdiction to entertain applications in revision where no right of appeal has been exercised, where the application is made by a third party; but entertaining such an application is somewhat in breach of the spirit of S. 439 (5), and third parties ought not to apply in revision unless there is a very strong case. AIR (Vol 18) 1931 Bom 140: 32 Cr LJ 471: 33 Bom LR 56: 55 Bom 353: 130 Ind Cas 25.

——**S. 439 — Application for revision by third party against accused's wishes.**

Ordinarily, where a person being a friend and as such interested in the liberty of another sentenced to imprisonment applies in revision, the Court will not interfere, where it appears that the prisoner is of age, educated and sane, unless the Court is satisfied that there has been a miscarriage of justice. Even where there has been a miscarriage of justice, the Court, in the interest of the prisoner himself, where he himself prefers to abide by the decision already given, must be careful to avoid taking any action which may place him in other and perhaps greater jeopardy while seeking to remove the stigma of illegality from the administration of the law. On the other hand, the Court cannot allow any such alleged miscarriage to be used to gratify a desire for self-advertisement of pretended martyrdom at the expense of the Court's reputation for impartiality and justice. AIR (Vol 18) 1931 Cal 410: 35 CWN 716: 32 Cr LJ 844: 58 Cal 1303: 132 Ind Cas 174 (DB).

——S. 439 — Order to submit a charge-sheet is judicial order. 111 Ind Cas 862: 7 Pat 561: 10 PLT 14: 29 Cr LJ 942: 11 AI Cr R 209: AIR (Vol 15) 1928 Pat 585.

——S. 439 — Revision is excluded by competency of appeal — High Court cannot interfere suo motu. 82 Ind Cas 754: 18 SLR 262: 25 Cr LJ 1362: AIR (Vol 12) 1925 Sind 206 (DB).

——**S. 439 — Order under S. 197 — No revision lies therefrom.**

The granting of sanction under S. 197, Cr. P. Code, is clearly not a judicial but an executive act, and it is difficult to see how it can assume a different character because sanction is granted by a Court, or merely because the Court regards it as such. Under the revisional powers conferred by the Cr. P. Code, the High Court has no authority to interfere with an order made by a Subordinate Court granting or refusing sanction under S. 197. 65 Ind Cas 545 : 23 Cr LJ 113 : 4 PWR 1922 : 35 PLR 1922: 2 Lah 305: 112 PLR 1921: AIR (Vol 9) 1922 Lah 146.

——**S. 439 — Proceedings, meaning of — Inferior Criminal Court — Magistrate acting under Bom. Dt. Munl. Act, S. 161 (2).**

A Magistrate acting under S. 161 (2) of the Bom. Dt. Munl. Act is an inferior Criminal Court and his orders are liable to revision by the High Court. 43 Bom 864: 21 Bom LR 755: 20 Cr LJ 702: 52 Ind Cas 670: AIR (Vol 6) 1919 Bom 93 (DB).

——**S. 439 — Proceedings under S. 110 — Semble.**

An application for revision made to a High Court in respect of orders to give security to keep the peace should not be rejected solely on the ground that the applicant did not first make the application to the District Magistrate. 15 ALJ 469: 39 All 466: 18 Cr LJ 630: 39 Ind Cas 998: AIR (Vol 4) 1917 All 428 (DB).

——**S. 439 — Revision — Criminal cases — Revision of judgment of single judge — Chief Court.**

Held, that no application for revision lies against the judgment of a single judge of the chief court exercising original criminal jurisdiction. 4 PR 1909 Cr : 9 Cr LJ 378: 10 PWR 1909 Cr: 1 Ind Cas 747: 1910 PLR 41 P 162 (165).

——**S. 439 — Revision — Practice — Discretion of court as to entertainment of application in revision.**

Held, that it is not the practice of the High Court to entertain an application for revision on the criminal side, where there exists a lower court having concurrent revisional jurisdiction, unless a similar application has first been made to the lower court and has been rejected. 1908 AWN 25: 30 A 116 (116, 117): 3 MLT 124: 7 Cr LJ 48.

——**S. 439 — Criminal case — Powers of High Court in — Order not sealed — Appeal rejected and opinion expressed — No ground for revision — Subsequent application for revision.**

An application from jail worded as an appeal against an order passed under Ss. 110, 118, Cr. P. C., was summarily rejected by means of the following order:— "No appeal lies in this case, and no sufficient ground appears for interference in revision. The application is dismissed". — This order was signed by the judge who passed it, but was not sealed with the seal of the court.

Held, that the judge who had passed the order quoted above was not under the circumstances precluded from entertaining an application for revision presented by counsel in relation to the same matter. (1904) AWN 195: 1 ALJ 495: 27 A 92 (94): 1 Cr LJ 710.

——**Ss. 439, 523 — Order under S. 523 — Revision.**

Orders under S. 523 are revisiable by the High Court. (1902) 4 Bom LR 12 (14) (DB).

**(b) When not.**

——**S. 439 — Refusal to entertain revision — Illegality — Refusal to treat as appeal — Discretion.**

A Sessions Judge cannot be said to have acted illegally if he refuses to entertain a revision petition on the ground that it is barred by S. 439 (5); whether he can or cannot treat it as an appeal, he has discretion to refuse to do so. AIR (Vol 32) 1945 Oudh 20 : 1944 OWN 299 : 1944 AWR (CC) 207 : 220 Ind Cas 490 : 47 Cr LJ 27.

——**S. 439 — Revision cannot be entertained until order of lower Court is complied with.**

Where an accused does not surrender to his bail bonds in contravention of the order of the lower Court to do so and remains at large, he is in contempt of Court and under S. 439, Criminal P. C., as long as the accused does not enter appearance in obedience to the order of the lower Court, the High Court will not be justified in exercising its discretionary powers in favour of the accused. Further, until the order of the lower Court is complied with, the Counsel representing him will not have a right of audience. AIR (Vol 26) 1939 All 5 : ILR (1938) All 991 : 1938 ALJ 1022 : 1938 AWR 690 : 40 Cr LJ 153 : 178 Ind Cas 1000.

—— S. 439 — **Unappealable sentence.**

It is the nature of the sentence which does or does not give a right of appeal and it is hardly open to the accused persons to say that they should have been given a higher sentence so that they might have a right of appeal.

The accused persons had gone to the house of one S and had tried to take away by force his wife. The only witness who said that any of the accused persons committed house trespass by entering her hut was the woman herself. The Magistrate contented himself with framing a charge of an offence of rioting under S. 147, Penal Code, and not under S. 452. He sentenced the accused to a fine of Rs. 30 only.

Held, that the Magistrate did not act in such a way that the High Court should interfere in unappealable sentence. The accused were treated with leniency and therefore, the High Court should not interfere in its extraordinary jurisdiction in revision. AIR (Vol 23) 1936 All 147 : 1936 AWR 129 : 1936 ALJ 209 : 37 Cr LJ 417 : 161 Ind Cas 307.

——**S. 439 — Accused charged under Ss. 323 and 427, Penal Code — Magistrate's order ambiguous in mentioning whether accused were guilty of both offences or only of one — Sessions Judge interpreting that order as finding guilty under one — Interference in revision.**

The accused were all charged under two sections of the Penal Code, Ss. 323 and 427. But the Magistrate, in passing his final order, said: "The charge is brought home to the accused.... .....I fine each of them Rs. 50." The applicants appealed to the Sessions Judge. The Sessions Judge's interpretation of the order was that the Magistrate intended to convict under S. 323 and to acquit under S. 427 as they had been fined only Rs. 50 and as such, he held that no right of appeal lay:

Held, that in the absence of any indication that the Magistrate intended to pass two sentences or one sentence consisting of two punishments, it could not be held that the Sessions Judge was clearly wrong in holding that the applicants had no right of appeal and that there was no need to interfere in revision. AIR (Vol 22) 1935 All 630 : 36 Cr LJ 1102 (2) : 1935 AWR 931 : 1935 ALJ 952 : 157 Ind Cas 923.

——S. 439 — Application to cross-examine filed at late stage disallowed — Discretion, held properly exercised — Point not taken by accused as a ground of appeal before Sessions Judge—High Court cannot interfere in revision. AIR (Vol 20) 1933 Pat 598 : 35 Cr LJ 95 : 146 Ind Cas 580 (DB).

——**S 439 — Order of Magistrate under Railways Act, S. 113 (4).**

Order of a Magistrate under S. 113 (4), Railways Act is merely an administrative or a ministerial order and the proceedings before him are not criminal proceedings in a criminal Court within the scope of the Criminal Procedure Code and is not subject to revision under S. 439. AIR (Vol 17) 1930 Sind 162 : 24 SLR 389 : 126 Ind Cas 58 : 31 Cr LJ 952 : 1930 Cr C 646 (DB).

——S. 439 — Complainant ordered to pay compensation exceeding Rs. 50 under S. 250, has right of appeal and so no revision lies. AIR (Vol 16) 1929 Sind 176 : 1929 Cr C 452 : 118 Ind Cas 215 : 30 Cr LJ 905 (DB).

——S. 439 — Party, who was in contempt of Court, was not heard in revision. AIR (Vol 15) 1928 Cal 241 (DB).

——S. 439 — A person aggrieved by an adverse order of a Magistrate failed to appeal against it, though an appeal lay. No revision will be allowed. AIR (Vol 15) 1928 Mad 1174 : 1928 MWN 777 : 28 MLW 785 : 30 Cr LJ 133 : 12 AI Cr R 62 : 1 M Cr C 282 : 113 Ind Cas 325 : 55 MLJ 676.

——**S. 439 — Second revision.**

Fresh application for revision on the same grounds is not maintainable. AIR (Vol 14) 1927 All 724 : 25 ALJ 1010 : 8 AI Cr R 337 : 8 LRA Cr 135.

——S. 439 — Sessions Judge summarily dismissing revision application — Revision does not lie. AIR (Vol 13) 1926 Oudh 63 : 26 Cr LJ 1452 : 89 Ind Cas 972.

——**S. 439 — Limitation.**

The only limitation to the exercise of the right to apply for revision is that, under sub-S. (4) to S. 435 applications for revision cannot be made both to the Sessions Judge and to the District Magistrate. Also a petitioner would in practice be required to state all his grounds for revision in a single petition. With these exceptions there is nothing in the Code to make the disposal of one criminal revision case a bar to the disposal of another arising out of the same original trial. It is only when there has been an actual adjudication upon a particular point, such as the jurisdiction of the lower Court to try the accused or the adequacy of the sentence, that the High Court will not review its own decision. Hence, where an accused's revision petition from his conviction has been dismissed, the complainant can apply for enhancing sentence.

Per Wallace, J. — No Court can reasonably accept the principle that once it has passed any sort of order in criminal revision, it is precluded from entertaining any further revision petition or reference in the same case, or even from proceeding suo motu. When a Court has refused to allow as adequate certain reasons put forward by a party for interference in revision, it cannot be said to have thereby endorsed the correctness, legality and propriety of the finding, sentence or order under revision beyond all further possibility of question. The Court would no doubt refuse to listen to a fresh revision petition put in by a party who had already put in a revision petition and obtained orders thereon, on the salutary principle that a party must put forward all his grounds of attack at once. AIR (Vol 12) 1925 Mad 993 : 85 Ind Cas 727 : 26 Cr LJ 583 (DB).

——**S. 439 — No revision as regards question of a place being a public place.**

The High Court will not interfere in revision except in very rare cases of an extreme nature. When the question involved is as to whether a place is or is not a public place, such question is a question of fact for decision on evidence in each particular case. AIR (Vol 12) 1925 Nag 123 : 81 Ind Cas 897 : 25 Cr LJ 1073.

——**S. 439 — District Magistrate applying for revision against Sessions Judge is undesirable but useful.**

Though to allow the District Magistrate who is a sub-ordinate of the Sessions Judge to get his superior's order modified in revision, is not advisable yet if the District Magistrate is wholly precluded from bringing cases to the notice of the High Court, many evils may ensue due to judicial idiosyncrasies going unchecked. AIR (Vol 12) 1925 Sind 188 : 83 Ind Cas 881 : 17 SLR 268 : 26 Cr LJ 177 (DB).

——S. 439 — Reference by District Magistrate against the order of Sessions Judge is not allowed — Public Prosecutor should be moved. AIR (Vol 11) 1924 Lah 420 : 73 Ind Cas 269 : 24 Cr LJ 573.

**——S. 439 — Person breaking bail would not be heard.**

A person who applies to the High Court and is allowed out on bail and afterwards breaks his bail, is not entitled to have his application in revision heard. AIR (Vol 10) 1923 All 327 : 71 Ind Cas 704 : 24 Cr LJ 240 : 4 LRA Cr 72.

——S. 439 — It would be improper to proceed with the revision petition when the accused's contention can properly be put forward elsewhere. AIR (Vol 10) 1923 Mad 484 : 17 MLW 357 : 44 MLJ 366.

**——S. 439 — Reference by Sessions Judge not entertained — Right of revision by accused is not taken away thereby.**

It would amount to a denial of justice to accept the argument that a reference by a Sessions Judge which the High Court may or may not see fit in its discretion to entertain, resulted in depriving a convicted person of the right to apply to the High Court in revision. It by no means follows from this view that any accused person has the right to come in revision more than once. The mere fact that he had failed on his first application to raise the point which he relied upon in his second, would give a discretionary power not to entertain the second application at all. AIR (Vol 9) 1922 All 502 : 68 Ind Cas 32 : 45 All 11 : 20 ALJ 775 : 23 Cr LJ 496 (DB).

**——S. 439 — Dismissal for default — Another petition, if can be entertained.**

Once a Criminal revision petition is dismissed on the merits or for default, the rules of justice equity, and good conscience require that no other petition on the same matter should lie. AIR (Vol 3) 1916 Mad 516 : (1915) MWN 786 : 16 Cr LJ 697 : 30 Ind Cas 745.

**———S. 439 — Proceedings, meaning of.**

No application for revision lies in the Punjab Chief Court from the judgment of a Single Judge exercising original Criminal jurisdiction. (1909) 4 PR 1909 Cr : 10 PWR 1909 Cr : 41 PLR 1909 : 9 Cr LJ 378 : 1 Ind Cas 747 (DB).

**(c) By a party not appealing.**

**——S. 439 — Revision on behalf of party.**

Applications in revision made on behalf of a party who has not appealed can be entertained. AIR (Vol 30) 1943 Bom 304 : 45 Bom LR 581 : 44 Cr LJ 786 : 208 Ind Cas 455 (DB).

——S. 439 — Accused having a right of appeal, instead of filing it, filing a revision and obtaining a rule — The revision is barred under S. 439 (5). ILR (1941) 1 Cal 417 (DB).

**——S. 439 — Duty of High Court — Application under S. 439, made against conviction by Bar Association, if maintainable.**

It is the duty of the High Court to see in any case which may be brought to its notice, that the conviction is in accordance with law, and the sentence not excessive. Hence even where the convict does not contest his conviction, an application under S. 439, Criminal P. C., against that conviction on behalf of the Bar Association can be maintained by the High Court. AIR (Vol 28) 1941 Lah 324 : 43 PLR 378 : 42 Cr LJ 890 : 196 Ind Cas 485.

**——S. 439 — Accused not preferring appeal — Application for revision by third party.**

The High Court has power to interfere in revision under S. 439, Criminal P. C., with the order of conviction even though the accused has not preferred an appeal and the application for revision is made by a third party, e.g., AIR (Vol 19) 1932 Lah 364 : 33 Cr LJ 339 : 33 PLR 384 : 136 Ind Cas 717.

**——S. 439 (5) — Applicability — Conviction of lawyers — Revision preferred by president of Bar Association — Sustainability.**

Where two members of the Bar Association were convicted under S. 117, Penal Code, read with S. 9, Salt Act, by the First Class Magistrate, and the Bar Association authorized the President to file a revision application to the High Court invoking its powers under S. 439 on the ground that the conviction was illegal.

Held, that the proceedings by way of revision before the High Court were not intended by a party who could have appealed but had not appealed and therefore Cl. 5 was inapplicable AIR (Vol 17) 1930 Oudh 497 : 1930 Cr C 1161 (DB).

——S. 439 — Execution of order directing maintenance to be charged on joint estate which was not appealed against cannot be revised. AIR (Vol 13) 1926 Bom 103 : 49 Bom 906 : 27 Bom LR 1363 : 27 Cr LJ 625 : 94 Ind Cas 604 (DB).

——S. 439 — Where the accused has a right to appeal but he does not, an application for revision cannot be entertained. AIR (Vol 7) 1920 Sind 75 : 60 Ind Cas 1001 : 14 SLR 173 : 22 Cr LJ 313 (DB).

**4. Compounding offences.**

See also Criminal P. C., S. 345.

**——S. 439 — Refusal to compound — Revision.**

The High Court will not interfere with the order of refusing to allow the offence under S. 324, I. P. C. to be compounded unless it thinks that the permission has been improperly withheld. 1933 MWN 245.

——S. 439 — High Court has got power under S. 439 to grant the permission necessary for compounding offences under S. 345 (2). AIR (V 16) 1929 Nag 278 : 118 Ind Cas 681 : 30 Cr LJ 960 : 1929 Cr C 454.

——S. 439 — Magistrate wrongly refusing to compound under S. 345 (2) — High Court can interfere and allow composition. AIR (V 16) 1929 Pat 512 : 124 Ind Cas 95 : 11 PLT 492 : 31 Cr LJ 607 : 1929 Cr C 272.

**——S. 439 — Order of acquittal on compromise in non-compoundable offence — Revision lies.**

As a rule an interference is not made in revision with an order of acquittal on the application of a private party except where such interference is imperatively demanded in the interests of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial. Where there was a patent error or irregularity in the order passed by the trying Magistrate in that the offence of which the accused was charged and acquitted on a compromise being filed, was not compoundable.

Held, that the Magistrate could have passed an order of acquittal without considering the case on the merits and the High Court would interfere in revision. AIR (V 11) 1924 Oudh 171 : 71 Ind Cas 602 : 24 Cr LJ 186.

——S. 439 — Compromise after conviction — High Court in revision has no power to sanction composition. AIR (V 10) 1923 Pat 89 : 65 Ind Cas 432 : 23 Cr LJ 80 : 3 Pat LT 458.

——S. 439 — Powers of High Court — Composition in revision.

A boy was convicted under S. 323 along with his father and was sentenced to receive stripes. His father appealed but the case was compounded. The boy had no right of appeal and the S. J. refused to deal with the case in revision.

Held, Section 439 authorises the High Court to exercise any of the powers conferred on a Court of appeal and if a Court of appeal can allow the composition of an offence it follows that the High Court can allow the same in revision too. AIR (V 9) 1922 All 488 : 74 Ind Cas 1046 : 45 All 17 : 24 Cr LJ 854.

——S. 439. —Penal Code, S. 323 — Corporal punishment — Revision — High Court can allow composition of offence in revision. AIR (V 9) 1922 All 488 : 74 Ind Cas 1046 : 45 All 17 : 24 Cr LJ 854.

——S. 439 —S. 439, Cr P. Code empowers a Court of revision not to exercise all the powers an Appellate Court, as is sometimes loosely expressed but only such powers as are conferred on a Court of appeal by Ss. 195, 423, 426, 427 and 428 and power to sanction composition of an offence being conferred on a Court of appeal by S. 345 Cl. (5) alone, S. 439 which defines the powers of the Revisional Court does not confer on it the power to sanction the composition of offences and such a Court acting under S. 439 cannot grant leave to compound an offence under S. 345 when each composition has been entered into after the convicition of the accused. AIR (V 4) 1917 Cal 705 : 43 Cal 1143 : 20 CWN 1071 : 17 Cr LJ 339 : 35 Ind Cas 515 (DB).

——S. 439 — A High Court may in revision permit the compounding of an offence and allow a case to be compromised. AIR (V 1) 1914 Oudh 167 : 17 OC 92 : 15 Cr LJ 567 : 24 Ind Cas 975.

——S. 439 — A Sessions Judge while convicting the accused recorded that 'no application for permission to compound has been made nor has it been stated that the complainant is willing to compound'. An application for revision was thereafter made on the ground that the complainant was willing to compound but no opportunity was given for the purpose. An application was put in by the complainant at the same time stating that the dispute had been compromised and asking that the Court to allow the offence to be compounded. Held, that under S. 439 read with S. 423 the Court could pass any order that may be just and proper and the offence having been compounded the conviction should be set aside. (1910) 13 OC 161 : 11 Cr LJ 496 : 7 Ind Cas 539.

**——S. 439 — Power of court to give leave to compound.**

The power conferred on a court exercising its powers of revision are wide enough to allow to give leave to the parties to compound an offence. (1910) 11 Cr LJ 203 : 7 ALJ 103 : 5 Ind Cas 696 : 32 All 153 (DB).

## 5. Conviction

(a) General.
(b) Setting aside.

### (a) General.

**——S. 439 — Interference with conviction on facts.**

Obiter. — Where the grounds taken for saying that the Magistrate was wrong in convicting accused are all grounds of fact and not connected with any question of law, High Court cannot interfere in revision with conviction. AIR (Vol 27) 1940 Mad 111: 50 LW 614: 41 Cr LJ 403: 1939 MWN 1039: ILR (1939) Mad 1035: (1939) 2 MLJ 878: 187 Ind Cas 103.

**——Ss. 439, 423 — Accused showing cause against conviction, whether entitled to argue on facts.**

Section 439, Criminal P. C., does not override the express terms of S. 423 and a convicted person in showing cause against his conviction under S. 439 (6), Criminal P. C., has only the same right as he has when he comes before the Court by way of an appeal under S. 423. AIR (Vol 23) 1936 Mad 516: 1936 MWN 459: 59 Mad 904: 44 LW 155: 71 MLJ 231: 37 Cr LJ 909: 164 Ind Cas 243 (DB).

**——S. 439 — Alteration of, into major offence.**

High Court cannot, in revision, alter a conviction on a charge under S. 498, I. P. C., only to a conviction under S. 366 or S. 373, I. P. C. as these offences are major offences. AIR (Vol 21) 1934 Lah 122: 36 Cr LJ 423: 153 Ind Cas 721.

**——S. 439 — Conviction based on finding of fact.**

Ordinarily, the High Court will not interfere in revision in cases where the conviction depends on a pure finding of fact. But where it is clear that the lower Courts have not applied their minds properly to the defence set up by the accused and consequently there has been a failure of justice, it is necessary for the High Court to interfere. AIR (Vol 20) 1933 Sind 359: 35 Cr LJ 206: 146 Ind Cas 952 (DB).

**——S. 439 — Conviction under S. 323 — Power of Appellate Court to alter conviction to one under S. 325.**

The prohibition contained in S. 439 (4), Criminal P. C., which says that nothing in that section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction, refers not only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, but also to a case where the accused has been acquitted of one charge, but convicted of a minor offence.

Therefore, where a person is charged with on offence under S. 325 I. P. C., but is acquitted under that section and convicted under S. 323, the Appellate Court has no power to alter the conviction to one under S. 325. AIR (Vol 19) 1932 Oudh 25: 33 Cr LJ 162 (2): 8 OWN 1299: 135 Ind Cas 382 (DB).

**——S. 439 — Conviction under Arms Act, whether can be altered into one under Explosives Act.**

It would not be fair in revision to alter a conviction under the Arms Act to one under the Explosives Act unless a conviction under the latter Act were obviously correct and unless it were certain that the accused had not been prejudiced by being charged under the Arms Act. AIR (Vol 18) 1931 All 17: 53 All 226: 1931 ALJ 1467: 32 Cr LJ 564: 130 Ind Cas 626.

**——S. 439 — Alteration — Power to alter for major offence.**

When the accused are charged under S. 325, I. P. C., but are convicted under a minor section namely, S. 323 of the same Code, the Magistrate must be held to have acquitted them of the charge under S. 325 and the High Court in revision cannot allter the conviction into one under S. 325. AIR (Vol 18) 1931 Rang 321: 33 Cr LJ 360: 136 Ind Cas 836.

**——S. 439 — Plea of guilty — Conviction — Accused cannot show cause against conviction.**

In a case where a person was convicted on a plea of guilty and where punishment was sought to be enhanced,

Held, (per Mukerji, J.) — The plea of "guilty" is a plea to the charge and does not necessarily amount to a confession of all the facts alleged. The Court is not bound to, but it may convict the

accused on his plea; vide, S. 271 (2), Cr. P. Code. The plea operates as a bar in certain cases, to the preferring of an appeal except as to the extent and legality of the sentence: vide S. 412, Cr. P. Code. A plea of guilty will perhaps also stand in the accused's way in the matter of a revision which he may seek for. But when called upon to show cause why his sentence should not be enhanced, the accused has the right to show cause against his conviction. S. 439 (6), Cr P. Code, does not make any exception as regards the case of a person who has been convicted on his own plea. Uncross-examined testimony of the prosecution witnesses given in the Court of the Committing Magistrate can hardlly be taken to suffice for the purpose of enhancing punishment.

Per Graham, J. — The only circumstance in which it would be open to an accused to go behind the plea and re-open the matter of his conviction would be where he could show that there was some mistake in recording the plea, and that he did not in fact plead "guilty." In view of S. 412 it cannot be held that an accused who has pleaded guilty is entitled under sub-S. (6), S. 439 to "show cause against his conviction." Those words are applicable only where the accused has been convicted on the evidence, and in that case and that case only he is entitled to show that the conviction is wrong either upon the facts or through some error of law.

Per Buckland, J. — The accused cannot go behind his plea of 'guilty" as a confession of the facts charged, nor is he entitled to withdraw his plea. AIR (Vol 16) 1929 Cal 747: 49 CLJ 432: 33 CWN 599: 56 Cal 1145: 30 Cr LJ 1038: 119 Ind Cas 301 : 1929 Cr C 395 (DB).

——S. 439 — Conviction may mean the verdict of the jury or the sentence of the Court. What the term as used in S. 439 (6) means in a particular case, depends on the particular facts of the case. AIR (Vol 16) 1929 Cal 747: 49 Cal LJ 432: 33 CWN 599: 30 Cr LJ 1038: 1929 Cr C 395: 119 Ind Cas 301: 56 Cal 1145 (FB).

**——S. 439 — Revision petition against conviction — Dismissal by High Court Judge — Accused debarred from showing cause against conviction.**

Where a petition for revision against his conviction by a convict has been rejected by a Judge of the High Court and a notice has subsequently been issued to the convict to show cause why his sentence should not be enhanced, the convict is barred from showing cause against his conviction as provided by S. 439 (6). That the previous order dismissing the revision was passed without issuing notice to opposite party makes no difference. AIR (Vol 16) 1929 Lah 797: 117 Ind Cas 669: 30 PLR 409: 1929 Cr C 429: 10 Lah 241: 30 Cr LJ 815 (DB).

——S. 439 — Conviction under S. 326, Penal Code, though charge framed under S. 302 — Conviction cannot be altered in revision to one for murder — But punishment may be enhanced. AIR (Vol 16) 1929 Lah 615: 115 Ind Cas 854: 30 Cr LJ 552: 1929 Cr C 182: 12 AI Cr R 410 (DB).

——S. 439 — Accused person can show cause against conviction also. AIR (Vol 16) 1929 Lah 584: 116 Ind Cas 883: 30 PLR 437: 30 Cr LJ 699: 1929 Cr C 150: 13 AI Cr R 97.

——S. 439 — Appeal against conviction dismissed — When showing cause against enhancement of sentence, accused cannot show cause against conviction on same grounds. AIR (Vol 16) 1929 Sind 26: 22 SLR 453: 111 Ind Cas 856: 29 Cr LJ 936 (DB).

——S. 439 — High Court in revision can re-alter it.

Where the Sessions Judge altered the conviction from Ss. 205/109 to one under S. 419, I. P. C.,

Held, that Cl. (4) of S. 439 does not prevent the High Court from re-altering the conviction from one under S. 419 to one under Ss. 205/109, Penal Code. AIR (Vol 14) 1927 Pat 199: 102 Ind Cas 837: 28 Cr LJ 529: 8 AI Cr R 117 (DB).

——S. 439 — Where there has been a conviction and a substantial punishment, the High Court does not usually interfere in revision. AIR (Vol 14) 1927 Rang 240: 6 Bur LJ 81: 103 Ind Cas 837: 8 AI Cr R 441: 28 Cr LJ 757.

——S. 439 — Appeal by accused against his conviction dismissed by one Bench — Application for enhancement pending before another Bench — Accused has no right to show cause against his conviction. AIR (Vol 13) 1926 Bom 555: 50 Bom 783: 28 Bom LR 1051: 27 Cr LJ 1173: 97 Ind Cas 805 (DB).

——S. 439 — An accused to whom an opportunity has been given of showing cause why his sentence should not be enhanced is entitled, on appearing, to show that the trial was contrary to law and thus illegal, though the question was not raised at the trial. AIR (Vol 13) 1926 Bom 110: 49 Bom 892: 27 Bom LR 1343: 27 Cr LJ 305: 92 Ind Cas 689 (DB).

——S. 439 — Failure in previous revision against conviction will debar accused from showing cause against conviction. AIR (Vol 12) 1925 Mad 993: 85 Ind Cas 727: 26 Cr LJ 583 (DB).

**——S. 439 — Legality of.**

Where the Dy. Magistrate overlooked the fact that Act 1 of 1904 had been replaced by the Poisons Act of 1919 and recorded a conviction under the Act of 1904,

Held, that the error was not vital and did not vitiate the conviction recorded by the Deputy Magistrate. AIR (Vol 11) 1924 Oudh 32: 10 OLJ 208: 77 Ind Cas 192: 25 Cr LJ 336.

**——S. 439 — Conviction — Ground of acquittal — Loss of record.**

Loss of record cannot be a ground for acquitting the accused in revision and in this case no retrial was ordered as the sentence was a petty one. AIR (Vol 4) 1917 Pat 420: 18 Cr LJ 737: 40 Ind Cas 737.

**——S. 439 — Conviction — Limit for interference — Expiry of sentence.**

The fact that the accused had undergone his sentence of imprisonment does not invalidate the interference of a Court of Appeal or revision and the High Court will set aside the conviction if it is unsustainable. AIR (Vol 3) 1916 All 236: 38 All 395: 14 ALJ 518: 17 Cr LJ 513: 36 Ind Cas 481.

**——S. 439 (3) — Conviction — Revision when allowed.**

A conviction, though not technically correct should not be interfered with in appeal, if it does substantial justice. AIR (Vol 3) 1916 Lah 275: 30 PWR (Cr) 1916: 37 PLR 1917: 17 Cr LJ 474: 36 Ind Cas 154.

**——S. 439 — Conviction — High Court's powers of revision — Conviction based on uncorroborated evidence of accomplice.**

When the lower Court for special reasons convicts a person on the sole testimony of accomplices after noticing S. 133 of the Evidence Act, the High Court will not interfere in revision except for special reasons. But where the lower Court is of opinion that his evidence has been corroborated, the High Court may consider whether such corroboration is sufficient in law and if there is no corroboration whether it can be sustained on the accomplice's evidence. (1911) 1 MWN 327: 21 MLJ 283: 12 Cr LJ 150: 10 MLT 84: 9 Ind Cas 897 (FB).

——S. 439 — Conviction — **Practice — When petition for revision will be tried as appeal.**

The Chief Court on hearing a petition for revision against an order of conviction passed after an unjustifiable order for retrial, seriously prejudicial to the accused, will proceed to try the case as an appeal. It will go into all the facts of the case to satisfy itself as to the guilt or innocence of the accused. (1909) 8 PR 1909 Cr: 38 PLR 1910: 17 PWR 1909 Cr: 10 Cr LJ 314: 3 Ind Cas 580 (DB).

**(b) Setting aside.**

——Ss. 439 and 423 — Powers of High Court — Alteration of conviction from S. 304 to S. 302, I. P. Code, and imposition of proper sentence. AIR (Vol 35) 1948 Lah 74: 49 PLR 305.

——**S. 439 — Summary trial.**

Ordinarily, the High Court should not interfere in revision in a case tried summarily in which a relatively small fine has been imposed, but where there has been confusion in the minds of the Magistrates and in consequence in the mind of the accused as to the offence with which the accused has been tried and charged it should do so. AIR (Vol 25) 1938 Sind 70: 32 SLR 684: 39 Cr LJ 474: 174 Ind Cas 685 (DB).

——**S. 439 — Principles.**

In revision, it is necessary, in order to get a conviction set aside, to show that it is wrong. Ordinarily, the Court will not go into the facts at all unless the conscience of the Court has been touched in regard to them. AIR (Vol 20) 1933 Pat 697: 35 Cr LJ 22 (2): 14 PLT 759: 13 Pat 150: 146 Ind Cas 370.

——**S. 439 — Conviction — Setting aside.**

Cattle Trespass Act (1 of 1871) — Conviction not justified under law and fine arbitrary — Conviction can be set aside. AIR (Vol 17) 1930 Oudh 250: 7 OWN 461: 1930 Cr C 570: 126 Ind Cas 497: 31 Cr LJ 1015.

—— S. 439 — Joint conviction of accused — Some only appealing — Conviction of all can be set aside. AIR (Vol 15) 1928 Pat 249: 29 Cr LJ 259: 107 Ind Cas 529: 9 AI Cr R 543.

——S. 439 — Conviction by Panchayat under I. P. C., S. 426 — Mischief — Value of property damaged not mentioned in judgment — High Court can interfere, under Government of India Act, S. 107, but not under Cr. P. Code. AIR (Vol 12) 1925 Mad 1144: 88 Ind Cas 521: 1925 MWN 600: 26 Cr LJ 1161.

——**S. 439 — Subsequent discovery of facts showing accused to be innocent — High Court cannot revise previous conviction.**

An application from the Sessions Judge of Meerut requesting the High Court to set aside a conviction passed by his predecessor and affirmed by a Judge of the High Court in appeal, on the ground that on certain materials that had since come to the knowledge of the District Magistrate, the conviction was wrong, cannot be entertained in revision. In such cases the District Magistrate may refer the matter to the Local Government who have power under Chapter XXIX of the Code of Criminal Procedure to do the needful. AIR (Vol 10) 1923 All 473 (2) : 45 All 143 : 24 Cr LJ 766 : 74 Ind Cas 270.

——**S. 439 — Conviction — Revision — High Court's interference — Findings of facts.**

The High Court in revision under S. 439, can set aside the conviction and sentences passed on the accused after consideration of the evidence on the record. AIR (Vol 4) 1917 Cal 659 : 17 Cr LJ 460 : 36 Ind Cas 140 (DB).

——**S. 439 — Conviction — Revision — Doubtful cases.**

Where with reference to the first report and other circumstances the case against an accused is very doubtful the concurrent findings of two Courts will be set aside and the benefit of the doubt will be given to the accused. 5 PWR 1913 Cr : 152 PLR 1913 : 14 Cr LJ 320 : 19 Ind Cas 1008.

——**S. 439 — Conviction — Not proved by evidence.**

Where the materials on record do not sufficiently show that the accused had himself made away with Government money and any of the cases brought against him for cheating, the Chief Court will acquit him in revision in spite of concurrent findings of both the lower Courts. 13 PWR 1909 Cr : 106 PLR 1909 : 11 Cr LJ 97 : 4 Ind Cas 978.

**6. Discharge.**

——**S. 439 — Acquittal — Revision against — Application of private party — Competency — Withdrawal of case under S. 494 without proper exercise of discretion — Discharge — Interference.**

It is not the practice of the High Court to interfere in revision with an order of acquittal at the instance of a private party. The High Court will interfere with an acquittal only in the most extraordinary circumstances, when moved by the public authorities and then too only on being satisfied that it is in the public interest to set aside the order of acquittal.

When there has been no judicial exercise of the discretion under S. 494, Cr. P. Code, and when an order of discharge is made in a case started on the complaint of a magistrate which required investigation, the High Court will interfere and set aside the order of discharge in revision. AIR (Vol 36) 1949 Pat 449 : 50 Cr LJ 992 : 30 PLT 152 (DB).

——**S. 439 — Discharge, order of — Setting aside of.**

The Sessions Court as well as the High Court should be very slow to interfere in revision to set aside an order of discharge. A I R (Vol 26) 1939 Bom 372 : 41 Bom LR 749 : 40 Cr LJ 951 : 184 Ind Cas 22 (DB).

——**S. 439 — Further enquiry.**

Order of discharge — Further enquiry ordered after a year :

Held, that unless there is a material public advantage, High Court will not interfere in revision. 1934 MWN 1096.

——S. 439 — Discharge of accused by Sessions Judge — Order in substance and in fact an acquittal —Competency of revision.

Where the accused was charged at the trial with an offence under S. 385, Penal Code, and was convicted after being called to enter upon his defence, and the Appellate Judge setting aside the conviction and sentence ordered the discharge of the accused :

Held, in an application for revision by the Local Government against the order of discharge, that the order discharging the accused was in substance and in fact one of acquittal, and no revision lay from it.

Held, further, that treating the petition as an appeal, there was sufficient evidence to justify the acquittal and hence there was no ground for interference. AIR (Vol 19) 1932 Rang 147 : 10 Rang 315 : 33 Cr LJ 763 : 139 Ind Cas 182 (DB).

——S. 439 — Before an order of discharge or acquittal can be set aside, it must be proved that it is clearly wrong. AIR (Vol 15) 1928 Lah 178 : 9 AI Cr R 428 : 29 Cr LJ 895 : 111 Ind Cas 575.

——S. 439 — High Court will not interfere with order of release unless on strong grounds.

When the trying Magistrate, before releasing accused under S. 562 on probation of good conduct, considered all relevant circumstances and the Public Prosecutor also said that an order under S. 562 would meet the ends of justice.

Held, that the terms of S. 562 (1) are wide and the Court of revision will refuse to set aside an order passed under that section by a Magistrate in the exercise of his discretionary jurisdiction, unless a strong case for interference is made out. AIR (Vol 14) 1927 Lah 353: 28 Cr LJ 255: 7 AI Cr R 427: 100 Ind Cas 127.

——S. 439 — When an order of discharge was challenged on the ground that S. 539B was not complied with, but was in reality obeyed, the High Court declined to interfere. AIR (Vol 14) 1927 Nag 397 : 28 Cr LJ 180 : 99 Ind Cas 852.

——S. 439 — Case against accused doubtful — Accused discharged — Order of discharge is not foolish and perverse. AIR (Vol 13) 1926 Lah 81 : 26 Cr LJ 1357 : 89 Ind Cas 397.

——S. 439 — Discharge — Revision.

At the last resort only the judicial commissioner will interfere under S. 439, Cr. P. Code with the order of discharge when an application is made to the District Magistrate, or Sessions Judge. A I R (Vol 7) 1920 Nag 198 : 58 Ind Cas 943.

——Ss. 439 and 253 — Discharge — Revision against discharge.

The High Court will not interfere in revision against an order of discharge wnere there is no clear error or defect in the proceedings which has resulted in grave injustice by the lower Court. Mere appreciation of evidence is not a sufficient ground. AIR (Vol 6) 1919 Mad 851 : 35 MLJ 518 : 20 Cr LJ 101 : 9 LW 113 : 48 Ind Cas 981.

——Ss. 439 and 423 — Discharge.

Under Ss. 439 and 423 the High Court can revise an order of discharge passed by a Presidency Magistrate and direct further inquiry to be made although question of jurisdiction does not arise in the case. AIR (Vol 4) 1917 Cal 261 : 20 CWN 1128 : 17 Cr LJ 428 : 35 Ind Cas 988 (DB).



——Ss. 439 and 209 — Discharge — High Court's power to set aside order of discharge by Presidency Magistrate.

The High Court has power under Ss. 435 and 239 to set aside an order of discharge when the ends of justice requires it whether the error be on a question of law or fact. (1913) 14 MLT 200 : (1913) MWN 728 : 14 Cr LJ 529 : 21 Ind Cas 129 (FB).

——Ss. 439, 435 — Presidency Magistrate — Discharge, order of — Interference in revision.

The High Court has power under S. 439 of the Code of Criminal Procedure to order a further inquiry in a case in which a Presidency Magistrate has discharged an accused person. (1907) 6 CLJ 705. (1906) 33 C. 1282; (1899) 3 CWN 601, 27 C 126 dissented. (1909) 13 CWN 1221 (1224) : 10 Cr LJ 385 : 36 Cal 994 : 11 CLJ 50 : 3 Ind Cas 861 (DB).

——Ss. 439, 436, 215 — Sessions Judge's power to order commitment — Revisional powers of High Court — Practice.

Where a Sessions Judge, acting under S. 436, Criminal Procedure Code, orders the commitment of a person discharged, it is open to the court to consider whether the Sessions Judge has or has not exercised a proper judicial discretion under S. 436 of the Code in setting aside the Magistrate's order of discharge, and for this purpose the High Court may consider the facts as well as the questions of law involved in the case. But the High Court will only interfere with the Sessions Judge's order where it is manifest that the Sessions Judge's order was improper, as for instance, where there was no evidence to prove the offence charged or where it is clear that the court would not act on the evidence. Section 215 refers only to a commitment actually made. (1906) 16 MLJ 529 (529, 530) : 5 Cr LJ 100 : 30 Mad 224.

——S. 439 — Presidency Magistrate — Discharge — Revision — Committal.

Under S. 439, the High Court has jurisdiction to set aside an order of discharge by a Presidency Magistrate and order a commitment for trial. This power is so clear from the terms of S. 439 that S. 437 cannot be taken to limit it to mofussil cases only. (1903) 27 Bom 84 (88, 90) : 4 Bom LR 779 (DB).

See also (1910) 11 CLJ 50 (53) : 36 Cal 994 : 13 CWN 1221 : 10 Cr LJ 385 : 3 Ind Cas 861.

### 7. Discretion.

——S. 439 — Interference with discretion of trial Court in the matter of summoning witnesses. AIR (V 37) 1950 Ajmer 25(2).

——S. 439 — Interference with — Grounds for.

Per Malick. J.—The High Court is very reluctant in criminal revisions to differ from the discretion exercised by the Courts below unless the discretion can be said to have been perversely exercised. In cases where the punishment awarded is manifestly inadequate or there has been a grave miscarriage of justice, High Court may, in very exceptional cases, substitute its own discretion for the discretion of the Courts below. But where the application for revision is much belated and the other facts and circumstances of the case do not warrant it, the High Court will not interfere. AIR (V 32) 1945 All 207: 1945 ALJ 204: ILR (1945 ) All 450: 1945 AWR (HC) 167: 1945 OWN (HC) 195: 47 Cr LJ 132: 221 Ind Cas 256 (DB).

——S. 439 — Summary trial.

Where the Presidency Magistrate has considered the matter and given full reasons for trying case summarily without recording evidence in full, his discretion to try it summarily must be taken to have been exercised judicially even though the case may have taken several hearings extending over a long period and the High Court will not interfere in revision. AIR (V 31) 1944 Bom 129: 46 Bom LR 204: 45 Cr LJ 631: ILR (1944) Bom 382: 212 Ind Cas 409 (FB).

——S. 439 — According to usual practice, the High Court will not interfere with the discretion of the lower Courts in matters of granting bail when the discretion is judicially exercised. AIR (V 30) 1943 Bom 82: 45 Bom LR 72: 44 Cr LJ 399: ILR (1943) Bom 167: 205 Ind Cas 602 (DB).

——S. 439 — Order under S. 562.

When the trial Magistrate who considered the matter thought that an order under S. 562, Criminal P. C., was inappropriate, the High Court in revision refused to interfere with their discretion on the question of sentence. AIR (V 30) 1943 Mad 89: 55 LW 677: (1942) 2 MLJ 549: 1942 MWN 750: 44 Cr LJ 304: ILR (1943) Mad 456: 204 Ind Cas 555.

——S. 439 — The revisional powers of the High Court under S. 439, Criminal P. C., are discretionary and are exercised for the ends of justice. AIR (V 30) 1943 Pat 44: 9 BR 73: 44 Cr LJ 25: 203 Ind Cas 275 (DB).

——S. 439 — Although the High Court is very reluctant to interfere with the discretion of a Judge as to the sentence, it will not allow a very inappropriate order to stand. AIR (V 29) 1942 Mad 415(2): (1942) 1 MLJ 224: 55 MLW 71: 1942 MWN 169: 43 Cr LJ 671: 201 Ind Cas 444.

——S. 439 — Commitment order.

Under S. 439, High Court sitting as a Court of Revision will not interfere under S. 215 Criminal P C., with an order of commitment made by competent Court merely on the ground that committing Magistrate did not exercise proper discretion. AIR (V 28) 1941 Cal 271: 73 CLJ 187: 45 CWN 385: 43 Cr LJ 16: 197 Ind Cas 113 (DB).

——S. 439 — Power is discretionary.

Exercise by the High Court of the revisional jurisdiction in criminal matters is a matter of discretion. AIR (V 26) 1939 Sind 335: ILR (1940) Kar 83: 41 Cr LJ 143: 185 Ind Cas 268 (DB).

——S. 439 — Discretion under S. 494.

Ordinarily, the High Court will not interfere with the discretion given to the prosecution by S. 494, Criminal P. C., but it undoubtedly has power to do so in special circumstances where the withdrawal appears to be manifestly improper. There is nothing wrong in the Prosecuting Inspector consulting his superior officers before putting in his application for withdrawal. Section 494, Criminal P. C. itself does not prescribe that reasons in writing must be given, but it is obviously desirable that reasons should be given in order to enable the High Court to judge whether the withdrawal has been rightly made. AIR (V 25) 1938 Nag 334: 39 Cr LJ 458: 1938 NLJ 12: ILR (1939) Nag 393: 174 Ind Cas 510.

——S. 439 — Interference by the High Court.

When the trial Court has judicially exercised the discretion vested in it, the High Court will not interfere. But where it has not exercised a wise discretion in directing the splitting of a case against several accused, the High Court will interfere. AIR (V 23) 1936 Sind 47: 37 Cr LJ 716: 162 Ind Cas 863 (DB).

——S. 439 — Sentence.

The discretion vested in the trying Magistrate cannot be legally interfered with in revision, more so when the Court of first appeal has not considered it desirable to interfere with the same and no sufficient grounds have been urged to satisfy the High Court that this discretion has been improperly exercised so as to call for its interference. AIR (V 22) 1935 Sind 245: 29 SLR 54: 37 Cr LJ 148: 159 Ind Cas 665 (DB).

——S. 439 — Section 259, Criminal P. C., does not make it compulsory upon Magistrate to dismiss a complaint or application. He may in his discretion do so but if he does not choose to exercise his discretion in that manner, there can be no ground for interference in revision. AIR (V 20) 1933 Oudh 430: 10 OWN 1037: 35 Cr LJ 121: 146 Ind Cas 638.

——S. 439 — Bail.

When an application for bail made to the Sessions Judge has been refused, the High Court will not lightly interfere with the exercise of discretion vested in the lower Court, and will interfere only when the discretion has been improperly exercised. AIR (V 20) 1933 Sind 367: 35 Cr LJ 144: 146 Ind Cas 561 (DB).

——S. 439 — Discretion — Re-trial.

High Court has power to interfere with an order of acquittal in revision. The question is one of discretion as to whether in any particular case, the High Court should or should not order a re-trial. AIR (V 19) 1932 All 191: 1932 ALJ 166: 54 All 413: 33 Cr LJ 885: 140 Ind Cas 122.

——S. 439 — Discretion under S. 344 as to costs.

High Court will not interfere with an order for costs under S. 344 when the order is not unreasonable. AIR (V 19) 1932 Bom 470: 34 Bom LR 1106: 33 Cr LJ 802: 56 Bom 536: 139 Ind Cas 577 (DB).

——S. 439 — It is doubtful whether the discretionary power under S. 439 (1) can be exercised in a case in which the sentence is manifestly illegal. AIR (V 17) 1930 Lah 338: 127 Ind Cas 855: 12 LLJ 83: 1930 Cr C 386 (DB).

——S. 439 — It is not usual for the High Court to interfere when the lower Court being duly invested with discretion has exercised it in a manner which is not on the face of it arbitrary. AIR (V 12) 1925 Sind 190: 82 Ind Cas 760: 19 SLR 353: 25 Cr LJ 1368 (DB).

——S. 439 — No revision where discretion by competent court exercised.

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, of the High Court is that as a revisional Court it will neither inquire into the reasons nor interfere. AIR (V 11) 1924 Pat 283: 77 Ind Cas 734: 2 Pat 708: 5 Pat LT 404: 25 Cr LJ 446: 2 Pat LRCr 165: 2 Pat LRCr 187 (DB).

——S. 439 — The High Court should not hesitate to exercise discretion in its revisional jurisdiction whenever circumstances seem clearly to justify its so doing. AIR (V 9) 1922 Pat 160: 66 Ind Cas 336: 3 Pat LT 93: 1922 PHCC 26: 23 Cr LJ 272.

——S. 439 — Where the whole question is one of fact, it is not the practice of the High Court to interfere with the discretion which is vested in the Magistrate. AIR (Vol 8) 1921 Pat 491 (DB).

——S. 439 — Order passed under S. 106 after exercise of discretion — High Court will not interfere. AIR (Vol 8) 1921 Pat 472.

**——S. 439 — Revision — Criminal — High Court's powers.**

A High Court can interfere in revision where the principle on which a Sessions Judge exercises his discretion is misconceived. 16 Cr LJ 20: 26 Ind Cas 324: AIR (Vol 2) 1915 Mad 821.

**——S. 439 — Practice — Discretion of court as to entertainment of application in revision.**

Held, that it is not the practice of the High Court to entertain an application for revision on the criminal side where there exists a lower court having concurrent revisional jurisdiction unless a similar application has first been presented to the lower court and has been rejected. (1904) AWN 232 (233).

**8. Enhancement of sentence.**

See also Criminal P. C., S. 423.

**(a) General.**
**(b) Nature.**
**(c) Sufficient reason.**
**(d) Ends of justice.**
**(e) Private complaint.**
**(f) Limitation.**
**(g) Notice.**

**(a) General.**

**——Ss. 439 (6) and 562 (3) — Right to show cause against conviction in a reference to High Court to pass sentence under S. 562 (3).**

In a case under S. 562 (1) the Magistrate does not pass a sentence and merely directs the release of the accused on his executing a bond to keep the peace and be of good behaviour. There is no sentence in such a case. Hence when a reference is made to the High Court in such a case for passing a sentence under S. 562 (3), Cr. P. Code, it is not a case of enhancement of the sentence within the meaning of S. 439 (6) and the accused would not be entitled to show cause against his conviction. 51 Cr LJ 1332: AIR (Vol 37) 1950 Raj 28 (DB).

——S. 439 — Enhancement of sentence — Delay in making application for — Effect. 47 Cr LJ 2: AIR (Vol 32) 1945 Oudh 215.

**——S. 439 — Enhancement by Court suo motu.**

The Judicial Commissioner's Court is always reluctant to enhance sentences suo motu. AIR (Vol 27) 1940 Pesh 40: 42 Cr LJ 254: 192 Ind Cas 179 (DB).

——S. 439 — Accused convicted of murder sentenced to transportation for a long term — Appeal filed long time afterwards — Appellate Court should not enhance sentence to one of death even if it confirms the conviction — It should not, for this purpose, open revision proceedings. AIR (Vol 26) 1939 Rang 225: 40 Cr LJ 725: 183 Ind Cas 145.

**——Ss. 439 (6), 562 — Order under S. 562 set aside and sentence in lieu thereof passed under S. 562 (3) — Whether amounts to enhancement.**

Under S. 562, Criminal P. C., when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore, when, under S. 562 (3), the High Court sets aside an order and passes a sentence in lieu thereof, it cannot be said that it enhances a sentence within the meaning of S. 439 (6), Criminal P. C. An enhancement of sentence presupposes that there is a sentence to be enhanced. AIR (Vol 26) 1939 Sind 339: ILR (1940) Kar 88: 41 Cr LJ 187: 185 Ind Cas 428 (DB).

——S. 439 — High Court will enhance punishments in exceptional cases only. (1937) 39 PLR 11.

**——S. 439 — Accused getting benefit of lenient but legal sentence — Sentence, whether will be enhanced in revision.**

Where a Sessions Judge passes a more lenient sentence in contravention of the rulings of law which are laid down from time to time for the guidance of those dealing with criminal cases, the High Court will interfere and will enhance the sentence. But it does not necessarily follow that the High Court must enhance the sentence in revision. It is recognized that a person who has, even wrongly, got the benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal. Where the accused is sentenced to transportation for life though death sentence ought to have been passed, and it appears there was an absence of premeditation, not such as to make it wrong to pass the death sentence, but such as might well have weighed with other authorities in exercising clemency, and three months have elapsed during which the accused has believed that his life would be spared, the High Court will not enhance the sentence. AIR (Vol 24) 1937 Rang 254: 1937 Rang LR 169: 38 Cr LJ 1051: 171 Ind Cas 285 (DB).

**——S. 439 — Principles.**

The High Court will not enhance the sentence in any and every case in which an accused person may have been punished too leniently, but only where the punishment appears to be so grossly and entirely inadequate as to involve a failure of justice. (1933) 141 Ind Cas 861: 15 NLJ 46: 34 Cr LJ 271.

**——S. 439 — Principles.**

The principles upon which the High Court habitually acts as a Court of Revision in relation to the enhancement of sentences, where the law allows a discretion to the Court whose sentence is impugned, are that it should not interfere if the sentence passed involves substantial punishment, and should interfere if the sentence is manifestly inadequate. The Court is, in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from jail, though this circumstance is no insuperable obstacle. The Court also frequently declines to interfere in order to enhance a sentence on the mere ground that it would itself have passed a heavier sentence, contenting itself with pointing out that the sentence is so far light that a heavier sentence would have been maintained. AIR (Vol 19) 1932 Lah 199: 33 PLR 49: 33 Cr LJ 365: 136 Ind Cas 729 (2).

**——S. 439 — Attack on Police Officer — Sentence — Charge and conviction only under S. 325, I. P. C., effect of — Enhancement of sentence in revision — Principles.**

Though attacks upon the Police should be more severely punished than attacks on ordinary persons, yet where the accused have not been charged and convicted under S. 333, I. P. C., but only under S. 325, the High Court will not take into consideration the fact that the persons assaulted were Police Officers and enhance the sentence in revision.

The principles to be applied by the High Court as a Court of Revision in relation to the enhancement of sentences are that it should not interfere if the sentence passed involved substantial punishment, and should interfere if the sentence was manifestly inadequate. AIR (Vol 18) 1931 Lah 31: 32 Cr LJ 539: 32 PLR 273: 130 Ind Cas 432.

——S. 439 — Enhancement of sentence — Miscellaneous.

Appeal presented and dismissed either after hearing or summarily—Accused in showing cause why his sentences should not be enhanced cannot go into merits. 32 Bom LR 1286: 1930 Cr C 1140: AIR (Vol 17) 1930 Bom 593 (DB).

——S. 439 — The principles upon which this Court habitually acts as a Court of revision in relation to the enhancement of sentences are that it should not interfere if the sentence passed involves substantial punishment, and should interfere if the sentence is manifestly inadequate. The Court is, in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from jail, though this circumstance is no insuperable obstacle. Again the Court frequently declines to interfere, in order to enhance a sentence, on the mere ground that it would itself have passed a heavier sentence, contenting itself with pointing out that the sentence, is so far light that a heavier sentence would have been maintained. 114 Ind Cas 442: 30 Cr LJ 300: 1929 Cr C 90: AIR (Vol 16) 1929 Lah 531.

**——S. 439 — Enhancement of sentence — Principles of — High Court may enhance sentence even contrary to the opinion of the District authorities.**

Ordinarily the High Court should be loath to take action in the matter of enhancement of punishment when the District authorities consider the sentence as sufficient; but there are occasions when the High Court has every right to enforce its own opinion which may be a contrary opinion to that of the District authorities. 30 Cr LJ 222: AIR (Vol 15) 1928 All 417 (DB).

**——S. 439 — Sentence manifestly inadequate.**

The Court of revision is slow to interfere, where interference involves the imprisonment of a person already discharged from jail, but that circumstance alone cannot be allowed to operate as an insuperable obstacle to the enhancement of a sentence. The test is that the Court should not interfere if the sentence passed involves substantial punishment, but that it should interfere if the sentence is manifestly inadequate. It is competent to the High Court to impose an additional sentence of imprisonment on revision, even where the accused has served out the sentence of imprisonment inflicted upon him by the lower Court. S was charged with criminal breach of trust under S. 409, Penal Code, and sentenced to simple imprisonment till the rising of the Court and a fine of Rs. 100.

Held, that the penalty imposed was wholly inadequate and should be enhanced. 114 Ind Cas 72: 30 Cr LJ 240: 12 AI Cr R 234: AIR (Vol 15) 1928 Lah 961.

——S. 439 — The effect of the enactment of this sub-section is that the High Court, when adjudicating upon an application for enhancement of sentence, is converted into a Court of appeal against conviction. 92 Ind Cas 892: 27 PLR 112: 27 Cr LJ 380: AIR (Vol 14) 1927 Lah 34.

——S. 439 — Application for enhancement of sentence — Accused can challenge findings of fact only when he has not appealed — If he has appealed and lost, ordinary rule governing revision applications will apply. 21 SLR 107: 27 Cr LJ 1233: 98 Ind Cas 49: AIR (Vol 14) 1927 Sind 39 (DB).

**——S. 439 — Sentence reduced on appeal — Even single Judge of High Court in revision can restore original sentence.**

Where the sentence passed by trial Court is reduced by the Sessions Court, on appeal even a single Judge of the High Court can restore the original sentence and even enhance it when an accused applies under S. 439. The rule about a two-Judge Bench only applies where the Court issues notice, of its own motion, or on an application by some one else, to show cause why the sentence should not be enhanced, but does not apply to the case where the whole matter has been brought for revision by the accused himself. 28 Cr LJ 31: 7 LRA Cr 162: 99 Ind Cas 63: AIR (Vol 13) 1926 All 719.

——S. 439 — Application by prosecution for enhancement of sentence — Accused can show cause even against original conviction — High Court has power to set aside conviction. 86 Ind Cas 469: 26 Cr LJ 821: AIR (Vol 13) 1926 Nag 321.

**——S. 439 — Sentence cannot be enhanced except on very serious grounds.**

It is perfectly impossible for the High Court to do the duty of all the Sessions Courts subordinate to it and it is primarily the business of the Police and the prosecuting agency to see that the Sessions Court trying the case in the original does its duty. It is very difficult for the Crown successfully to press for enhancement when their representative in the Sessions Court appears to have allowed the Sessions Court to pass the sentence, it did, without any serious attempt to modify it. 83 Ind Cas 881: 17 SLR 268: 26 Cr LJ 177: AIR (Vol 12) 1925 Sind 188 (DB).

**——S. 439 — Enhancement of sentence — Revision.**

The practice of the Court is not to enhance the sentence when the accused has completed his term of imprisonment except in exceptional cases. Under S. 439 (3) of the Cr. P. Code the High Court has power to inflict any punishment which might have been inflicted for the offence by a Magistrate of the first class and is not limited to the powers of the trying Magistrate. 1 Lah 453: 2 Lah LJ 541: 21 Cr LJ 557: 56 Ind Cas 861: AIR (Vol 7) 1920 Lah 213.

**——S. 439 — Enhancement of sentence.**

The Chief Court may not interfere even if the lower Court has committed an illegality or imposed a sentence lighter than what would have been imposed by the Chief Court if the case had come before it for trial. 7 PR (Cr) 1919: 48 PLR 1919: 8 PWR (Cr) 1919: 20 Cr LJ 212: 49 Ind Cas 772: AIR (Vol 6) 1919 Lah 205.

**——S. 439 — Enhancement of sentence — Magistrate acting under S. 30 — Powers to enhance the sentence — Limit — Compensation.**

The Chief Court cannot impose a greater sentence than the Magistrate who was empowered under S. 30 of the Code, was competent to inflict. There is no provision in the Code awarding compensation to the accused. (1916) 7 Cr LR 421 (Punj).

**——S. 439 — Enhancement of sentence — Discretion of Chief Court to interfere.**

In the case of a recommendation for enhancement of sentences the Chief Court will not interfere in revision under S. 439, Cr. P. Code when the accused has already undergone the imprisonment or has paid the fine and it is immaterial if the order of the Court below is wrong in law. 29 PWR 1913 Cr: 14 Cr LJ 599: 313 PLR 1913: 21 Ind Cas 471.

**——S. 439 — Enhancement of sentence.**

The High Court can enhance any sentence however the case may come before it. The District Magistrate can move the High Court in such a case. It is not necessary that the Government Pleader should move the High Court at the instructions to the Government. (1911) 13 Bom LR 1185 : 12 Cr LJ 604 : 12 Ind Cas 980 (DB).

**(b) Nature.**

——S. 439 — Per Full Bench; Khundkar and Sen JJ., contra:— There is nothing in the language of S. 439 (6), Criminal P. C., to suggest that the powers of a Court of Revision, dealing with a rule for enhancement, are wider than the powers conferred by S. 423 on a Court of Appeal. AIR (Vol 31) 1944 Cal 17: 48 CWN 113: 45 Cr LJ 309: ILR (1944) 2 Cal 1: 211 Ind Cas 177 (FB).

——S. 439 — Where an illegal order under S. 562, Criminal P. C., is passed by a Magistrate, and on appeal, the Sessions Judge affirms the conviction but refers the case to the High Court as to the sentence, the case should not be regarded as one for enhancement of the sentence, entitling the accused to agitate findings of fact. AIR (Vol 30) 1943 Mad 521: (1943) 1 MLJ 481: 1943 MWN 340: 44 Cr LJ 774: 208 Ind Cas 308.

——S. 439 — Enhancement of sentence in revision — Ordinarily matter of sentence is in discretion of Magistrate — No enhancement unless discertion is so exercised as to offend ordinary notions of justice. 1936 MWN 522.

——S. 439 — Recommendations for enhanced sentence for the offences under Ss. 120-B/420, Penal Code are not competent. 1934 MWN 1138.

**——S. 439 — Appeal against conviction — Dismissal — Power to enhance sentence subsequently.**

The dismissal of an appeal by the accused does not prevent the High Court from subsequently enhancing the sentence in the exercise of its revisional jurisdiction.

Sub-section 6 of S. 439, Criminal P. C., which provides that, notwithstanding anything contained in the section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction, does not apply to a convicted person whose appeal has been heard by the High Court itself. AIR (Vol 19) 1932 Pat 126: 10 Pat 872: 33 Cr LJ 155: 13 PLT 17: 135 Ind Cas 522 (DB).

**——S. 439 — Enhancement of sentence — Meaning of.**

Enhancement of punishment means that the sentence originally passed is to be vacated and a new and a proper sentence is to be passed. It cannot be that a second sentence in addition to the original one is to be passed because for one offence the law can punish the accused but once. 49 CLJ 432: 33 CWN 599: 56 Cal 1145: 30 Cr LJ 1038: 119 Ind Cas 301: 1929 Cr C 395: AIR (Vol 16) 1929 Cal 747 (DB).

——S. 439 — Where in a case there were three counts and the Court set aside the conviction in respect of two and declined to interfere with the sentence in respect of the third.

Held, that this did not amount to an enhancement of the sentence. 111 Ind Cas 399: 1 M Cr C 144: 29 Cr LJ 847: 11 AI Cr R 75: AIR (Vol 15) 1928 Mad 651.

——S. 439 — Enhancement of sentence is a very serious proceeding, and where there is a proposal to that effect it must be supported by the Government Pleader under instructions which would enable him to put before the High Court cogent reasons why there should be an enhancement of the sentence. The matter should be submitted to the trying Court where the prosecuting authorities think that the sentence ought to be deterrent. They cannot merely trust exclusively to the powers of the High Court of correcting sentences of the lower Courts where the sentences ought to be deterrent. 105 Ind Cas 820: 28 Cr LJ 996: 9 AI Cr R 204: AIR (Vol 15) 1928 Nag 58.

——S. 439 — The limitation as to sentence in S. 439 (3) of the Code does not apply to a sentence which has been passed under Cl. (3) by a magistrate acting under S. 34 of the Code; but except in very exceptional cases the sentence passed by the High Court under its powers of enhancement should not, where the sentence has been imposed by a Magistrate not specially empowered, exceed one of seven year's rigorous imprisonment which a Magistrate acting under S. 34 has power to pass. The usual course where the Court thinks that a sentence of seven years' rigorous imprisonment would not meet the ends of justice, would be set aside the trial and order the case to be committed to the Court of Session. 75 Ind Cas 356: 24 Cr LJ 932: AIR (Vol 10) 1923 Lah 600 (DB).

**——S. 439 — Enhancement of sentence — No power, if sentence is legal.**

The power of enhancement of sentence under S. 439, Cr P. C., can only be exercised where the sentence passed is a legal one. A sentence for a period already passed in the lock-up is not legal. 27 PR Cr 1919: 20 Cr LJ 684: 52 Ind Cas 604: AIR (Vol 6) 1919 Lah 29.

**——Ss. 439 and 562 — Enhancement of sentence — Release of accused under S. 562 — Revision — Imprisonment of whipping.**

Section 439 of the Cr. P. Code presupposes that a sentence has been imposed. Therefore where an accused is released on probation under S. 562 the High Court cannot substitute a sentence of imprisonment or of whipping in revision. 20 Cr LJ 99: 48 Ind Cas 979: AIR (Vol 5) 1918 Nag 137.

**——S. 439 — Enhancement of sentence — Conviction treated as conclusive.**

It has been the invariable practice of the Bombay High Court, in cases that come up before it for enforcement of sentence, to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. (1908) 10 Bom LR 93: 32 Bom 162 (163): 7 Cri LJ 119.

**(c) Sufficient reasons.**

**——S. 439 — Enhancement of sentence — Powers of High Court — Exercise of —Grounds for — Principles.**

Revisional powers are intended for the redress of genuine grievances and not of mere formal defects. The power of enhancing sentences should be exercised by the High Court very rarely and only in cases where a question of principle is involved. The High Court should not in revision enhance a sentence merely upon the ground that if it were trying the case itself, it would impose a heavier sentence than that imposed by the lower Court. 229 Ind Cas 172: 48 Cr LJ 298: AIR (Vol 34) 1947 Lah 160.

**——S. 439 (6) — Dacoity case — Appeal by accused dismissed confirming his sentence — Revision for enhancement of sentence — Sentence should not be ordinarily less than seven years — Leniency may be shown to approvers.**

In a dacoity case, where appeal from the conviction is dismissed by the High Court, an application by the Provincial Government for enhancement of sentence is maintainable.

Where crime of dacoity is prevalent all over the Province, the sentence should not be ordinarily less than seven years in a case where charge under S. 395, Penal Code is established.

In dacoity case, a sentence of three years' rigorous imprisonment was imposed upon the approver. The Provincial Government filed an application for enhancement of sentence:

Held, that it was true that sentence of three years' imprisonment appeared to be rather lenient in a dacoity case but it would not be desirable to discourage confessions by accused persons and having regard to the fact that the approver was really responsible for putting Police on the track of the offenders in the case, it would not be desirable to enhance the sentence imposed upon him. AIR (Vol 32) 1945 All 344: 1945 ALJ 184: ILR (1945) All 527: 1945 AWR (HC) 172: 1945 OWN (HC) 289 (DB).

——**S. 439 — Principles — Accused promoting insurance company — False representation regarding contribution.**

The delay in filing petition for revision for enhancement of sentence does not constitute any insuperable bar to the enhancement of the sentence.

Where the Magistrate has given adequate reasons for the sentence which he passed, the High Court would be slow to enhance it, if it is not shown that the sentence was either manifestly inadequate or has otherwise resulted in miscarriage of justice.

Where the accused made no contribution at all to the assets of the company promoted by them and represented falsely that they had done so with the deliberate object of deceiving the public, and also appropriated the amounts admittedly from the public funds, a deterrent sentence is called for and the High Court will enhance the sentence if it is inadequate. AIR (Vol 32) 1945 Oudh 215: 1945 OWN (CC) 55: 1945 AWR (CC) 40: 47 Cr LJ 2: 221 Ind Cas 42 (DB).

——**S. 439 — Leniency of sentence, whether ground for enhancement.**

The question of sentence is always a matter of discretion and, therefore, the High Court will, in revision, be loath to interfere unless the sentence passed is clearly wrong. The High Court will not interfere in revision in order to pass a sentence which is slightly different from the one originally passed. The fact that the sentence passed is very lenient is not a sufficient ground on which the High Court will exercise its powers to enhance the sentence. Generally speaking, a sentence will not be enhanced in revision unless it is such a manifestly inadequate punishment for the offence committed, as to amount to miscarriage of justice. AIR (Vol 29) 1942 Rang 49: 1941 Rang LR 55: 43 Cr LJ 525: 199 Ind Cas 147.

——**S. 439 — Murder — Power should be used only when failure to do so leads to miscarriage of justice.**

The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed the capital sentence, is not a sufficient reason for enhancement. AIR (V 25) 1938 Lah 260: 40 PLR 982: 39 Cr LJ 502: ILR (1938) Lah 347 : 174 Ind Cas 949 (DB).

——**S. 439 — Motor driver driving car at rash speed — Collision with tree — Occupants dying — Sentence of 4 months' rigorous imprisonment by Magistrate — Death, whether natural consequence of rash act — Enhancement, if proper.**

The accused, while driving his car at an excessive speed, on a straight road which was uncrowded wanted to pass over another car in front of him. Having got past the other car, the accused swerved to the left in order to get back to the proper side of the road, and in so doing, he lost control of his car which ran off the road, collided with a tamarind tree, and was thrown into a field, with the result that three of the passengers sitting in the back seat were killed. He was tried under S. 304-A, I. P. C. and sentenced to four months' rigorous imprisonment. The case was referred to the High Court for enhancement of sentence:

Held, that in a case of this sort, the sentence to be imposed could not be measured by the consequences of the act, unless those consequences were necessarily inherent in the act, and that the fact that three deaths resulted was not a circumstance which ought greatly to enhance the punishment to be inflicted for the rash and negligent act of the accused. The death of the three persons was not at all a natural and probable consequence of his act. In the circumstances, the rash and negligent act of the accused being in driving at a speed, at which he was unable to control the car, it could not be said that the punishment of four months' rigorous imprisonment inflicted by the Magistrate was so grossly insufficient that the High Court ought to interfere in revision. AIR (V 24) 1937 Bom 80 : 38 Bom LR 1111 : 38 Cr LJ 658 : 168 Ind Cas 865.

——**S. 439 — Principles — Sound reasons given — Sentence held, would not be enhanced in revision.**

Though it is competent to the High Court to enhance the sentence in revision, it will only do so for exceptional reasons. Where a sentence passed is substantial even though inadequate, it will not be enhanced in revision, on the mere ground that the High Court, as a Court of first instance, would have passed a heavier sentence. The High Court in the exercise of its revisional power, enhances a sentence only where the sentence is so grossly inadequate as to amount to a miscarriage of justice.

Where on appeal from a conviction under S. 247, I. P. C. and sentence of one year's rigorous imprisonment, the Sessions Judge maintained the conviction but reduced the sentence to a term of six months giving sound reasons for reducing it:

Held, that there being sound reasons and the sentence not being grossly inadequate, the High Court would not enhance it in revision. AIR (V 24) 1937 Lah 215 : 38 Cr LJ 720 : 169 Ind Cas 171.

——**S. 439 — Trial Court accepting plea of guilty and sentencing — Prosecution evidence not recorded.**

Where a person on a plea of guilty was convicted and fined under S. 6 (c), Boilers Act, and no prosecution evidence was recorded as his plea was accepted, and a reference was made to the High Court to enhance the fine:

Held, that as there was no evidence before the High Court by which the heinousness of the offence could be judged, the discretion of the trial Court in the matter of sentence would not be interfered with. AIR (V 24) 1937 Pat 275 : 18 PLT 468 : 3 BR 448 : 38 Cr LJ 572 (1) : 168 Ind Cas 548 (DB).

——S. 439 — In a revision for enhancement of sentence the accused will be acquitted by the High Court if the case for the prosecution is not supported by any reliable evidence. (1936) 38 Pun LR 228.

——**S. 439 — Absence of special circumstances.**

In a case where the sentence given is one against which no appeal lies, the High Court has power to enhance the sentence under S. 439, Criminal P. C. But the High Court will be slow to exercise that power, because under sub-s. (6) of S. 439, the accused is entitled, before having the sentence enhanced, to challenge his conviction, and where he has been given a sentence which is not appealable, by a Presidency Magistrate, and there is no evidence re-

corded, he has really no material on which he can challenge his conviction and he is in worse position than if he had been given an appealable sentence. Unless the circumstances are special, sentence should not be enhanced. AIR (V 22) 1935 Bom 37 : 36 Bom LR 1126 : 36 Cr LJ 527 : 154 Ind Cas 577.

——S. 439 — High Court, when can interfere.

The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than that which the trial Court has passed, is no reason for enhancing the sentence. The High Court will interfere only where the sentence passed is manifestly and grossly inadequate. AIR (V 21) 1934 Bom 471 : 36 Bom LR 954 : 36 Cr LJ 351 : 153 Ind Cas 525 (DB).

——S. 439 — Principles.

The High Court is slow to interfere, where interference would involve the imprisonment of persons already discharged from jail, though that circumstance is no insuperable obstacle. The Court frequently declines to interfere in order to enhance a sentence on the mere ground that it would itself have passed a heavier sentence. AIR (V 21) 1934 Lah 613 : 35 PLR 527 : 36 Cr LJ 414 : 163 Ind Cas 449.

——S. 439 — Sentence otherwise substantial.

It is not the practice of the High Court to enhance the sentence if it is otherwise substantial even if the superior Court might have originally awarded a higher sentence. AIR (V 21) 1934 Lah 89 : 35 Cr LJ 1453 : 151 Ind Cas 924.

——S. 439 — Enhancement of sentence — Reasons for — Accused beating his wife brutally with heavy stick and inflicting injuries — Wife dying — Proper punishment.

Accused who had dispute with his wife, because she ran away to her father's house, beat her with a stick after her return as a result of which she died two days later. He was convicted under S. 325 for causing grievous hurt to his wife and was sentenced to one year's rigorous imprisonment.

Held, that under the circumstances the sentence of one year's rigorous imprisonment, was too short and should be enhanced to three years' rigorous imprisonment. It was a brutal thing for a man to beat a woman with a heavy stick and hurt her on vital parts of her body causing such injuries that she died in two days. AIR (V 17) 1930 Bom 593 : 32 Bom LR 1286 : 1930 Cr C 1140 (DB).

——S. 439 — Penal Code, S. 323 — Husband hitting his wife without provocation — Wife dying — Husband convicted under S. 323 for three months — Punishment ought to be enhanced being grossly inadequate. AIR (V 16) 1929 Lah 531 : 30 Cr LJ 300 : 1929 Cr C 90 : 114 Ind Cas 442.

——S. 439 — Nature of offence.

Accused attempted to murder his relation by giving him Dhatura poison, who narrowly escaped from death.

Held, that the sentence of five years' rigorous imprisonment should be enhanced. AIR (V 16) 1929 Oudh 150 : 6 OWN 43 : 30 Cr LJ 544 : 12 AI Cr R 359 : 115 Ind Cas 846 (DB).

——S. 439 — Abetting personation at election — Abettor an M.L.C. — If a justification for enhancing the sentence.

Iqbal Ahmad, J. — The fact that the accused is an elected representative of the people of his district in the local Council is a matter that should not be taken into consideration as a justification for enhancing the sentence.

Walsh, J. — The fact that the accused was an M.L.C. when he committed this offence is to be regarded as an aggravation.

Mears, C. J. — The fact that he is a man of some education and position and member of the Legislative Council cannot be urged in his favour as an argument for the infliction of a lesser sentence; these considerations cut the other way and the case must be treated as one of public importance and an offence as one of gravity. AIR (V 15) 1928 All 150 : 30 Cr LJ 933 : 118 Ind Cas 577 (FB).

——S. 439 — The High Court will not ordinarily enhance the sentence merely on the ground that if it were seised of the trial of the accused, it would have awarded a longer sentence of imprisonment than that awarded by the Magistrate, but it will interfere only where the sentence awarded by the trial Court is grossly inadequate. AIR (V 15) 1928 Lah 951 : 11 AI Cr R 15 : 29 Cr LJ 764 : 110 Ind Cas 796.

——S. 439 — The mere fact that the Judge of the High Court might when sitting as a Court of the first instance would have passed a heavier sentence is not by itself a sufficient ground for interference especially when the sentence passed by the trial Magistrate is a substantial one. (1928) 107 Ind Cas 759 : 29 Cr LJ 276 : 9 AI Cr R 504 (Lah).

——S. 439 — Although a High Court has power under S. 439, Criminal P. C. to enhance the sentence awarded by the lower Court, yet it will not ordinarily exercise its exceptional revisional powers in the direction of enhancing sentences, unless the sentences are manifestly inadequate. The mere ground that the High Court would itself have passed a heavier sentence, or that it would have maintained a heavier sentence is not enough to enhance the sentence. AIR (V 12) 1925 Oudh 723 : 12 OLJ 421 : 2 OWN 550 : 26 Cr LJ 1364 : 89 Ind Cas 452 (DB).

——S. 439 — Although the High Court has power to interfere in revision with an inadequate sentence it does not ordinarily interfere merely because, it would itself have passed a heavier sentence so long as the sentence passed involves substantial punishment. AIR (V 11) 1924 Rang 373 : 3 Bur LJ 155.

——S. 439 — Enhancement of sentence — Grounds.

Enhancement of sentence being a very serious proceeding, must be supported by Government Pleader with cogent reasons. AIR (V 1) 1914 Bom 29 : 16 Bom LR 202 : 15 Cr LJ 365 : 23 Ind Cas 733 (DB).

(d) Ends of justice.

——S. 439 — Original sentence served out by accused — High Court can enhance sentence.

It is within the power of the High Court to enhance a sentence of an accused person although he has served out his original sentence and has been discharged from jail custody. The question whether such power should or should not be exercised depends upon the circumstances of each case.

The accused was convicted under S. 412, Penal Code, and sentenced to six months' rigorous imprisonment:

Held that the sentence of six months' rigorous imprisonment for a conviction under S. 412, Penal Code, was wholly inadequate and should be enhanced to five years even though the original sentence had been served out in the circumstances of the case. AIR (Vol 33) 1946 Pat 239: 24 Pat 715 (DB).

——S. 439 — High Court does not interfere to enhance punishment unless it is grossly inadequate.

High Court does not interfere to enhance punishment unless it considers that it is grossly inadequate. A Magistrate must have some discretion in the matter

of punishment, and in the exercise of his discretion the High Court must not lightly interfere. AIR (Vol 33) 1946 Sind 62: ILR (1945) Kar 409 (DB).

——S. 439 — Sentence wholly served.

Though the High Court can enhance a sentence which has been wholly served, it should always be reluctant to enhance the sentences of persons who do not themselves institute the proceedings which bring their cases to the notice of this Court and especially reluctant to enhance the sentences of such persons when they have almost completed the term for which they have been committed. AIR (Vol 28) 1941 Rang 135: 1941 Rang LR 65: 42 Cr LJ 690: 195 Ind Cas 190 (DB).

——S. 439 — Enhancement of sentence after trial is a very real hardship to the prisoner and it should be restored to when the original sentence is grossly inadequate. (1940) 42 PLR 150.

**——S. 439 — Trial by jury and sentence not one of death — Court, if can enter into question of fact — — Sentence, if can be enhanced to death.**

An accused, when appearing in answer to a rule to show cause why the sentence passed on him should not be enhanced, is in the same position as if he were appealing from an order of conviction. When the trial has been by jury and when the sentence is not one of death, the accused cannot ask the Court to enter into questions of fact. If the accused have been sentenced to death, the High Court can consider whether or not the jury were right in their conclusions on the facts, but where the accused have not been condemned to death, they cannot appeal on facts and the High Court is, therefore, debarred from considering whether or not the facts are true. In these circumstances, it would be unjustifiable and unfair to enhance the sentence passed, to one of death. AIR (Vol 26) 1939 Cal 497: 40 Cr LJ 877: 184 Ind Cas 206 (DB).

**——S. 439 — Lower Court not exercising discretion judicially.**

No doubt the question of sentence is a matter of discretion of the trial Court, and the High Court should be loath to interfere if that discretion had been judicially exercised, but where the discretion does not appear to have been judicially exercised and the trial Judge has thought that a very lenient sentence would be sufficient for hitting the mother-in-law by accident when he meant to hit the wife, the High Court would interfere and enhance the sentence. AIR (Vol 23) 1936 Mad 788: 44 LW 348: 1936 MWN 895: 37 Cr LJ 1153: 165 Ind Cas 330 (DB).

**——S. 439 — Power of High Court to enhance sentence.**

The High Court has power to enhance any sentence if it considers that the sentence passed in the lower Court is improper. Whether the High Court will interfere or not will depend on the facts of each case. AIR (Vol 22) 1935 Lah 337: 36 Cr LJ 1001: 38 PLR 109: 16 Lah 1131: 156 Ind Cas 786 (DB).

——S. 439 — A High Court will only enhance a sentence of transportation for life passed by a Sessions Judge when the Judges are of opinion that sentence of death is the only possible sentence that should be passed. AIR (Vol 20) 1933 Nag 307 : 34 Cr LJ 1162 : 30 NLR 9 : 146 Ind Cas 118 (DB).

**——S. 439 — Sentence substantial though inadequate — Enhancement.**

Where a sentence is substantial, though inadequate and the convict has served the sentence, there should be no enhancement in revision. AIR (Vol 18) 1931 Lah 132 : 32 PLR 5 : 32 Cr LJ 943 : 132 Ind Cas 577.

**——S. 439 — Enhancement of sentence — Reasons for.**

Although no doubt an attack upon a public servant such for example as a police constable, in the discharge of his duty, should be more severely punished, where in the trial Court such an attack has been improperly treated as an attack on the ordinary man and the charge has been framed accordingly under Ss. 325, 149 instead of under S. 333, I. P. C., High Court cannot interfere in revision to enhance the sentence unless the sentence is manifestly inadequate. AIR (Vol 18) 1931 Lah 31 : 1931 Cr C 95.

**——S. 439 — Practice of Lahore High Court.**

According to the general practice of the Lahore High Court a convict is not sent back to jail by increasing his sentence after he has undergone the sentence and released. AIR (Vol 16) 1929 Lah 194 : 30 Cr LJ 2 : 11 AI Cr R 577 : 112 Ind Cas 769.

——S. 439 — Conviction under S. 324, Penal Code — Only fine imposed though imprisonment necessary — Origin of quarrel not satisfactorily established — Complainant aggressor — Accused acting in self-defence — Five months since conviction elapsed — Sentence was not enhanced to one of imprisonments. AIR (Vol 16) 1929 Lah 102 : 30 Cr LJ 939 : 118 Ind Cas 540.

——S 439 — Penal Code, Ss. 147, 149, 302, 324 and 326 — Communal riots — Attack by Mahomedans on two Hindus resulting in one's death and injury to the other — Assembly convicted under Ss. 147, 149 and 324, Penal Code, and not under S. 302 — Revision for enhancement of sentence — View of the case taken by the lower Court though favourable to the accused, not clearly wrong — High Court will not interfere. AIR (Vol 15) 1928 Lah 546 : 9 AI Cr R 571 : 29 Cr LJ 366 : 9 LWN 12 : 108 Ind Cas 265 (DB).

**——S. 439 — High Court will enhance sentence only when sentence is grossly inadequate.**

Where the accused is tried under Ss. 302 and 325 but convicted only under S. 325 High Court can alter the conviction to one under S. 302. High Court can also enhance the sentences without altering the convictions but this is not done usually but only when the sentences are grossly inadequate. AIR (Vol 15) 1928 Lah 507 : 9 AI Cr R 567 : 29 Cr LJ 343 : 108 Ind Cas 162 (DB).

**——S. 439 — Appellate Court — Finding that graver offence is committed than one convicted for — Justifies enhancement.**

It is open to a Judge of the Judicial Commissioner's Court, who hears an appeal against a conviction and who comes to the conclusion that a graver offence has been committed, not only to alter the conviction but to proceed on the revisional side and issue notice to the accused to show cause why the sentence should not be enhanced and, if no sufficient cause is shown, to enhance the sentence accordingly. AIR (Vol 13) 1926 Nag 323 : 27 Cr LJ 339 : 92 Ind Cas 851 (DB).

——S. 439 — Appeal by convict and revision by High Court — Conviction for murder in place of conviction for lesser offence is justified. AIR (Vol 11) 1924 Rang 93 : 1 Rang 436 : 25 Cr LJ 247 : 76 Ind Cas 711 (DB).

——S. 439 — Enhancement of sentence.

Where a substantial sentence has been passed by the trying Court the High Court will always be slow to interfere unless the sentence passed is manifestly inadequate. AIR (V 4) 1917 Sind 46: 10 SLR 207 : 18 Cr LJ 708 : 40 Ind Cas 708 (DB).

——S. 439 — Enhancement of sentence — Reference after long time.

Although a sentence may be inadequate, it is not expedient to enhance the sentence after the lapse of nine months. (1912) MWN 50 : 13 Cr LJ 121 : 13 Ind Cas 777.

——S. 439 — Enhancement of sentence.

The High Court, as a Court of Revision, will not enhance a sentence unless it is very clearly inadequate. (1903) 13 MLJ 262: 26 Mad 478 (480): 2 Weir 483.

(e) Private complaint.

——S. 439 — Private complainant.

Though the High Court should generally be very loath to enhance sentences on the application of a private complainant, yet there might be cases in which a complainant or some other person might bring some matter to the notice of the Court and the Court would come to the conclusion that the interest of justice generally would be served by an enhancement. AIR (Vol 28) 1941 All 309: 1941 ALJ 342: 1941 AWR 215: 1941 OWN 839: 42 Cr LJ 779: ILR (1941) All 465: 195 Ind Cas 720 (DB).

——S. 439 — Private complainant — Interference, when justified.

Where a private complainant applies in revision for changing the conviction of the accused from S. 323 to S. 325, Penal Code, and for enhancement of the sentence, the High Court should refuse to entertain such an application where Government has not seen fit to move. But where the High Court considers the sentence imposed to be glaringly inadequate in the case of one of the accused at least and the judgment of the trial Magistrate very weak and illogical in its final conclusions, then its interference is called for.

(Sentence in case of one of the accused was enhanced from a fine of Rs. 10 to six months' rigorous imprisonment, though the conviction was not altered). AIR (Vol 27) 1940 Nag 276: ILR (1942) Nag 277: 1940 NLJ 389: 41 Cr LJ 793: 189 Ind Cas 731.

——S. 439 — Application by private complainant — Crown opposing — Duty of Court.

The application for enhancement of sentence in revision must be looked at askance where it is made by a complainant direct and is opposed by the Counsel for the Crown. It would only be in a very extraordinary case that the High Court would enhance the sentence. It may well be true that the complainant has been put to considerable expense in prosecuting the case. The Criminal Courts, however, cannot guarantee to reimburse a complainant by infliction of a heavy penalty on the accused. That is rather the function of a Civil Court. AIR (Vol 27) 1940 Nag 249: ILR (1942) Nag 208: 1940 NLJ 309: 41 Cr LJ 734: 189 Ind Cas 382.

——S. 439 — Application by private person — Court, whether should enhance sentence — Duty of High Court in dealing with such application.

Courts should not be allowed to become tools in the hands of members of the public in giving vent to their private animosities.

It is the part of the Crown and not of individuals to ask Courts to enhance sentences. The Chief Court, therefore, should not enhance a sentence upon an application of a private person to that effect.

In dealing with applications for enhancement of sentences, the High Court will have regard to what those responsible for maintenance of peace and order in the locality think of the matter.

The fact that the private applicants' application of enhancement of the sentence was rejected by the District Magistrate, the head of the magistracy in the District, shows that an enhancement of the sentence of the accused was not considered necessary in the interests of justice. AIR (Vol 26) 1939 Oudh 54: 1938 OWN 1366: 40 Cr LJ 181: 1938 AWR 144: 14 Luck 401: 179 Ind Cas 250 (DB).

——S. 439 — Petition by complainant.

Although it is not the policy of the High Court to enhance sentences in criminal cases on a petition by a party, it is not an invariable rule.

(Where a petition of the complainant for the enhancement of the sentence of the accused was supported by the Crown Counsel under the instructions of the Crown, the High Court enhanced the sentence.) AIR (Vol 25) 1938 Lah 116: 39 PLR 659: 39 Cr LJ 296: 173 Ind Cas 321.

——S. 439 — Crown and not individuals should ask for enhancement.

It is the part of the Crown, not of individuals, to ask Courts to enhance sentences passed upon criminal offenders. AIR (Vol 20) 1933 Oudh 421: 10 OWN 903: 35 Cr LJ 118: 146 Ind Cas 577 (DB).

——S. 439 — Enhancement of sentence — Application by private complainant — Substainability.

Where the complainant wishes to apply for enhancement of sentence passed on the accused by the Sessions Judge, it is not intended by the Code that his only remedy is to apply to a District Magistrate to move the Local Government to apply for an enhancement, because the Local Government will only apply for an enhancement if the enhancement is required in the public interest. The High Court does not regard the question of enhancement only from the point of view of public interest but from the circumstances of the particular case before it. A private complainant can, therefore, apply in revision to the High Court for enhancement of a sentence. AIR (Vol 18) 1931 All 13: (1930) ALJ 1324: 1931 Cr C 13 (DB).

——S. 439 — Application by private person.

The High Court can enhance a sentence under S. 439, Criminal P. C., even on the application of a private person. AIR (Vol 18) 1931 Rang 52: 8 Rang 578: 32 Cr LJ 353: 129 Ind Cas 510.

——S. 439 — Enhancement of sentence — Private complaint.

Where a person was convicted on a plea of guilty and on a rule being issued for enhancement of sentence on the application of the complainant, the Crown did not appear to support it.

Held, that in such a case the rule should ordinarily be discharged unless it is clear beyond doubt that it should be made absolute. AIR (Vol 16) 1929 Cal 785: 1929 Cr C 439: 50 CLJ 176: 33 CWN 605: 121 Ind Cas 305 (DB).

——S. 439 — It is a safe working rule for the High Court not to interfere, although it has power to in-

terfere, on petitions for enhancement of sentences passed on accused persons, made on behalf of private complainants. AIR (Vol 16) 1929 Cal 340: 33 CWN 395: 118 Ind Cas 894: 30 Cr LJ 979: 56 Cal 964.

——S. 439 — The Court will naturally be loath to act on the motion of a private complainant but in extreme cases it has indubitably power to enhance sentence of an accused where it is inadequate. AIR (Vol 15) 1928 All 419: 113 Ind Cas 768: 30 Cr LJ 219 (DB).

——S. 439 — It is the part of the Crown, not of individuals, to ask Courts to enhance sentences passed upon criminal offenders. AIR (Vol 14) 1927 Oudh 321: 2 Luck 605: 4 OWN 699: 104 Ind Cas 242: 28 Cr LJ 802 (DB).

——S. 439 — Private party cannot apply — He may move Government for enhancement. AIR (Vol 13) 1926 Rang 106: 5 Bur LJ 1: 27 Cr LJ 818: 95 Ind Cas 594.

**——S. 439 — Right to apply.**

A private complainant has no right to make an application for enhancement of sentence. In proper cases the Court itself may act of its own motion in the way of enhancing sentences and may properly make use of any information through whatever channel that information comes, to enable it to apply that revisional jurisdiction. AIR (Vol 13) 1926 Sind 254: 19 SLR 64 (DB).

**——S. 439 — Enhancement of sentence.**

Though it is contrary in practice to proceed in an application for enhancement of sentence by a private complainant, the High Court will take action on such an application if it is supported by a report from the District Magistrate. (1910) 4 SLR 86: 11 Cr LJ 593: 8 Ind Cas 218 (DB).

**(f) Limitation.**

**——S. 439 — Appeal by accused dismissed confirming his sentence — Whether bar to revision for enhancement of sentence.**

The fact that an appeal sent by the accused from jail has been dismissed and his conviction and sentence have been confirmed is no bar to an application in revision by the Government for enhancement of sentence. AIR (Vol 29) 1942 All 339: 1942 ALJ 376: 43 Cr LJ 867: 1942 AWR (HC) 293: ILR (1942) All 892: 202 Ind Cas 586 (DB).

**——S. 439 — Limitations — Sentence passed by Assistant Sessions Judge.**

The power to enhance a sentence is given to the High Court by S. 439 (1), Criminal P. C. which sub-section, standing by itself, does not suggest that there is any limitation upon the power of the High Court to enhance a sentence other than the limitation imposed by the maximum sentence prescribed for the offences. Prima facie, the power of the High Court to enhance sentences does not depend upon the powers which the trial Court may have with regard to sentences. In the absence of express words limiting the powers of the High Court in cases of sentences passed by Assistant Sessions Judges, the High Court can enhance such sentence up to the maximum sentence prescribed by law for the offence. AIR (Vol 22) 1935 All 989: 1935 AWR 1236: 37 Cr LJ 43: 159 Ind Cas 290 (DB).

**——S. 439 — Death ensuing within a few hours of infliction of injuries — Injuries not accidental — Sentence of five years' rigorous imprisonment is inadequate.**

Except in the specific case provided for in Cl. (3), S. 439, Criminal P. C. the High Court's powers of enhancement of sentence under S. 439, Cr. P. C. are not in any way restricted, and the High Court is, therefore, competent to inflict any sentence which, in the circumstances of the case, might appear to be proper, irrespective of the limits of the powers exercisable by the Court of trial:

Held, that as the injuries inflicted by the accused, being the cause of death of the deceased which ensued within a few hours of his receiving the injuries and it being clear that the injuries were not accidental, a sentence of five years rigorious imprisonment was altogether inadequate and that the sentence should be enhanced to one of ten years' rigorous imprisonment. AIR (Vol 22) 1935 Oudh 239: 1935 OWN 140: 36 Cr LJ 454: 10 Luck 664: 154 Ind Cas 93 (DB).

**——S. 439 — Enhancement of sentence.**

Where a reference was made by the Sessions Judge to the High Court for enhancement of sentence for the offence of sodomy, the High Court felt constrained to restrict themselves within the limit of the powers which could have been exercised by the trying Magistrate, having regard to the provisions of S. 439 (2), Criminal P. C., and enhanced the sentence to one of two years' rigorous imprisonment. AIR (Vol 20) 1933 Sind 87: 34 Cr LJ 618: 143 Ind Cas 605 (DB).

**——S. 439 — Enhancement of sentence — Procedure.**

Where the High Court purports to set aside the sentence under one Court but enhances the same under another it is its duty to comply with the requirements of Cl. (2) of S. 439. AIR (Vol 18) 1931 Cal 450: 35 CWN 184 (DB).

**——S. 439 — Right to re-open in revision question of guilt is lost when there is a finding on it by High Court in previous proceedings.**

Where a High Court has given a finding on appeal as to the guilt of the accused person and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced the right which he would have under S. 439 (6) to reopen the question of his guilt had no such finding been given vanishes because of the inherent incapacity of any Judge of a High Court to reconsider the decision given by another. This principle applies equally to a previous order on revision and a previous order on appeal. AIR 1925 Bom 268 Diss from. AIR (Vol 14) 1927 Lah 217: 8 Lah 521: 28 Cr LJ 266: 100 Ind Cas 234: 28 PLR 559.

**——S. 439 — High Court's notice suo motu for enhancement of sentence — Prisoner absent and unrepresented — Sentence cannot be enhanced.**

Where the High Court, of its own motion, has issued notice to a prisoner to show cause why his sentence should not be enhanced and where at the hearing of the notice neither the prisoner nor his counsel is present, the High Court cannot pass an order enhancing the sentence. If such an order is passed, it is null and void and can be declared to be so. AIR (Vol 12) 1925 Oudh 476: 85 Ind Cas 383: 26 Cr LJ 543.

**——S. 439 — High Court will not act proprio motu.**

It is not the practice of the High Court to call on an accused person proprio motu to show cause why his sentence should not be enhanced but to leave it to the Local Government to apply in revision for an enhancement if so advised. AIR (Vol 9) 1922 Nag 65: 64 Ind Cas 277: 18 NLR 101.

**——S. 439 — Enhancement of sentence — Practice.**

The power of enhancement of sentence conferred upon the High Court by S. 439, Cr. P. Code, is limited only by Cl. (3) of that section which clause does not regard the difference in the power of the trying Magistrates under S. 32 of the same Code but lays down the general rule that, in cases of sentences passed by Magistrate not empowered under S. 34, the limit of enhancement shall be the sentence that may be inflicted by a Presidency or a first class Magistrate. Where it is proposed to enhance the sentence, the High Court will re-open both the conviction and the sentence of the Lower Courts. AIR (Vol 2) 1915 Sind 33: 9 SLR 82: 16 Cr LJ 712: 30 Ind Cas 1000 (DB).

**(g) Notice.**

**——S. 439 (6) — Right of accused to challenge conviction.**

Where a convicted person is called upon to show cause why his sentence should not be enhanced, he is entitled to show cause against his conviction even though his petition for revision has already been dismissed. AIR (Vol 32) 1945 Lah 130: ILR (1944) Lah 391 (FB).

**——S. 439 — Notice to show cause why sentence should not be enhanced — Accused is entitled to argue under S. 439 (6), that his conviction was bad.**

Where the High Court has issued notice on the accused to show cause why the sentence should not be enhanced he is entitled to argue under sub-s. (6) of S. 439, Criminal P. C., that his conviction was not justified. AIR (Vol 29) 1942 Oudh 45: 1941 OWN 1017: 42 Cr LJ 828: 1941 AWR (CC) 284: 17 Luck 150: 196 Ind Cas 244 (DB).

**——Ss. 439 (6), 423 — Verdict of jury — Notice to show cause against enhancement of sentence — Accused cannot challenge facts.**

The provision in S. 439, sub-s. (6), Criminal P. C., that the accused shall be entitled to show cause against his conviction, means that he can show cause in accordance with law. He cannot claim, for example, in revision proceedings to call fresh evidence. He can only challenge his conviction in accordance with law, and where the conviction is based on the verdict of jury, he has no greater right of appeal than he possesses under S. 423, and cannot challenge the facts. AIR (Vol 27) 1940 Bom 279: 42 Bom LR 475: ILR (1940) Bom 500: 41 Cr LJ 916: 190 Ind Cas 412.

——S. 439 — Where a recommendation for enhancement of sentence has been made to the High Court after the decision of the appeal by the accused, the accused, when called upon to show cause against the enhancement of the sentence, cannot be allowed to show cause against his conviction but may only show cause against enhancement of the sentence. The order of the High Court in appeal must be regarded as final, and the accused person cannot be heard to show cause against his conviction. It does not make any difference that the accused's appeal from the jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment, and if necessary, the evidence. AIR (Vol 26) 1939 Rang 392: 1940 Rang LR 145: 41 Cr LJ 108: 185 Ind Cas 142.

**——S. 439 (6) — Sub-s. (6) of S. 439 only refers to sub-s. (5) — Scope.**

Sub-section (6) of S. 439, Criminal P. C., can only refer to sub-s. (5) of the section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Sub-section (6) is intended to operate as an exception to what is otherwise laid down in the section itself. AIR (Vol 26) 1939 Rang 392: 1940 Rang LR 145: 41 Cr LJ 108: 185 Ind Cas 142.

**——Ss. 439 (6), 423 (2) — Scope of — S. 439 (6) should be read with S. 423 (2) — S. 439 (6), whether gives accused unlimited right to impugn his conviction.**

Section 418, Criminal P. C., limits the right of appeal in cases of convictions based on verdicts of jury to matters of law only. Section 439 (6), Criminal P. C., entitles the person who has been called upon to show cause why his sentence should not be enhanced to show cause against his conviction only so far as S. 423 (2), Criminal P. C., allows. The combined effect of S. 439 (6) and S. 423 (2), Criminal P. C. is to entitle the accused to question the conviction by showing that the Judge misdirected the jury or that the jury misunderstood the law laid down by the Judge in his charge. To hold that S. 439 (6) confers an unlimited right of impugning the conviction would be to introduce the anomaly that a person convicted on the verdict of a jury can question the conviction only within the narrow limits laid down in S. 423 (2), but if he has to show cause against a motion for enhancement of sentence, his right to question his conviction is very materially enlarged. AIR (Vol 23) 1936 All 850: 1936 ALJ 1287: 38 Cr LJ 137: ILR (1937) All 308: 166 Ind Cas 176 (DB).

**——S. 439 — Revision against conviction — Fresh notice to show cause against enhancement.**

Where the petitioners, in a revision case, are already before the Court represented by Counsel and he is in possession of all the papers upon which he may argue on the question of the enhancement of the sentence, it is not necessary nor is it required by law to serve a further notice on the petitioners, when after the perusal of the record at the hearing of the revision, the High Court considers it necessary to enhance their sentence and ask the Counsel to show cause immediately why their sentence should not be enhanced. (1936) 163 Ind Cas 768: 62 Cal 952: 37 Cr LJ 859 (DB).

**——S. 439 — In showing cause, if one can go behind verdict of jury.**

Though S. 439 (b), Criminal P. C. provides that a convicted person in showing cause why his sentence should not be enhanced, is entitled to show cause against his conviction, the accused is not entitled to go behind the jury's verdict and show upon the evidence that the conviction was wrong.

In showing cause against their conviction, the accused must proceed according to the provisions of S. 423 (2) which provides that the Court shall have no authority to alter or reverse the verdict of a jury, unless the Court is of opinion that such verdict is erroneous owing to a misdirection by the Judge to the jury or to a misunderstanding on the part of the jury of the law as laid down by him. Since in an appeal the accused person cannot go behind the verdict of the jury, but can only show that there was a misdirection by the Judge or a misunderstanding on the part of the jury of the law as laid down by the Judge, it cannot be said that an accused in showing cause against enhancement of sentence in a conviction in a jury trial, can go behind the same. (1936) 163 Ind Cas 768: 62 Cal 952: 37 Cr LJ 859 (DB).

——S. 439 — In a petition for enhancement of sentence facts can be gone into to show cause against conviction. 1936 MWN 1145 (DB).

**——Ss. 439, 430 — Notice to show cause why sentence should not be enhanced — Accused, if can show cause against conviction — Government not moving for enhancement — High Court, if can enhance.**

The effect of the words 'notwithstanding anything contained in this section' in S. 439 (6), Criminal P. C. is to allow the accused, when notice is issued to show cause why sentence should not be enhanced, not only to show cause why sentence should not be enhanced but to show cause against the conviction itself, provided that an appeal, if an appeal lies or a revision application, where no appeal lies, has not been already dismissed.

Section 439 (6) does not destroy and was not intended to destroy the finality of judgments of Appellate Courts given by S. 430, Criminal P. C.

Ordinarily it is for the Government to move the High Court to enhance sentence, but if the attention of Government is not drawn to a particular matter which requires their attention there is no reason why the High Court should not exercise powers conferred on it by law, even when conviction is by a Judge of the same Court. AIR (V 23) 1936 Sind 233: 38 Cr LJ 114: 165 Ind Cas 933 (DB).

**——Ss. 439 (6), 412 — Accused pleading guilty — Notice for enhancement of sentence — Right of accused pleading guilty to appeal.**

Notwithstanding his plea of guilty, an accused has a right to appeal both against the conviction and sentence passed against him, when notice for enhancement of sentence has been served upon him. AIR (Vol 22) 1935 Rang 49: 12 Rang 616: 36 Cr LJ 336: 153 Ind Cas 390 (DB).

**——S. 439 (6), operates as exception to sub-s. (5) only — Dismissal of revision by accused — Application by Crown for enhancement of sentence — Accused, if can be re-heard on merits of conviction.**

Section 439, sub-s. (6), Criminal P. C., expressly gives an accused person, upon whom a notice has been served, to show cause why his sentence should not be enhanced, a right to show cause also against his conviction; but the words used in S. 439 (6) "notwithstanding anything contained in this section" show that sub-s. (6), S. 439, was primarily intended to operate as an exception to what is otherwise laid down or implied in sub-s. (5), S. 439, which says that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Sub-s. (6), S. 439, cannot, therefore, give to an accused person a right to be heard against his conviction if such a right is in conflict with other provisions of the Code. Where, therefore, a petition for revision by the accused against his conviction and sentence has been dismissed by the High Court, but notice to enhance his sentence has been subsequently issued on an application by the Crown, the accused cannot, at the hearing of the application for enhancement of the sentence, be re-heard on the merits of his conviction. AIR (Vol 21) 1934 Bom 471: 36 Bom LR 954: 36 Cr LJ 351: 153 Ind Cas 525 (DB).

**——S. 439 (6) — Evidence — Notice — Necessity of issuing.**

When a case comes to the knowledge of the High Court by an appeal having been filed, it is not desirable, if the appeal is admitted, to issue a notice at the same time on the accused, under S. 439 of the Criminal P. C. asking him to show cause why the sentence passed upon him should not be enhanced. It is neither necessary nor desirable for the High Court to issue a notice for enhancement of sentence at the time of admission of the appeal. It is, however, open to consider the question of enhancement of sentence after the appeal has been heard.

Where at the time of the admission of an appeal, a notice has been issued to show cause why the sentence should not be enhanced, the accused is entitled on the evidence to show that he is innocent. If the conviction is not correct on the evidence, the appellant will be entitled to an acquittal. If, on the other hand, the evidence is sufficient for conviction, it is not necessary for the High Court to send the case for re-trial even though there may be misdirection or admission of irrelevant evidence, as the Court can accept the verdict of the jury under S. 167, Evidence Act, unless the Court is of opinion that it is difficult to arrive at any conclusion on the evidence and it is necessary or desirable that a re-trial should be ordered. AIR (Vol 20) 1933 Bom 153: 35 Bom LR 174: 35 Cr LJ 747: 148 Ind Cas 553 (DB).

**——S. 439 — Enhancement of sentence to show cause.**

Where an appeal has been presented and dismissed either after hearing or summarily, it is not open to the accused in showing cause why the sentence should not be enhanced, to go again into merits. AIR (Vol 17) 1930 Bom 593: 32 Bom LR 1286: 1930 Cr C 1140 (DB).

——S. 439 — It is not the practice of the Court, save in extreme cases, to call upon the accused to show cause why the sentences should not be enhanced. AIR (Vol 16) 1929 Pat 161: 8 Pat 181: 117 Ind Cas 176: 30 Cr LJ 737 (DB).

**——S. 439 — Findings of fact are not binding.**

Iqbal Ahmed, J.—Cl. (6), S. 439 does not disentitle the person, to whom notice had been issued, to challenge the findings of fact recorded by the Courts below. By Cl. (6) it is intended to give a person to whom notice has been issued why his sentence should not be enhanced, the right of showing by arguments a fortiori not only that the sentence should not be enhanced, but that the conviction is wrong and cannot be maintained. In showing cause against his conviction the accused is entitled to argue that the estimate of evidence made by the Courts

below is erroneous, and that the conviction is against the weight of evidence upon the record. AIR (Vol 15) 1928 All 150: 30 Cr LJ 933: 118 Ind Cas 577 (FB).

——S. 439 — Appeal against conviction dismissed — Application for enhancement — Accused cannot be reheard on merits. AIR (Vol 14) 1927 Bom 666: 101 Ind Cas 593: 8 AI Cr R 89: 29 Bom LR 490: 28 Cr LJ 465 (DB).

**——S. 439 — Application for if can be heard after appeal against conviction is decided.**

Per Fawcett, J.—Sub-section (6) does not suffice to show that an application for enhancement cannot be heard after a judgment on an appeal has been delivered by Court.

Per Madgavkar, J.—No hard and fast rule as to the appropriate time for issue of notice of enhancement can be laid down by the High Court. AIR (Vol 13) 1926 Bom 555: 50 Bom 783: 28 Bom LR 1051: 27 Cr LJ 1173: 97 Ind Cas 805 (DB).

### 9. Evidence.

**(a) General.**
**(b) Insufficient evidence.**
**(c) Error of Law.**
**(d) Appreciation of evidence.**

#### (a) General.

**——S. 439 — Duty of parties.**

It is not the practice of the High Court to take evidence in revision applications and, therefore, the parties should not, in the anxiety to quash proceedings at the earliest possible stage, bring revision applications before the High Court before the facts have been fully ascertained. AIR (Vol 29) 1942 All 148: 1942 ALJ 85: 1942 AWR (HC) 42: 43 Cr LJ 490: ILR (1942) All 344: 199 Ind Cas 507 (FB).

**——S. 439 — Concurrent findings that evidence of witnesses was not true.**

The concurrent finding of fact by the lower Court that the evidence of a witness was not true, must be accepted as correct by the High Court in revision. AIR (Vol 29) 1942 Mad 668: 55 LW 517: 1942-2 MLJ 278: 1942 MWN 581: 44 Cr LJ 5: 203 Ind Cas 461.

——S. 439 — Witnesses not examined under S. 256, Criminal P. C. — No failure of justice — No interference in revision. AIR (Vol 29) 1942 Oudh 130 : 1941 OWN 1290: 1941 AWR (CC) 397: 43 Cr LJ 280: 197 Ind Cas 839.

**——S. 439 — Interference in findings of fact — Principles.**

Though the High Court has a wider power of interference in revision applications to prevent injustice, this power is to be exercised in accordance with well established principles. It is not, for instance, for the High Court in revision to deal with questions of fact or of law as would a Court of first appeal. To justify the interference of the Court in revision, it must be shown, first, that the Judge below has committed some error of law; and secondly, that the accused has been materially prejudiced by that error. The High Court may also exercise its revisional power, even as regards findings of fact, in cases where the lower Court has totally misconceived the evidence and come to an obviously wrong conclusion. But it is only very extreme cases which justify such an interference with the appreciation of fact by the lower Court which heard the evidence and the Appellate Court which re-considered its value. AIR (Vol 24) 1937 Sind 293: 39 Cr LJ 123: 32 SLR 87: 172 Ind Cas 374 (DB).

——S. 439 — High Court will not interfere in revision with an order admitting evidence in preliminary inquiry prior to committal. AIR (Vol 22) 1935 Mad 257: 1934 MWN 1173: 41 MLW 280: 68 MLJ 282: 36 Cr LJ 781 (2): 58 Mad 430: 155 Ind Cas 395 (2) (DB).

**——Ss. 439, 435 — Revision — Accused, if entitled to contend that he was convicted on the strength of tainted evidence only.**

It is open to an accused person to contend in revision that he has been convicted on the strength of tainted evidence and tainted evidence only and that it is not the practice of the High Court to convict on such evidence. The Criminal Procedure Code confers the widest powers of revision upon the High Court and it is not proper for Judges to lay down rules which confine that discretion in a manner in which the Legislature has not seen fit to confine it. AIR (Vol 20) 1933 Bom 482: 35 Bom LR 1040: 35 Cr LJ 317: 58 Bom 40: 147 Ind Cas 25 (DB).

**——S. 439 — Evidence not challenged during trial — Objection in revision.**

Where the evidence of the prosecution witnesses to prove the handwriting of the accused was not challenged when it was given, and the witnesses were not cross examined in the trial Court by the defence though they were given an opportunity to do so.

Held, that it was not open to the defence in revision to challenge the evidence as to handwriting on the ground that the witnesses were not acquainted with the handwriting of the accused. AIR (V 18) 1931 All 12: 32 Cr LJ 311: 1930 ALJ 1535: 129 Ind Cas 443.

——S. 439 — There must appear on the face of judgment or of order complained of or of the record some ground — which need not always be a ground of law — to induce High Court to think that the evidence ought to be examined in order to see whether there has been a miscarriage of justice. AIR (Vol 18) 1931 Cal 619: 58 Cal 1081: 35 CWN 374:32 Cr LJ 1237: 134 Ind Cas 915 (DB).

——S. 439 — Where a copy of the Gazette Notification is produced for the first time before the High Court in revision, the High Court can presume its genuineness under S. 81. Evidence Act. AIR (Vol 18) 1931 Lah 273: 32 Cr LJ 1227: 134 Ind Cas 769.

**——S. 439 — Defective judgment.**

The High Court in criminal revision, as a rule depends mainly upon the findings arrived at by the lower Appellate Courts on questions of evidence. It is therefore the duty of such Courts to see that their judgments are self-contained and give a full analysis of the evidence, and that their findings are clear so that the High Court accepting these findings may be able to direct itself to the considerations of the questions of law and procedure only.

It is not proper for the Magistrate in the lower Appellate Court to say that as the trial Magistrate has discussed the evidence under several heads, he need not repeat what has been said in the judgment of the lower Court. This method of dealing with evidence of a case in appeal is highly unsatisfactory. AIR (Vol 17) 1930 Lah 1051: 1930 Cr C 1227.

——S. 439 — If evidence of alibi was clearly in the mind of Judge, mere absence of finding on that fact is not sufficient to state that his finding that prosecution case was made out was not in

accordance with law. AIR (Vol 16) 1929 Pat 231: 30 Cr LJ 1070: 119 Ind Cas 560.

——S. 439 — It is not the duty of the High Court in revision to weigh the evidence and to decide whether the conclusion drawn from it was justified. AIR(Vol 16) 1929 Sind 150: 1929 Cr C 318: 118 Ind Cas 223: 30 Cr LJ 906 (DB).

**——S. 439 — Finding of facts — Evidence.**

It is not open to High Court to go behind the finding of fact in revision unless it is shown that the evidence on the record left no scope for the Courts below to come to that conclusion. AIR (Vol 16) 1929 Sind 90: 116 Ind Cas 99: 23 SLR 216: 30 Cr LJ 548: 12 AI Cr R 365 (DB).

**——S. 439 — Order of commitment — Revision — Court if can weigh evidence.**

To test whether there is or is not evidence for Judge to decide and to quash a commitment it is necessary to accept the evidence for the prosecution. Whether the evidence is believed or disbelieved at the trial is a matter with which High Court is not concerned. The real test deciding as to whether there is evidence which could fairly be acted upon it is whether a Judge at a trial held with the aid of jurymen could say that there was no evidence which could go before a jury. Whether an accomplice can be believed or whether the evidence of an accomplice has been corroborated is a matter for decision at the trial. The function of a Court of revision is not to sit in judgment over the order of a Magistrate committing a case to the Court of Session. AIR (Vol 14) 1927 All 90: 49 All 181: 24 ALJ 1050: 7 LRA Cr 197: 98 Ind Cas 489: 27 Cr LJ 1369.

**——S. 439 — Going into facts and revising convictions without application is not illegal.**

There is no provision of law which debars a Court of revision from going into the evidence if it is of opinion that it is necessary to do so in the interests of justice. The High Court in revision has power to scrutinise the evidence to find out whether the convictions of the accused who did not appeal are justified. AIR (Vol 11) 1924 Lah 585: 77 Ind Cas 723: 25 Cr LJ 435.

——S. 439 — In revision High Court cannot go into the evidence itself unless there is some very strong reason for so doing. AIR (Vol 8) 1921 Pat 227: 64 Ind Cas 131: 2 PLT 681: 22 Cr L J 739: 1921 PHCC 174.

**——S. 439 — Evidence — Power to examine.**

Where the Magistrate found the story of rape to be an exaggeration, the High Court in revision found there was some evidence which if believed could constitute that offence, and ordered the accused to be committed to the Court of Sessions. Per Huda, J. In revision the High Court should not take the responsibility of coming to the conclusion even incidentally regarding a charge upon which the accused has not been tried. AIR (Vol 7) 1920 Cal 40: 30 CLJ 132: 25 Cr LJ 10: 23 CWN 1031: 54 Ind Cas 58 (DB).

**——Ss. 439 and 436 — Evidence — Power to go into.**

The High Court could go into evidence in order to find out whether the order passed by the District Magistrate under Section 436 directing the commitment of the accused was proper or not. AIR (Vol 7) 1920 Pat 46: 1 PLT 153: 21 Cr LJ 328: 55 Ind Cas 600.

**——S. 439 — Evidence — Revision — Evidence — Examination of.**

The High Court in revision has power to examine the evidence if prima facie grounds exist especially where the accused has been given a non-appealable sentence. AIR (Vol 5) 1918 Nag 152: 19 Cr LJ 666: 45 Ind Cas 1002.

**——S. 439 — Evidence — Irrelevant matters — Order can be reviewed.**

A Magistrate who considers irrelevant matters cannot be said to have acted outside his office and his order can be reviewed under the Criminal Procedure Code. AIR (Vol 1) 1914 Mad 105: 26 MLJ 310: 24 Ind Cas 134.

**——S. 439 — Evidence — Serious discrepancy in prosecution.**

Where a conviction is based on evidence containing a serious discrepancy of which no notice was taken by the Lower Court, the High Court may set it aside on revision. 113 PLR 1912: 8 PWR (Cr) 1912: 13 Cr LJ 463: 15 Ind Cas 95.

**——S. 439 — Evidence — Acceptance of accomplice's evidence without corroboration.**

Even if the rule of practice, that the evidence of an accomplice cannot be accepted without corroboration, is not adhered to, the High Court will not interfere unless the case presents exceptional circumstances. (1912) 6 SLR 106: 13 Cr LJ 767: 17 Ind Cas 79 (DB).

**——S. 439 — Evidence — Circumstantial evidence, conviction based on — Revision by High Court.**

If a conviction is based upon circumstantial evidence, the question whether the evidence believed by the Court which heard it, is of such a nature that it ought to have been accepted as establishing the guilt of the accused person beyond reasonable possibility of doubt, always remains and this is a question which may be dealt with by a High Court in revision. (1910) 13 OC 309: 11 Cr LJ 631 : 8 Ind Cas 379.

**(b) Insufficient evidence.**

**——S. 439 — Evidence flimsy.**

Where the Chief Court sets aside the conviction in revision on the ground that the trial was vitiated as the trial Court did not comply, with the mandatory provisions of the law, it may refuse to order re-trial if it finds that the evidence is flimsy. AIR (Vol 29) 1942 Oudh 429 : 1942 OWN 448 : 44 Cr LJ 97 : 1942 AWR (CC) 290 : 203 Ind Cas 524.

**——S. 439 — Revision on ground of insufficient evidence.**

Appreciation of the evidence is a matter for the Courts which deal with the facts of the case. The conviction cannot be set aside on revision merely because of inadequate evidence. AIR (Vol 28) 1941 Cal 185 : 72 CLJ 104 : 44 CWN 1114 : ILR (1941) 1 Cal 67 : 42 Cr LJ 490 : 194 Ind Cas 38.

**——S. 439 — Opportunity to adduce evidence, by remanding case for re-trial.**

The prosecution is required and expected to produce all the relevant and available evidence in order to bring home the charge to the accused and they cannot be allowed to produce evidence at their pleasure piece-meal. Where the prosecution has failed to adduce the necessary evidence, which would justify the conviction of the accused, it should not be allowed another opportunity to fill in the gaps which were deliberately left by them by remanding the case for re-trial. AIR (Vol 25) 1938 Pat 39 : 18 PLT 871 : 4 BR 218 : 39 Cr LJ 278 (1) : 173 Ind Cas 12.

**——S. 439 — Sufficiency.**

The opinion of the Court of first instance in respect of sufficiency or insufficiency of evidence will not be questioned in revision. AIR (Vol 12) 1925 Oudh 49 : 25 Cr LJ 366 : 77 Ind Cas 302.

**——S. 439 — Evidence — Insufficient — Conviction under Ss. 6 and 7 of Madras Town Nuisances Act.**

When, on appeal from convictions under Ss. 6 and 7 of the M. T. N. Act, the Sub-Divisional Ma-

gistrate after finding that there was no evidence that the house where gaming was carried on was a common house, orders a retrial in absence of an assurance of the prosecution that such evidence would be forthcoming, such order is irregular and the High Court will interfere in revision. AIR (Vol 4) 1917 Cal 525 : 20 CWN 698 : 17 Cr LJ 193 : 34 Ind Cas 305 (DB).

**——S. 439 — Evidence — Unreliable — When ground for revision.**

Evidence of persons who restored the stolen property to its owner that it was recovered from the petitioner where no name of any burglar was given in the first report to the police is insufficient for conviction under S. 457, I. P. C., the High Court disbelieved the evidence and acquitted the accused. AIR (Vol 2) 1915 Lah 386 : 28 PWR Cr 1915 : 16 Cr LJ 737 : 31 Ind Cas 337.

**——S. 439 — Evidence insufficient — Conviction — Revision.**

The High Court will interfere in revision though it is very unusual, when the conviction is found to be based on insufficient evidence. 12 P W R 1913 Cr : 66 PLR 1913 : 14 Cr LJ 148 : 19 Ind Cas 148.

**——S. 439 — Practice — Summary rejection of an appeal by the Sessions Judge — Revision of the judge's order — High Court's practice where evidence is found insufficient — Circumstantial evidence — Suspicion — Subsequent conduct of accused confirming suspicion.**

On an application to the High Court to set aside an order of the Sessions Judge summarily dismissing an appeal which the applicants preferred from an order of the Magistrate convicting them of an offence under the Penal Code, the High Court finding that the evidence on which the conviction was based was insufficient, instead of remanding the appeal for a hearing on its merits, set aside the conviction and sentence and acquitted and discharged the accused. One, G, a servant of the complainant, deposited for safe custody a sum of money with one of the accused, who put it into a box, locked it and kept the key with himself. The other accused (C) used the box as a bed during the greater part of the night, and the next morning the lock was found to have been forced and the money was missing. It was found by the Magistrate that the accused set up a false story to account for the loss of the money and the evidence showed that the accused had opportunities to take away the money unnoticed. On a charge on these facts against the accused under Ss. 406 and 103, Indian Penal Code, with respect to the money lost.

Held, that these facts could not support a conviction.

Per Stephen J. : — In a case of this kind where there is no eye-witness and where the stolen property has not been found, the possibility of any other person being a culprit must be excluded before the accused can be convicted. (1906) 10 CWN 446 (448, 449) : 3 Cr LJ 385 (DB).

**——S. 439 — Practice — High Court, when will go into facts in revision.**

Although ordinarily the High Court does not go into evidence when exercising its power of revision under S. 439, Cr. P. C., yet it will do so in a particular case when necessary; for instance, to ascertain whether a re-hearing should be directed. (1906) 4 CLJ 232 (233) : 4 Cr LJ 162 (DB).

**(c) Error of law.**

**——S. 439 — High Court when will go into evidence.**

When the lower Courts have failed to discuss important evidence the High Court though sitting in revision, will be bound to go into that evidence. AIR (Vol 39) 1952 All 667 : 1950 ALJ 57.

**——S. 439 — Duty of High Court — Verdict of jury — Admission of inadmissible evidence — Evidence Act, S. 167.**

If the High Court is satisfied that the admission of inadmissible evidence might have seriously influenced the minds of the jury and made them return an erroneous verdict, it must set aside the verdict and the conviction and either order a re-trial or proceed to decide the case itself upon the admissible evidence on the record. AIR (Vol 37) 1950 Cal 306 : 51 Cr LJ 1201 (DB).

**——S. 439 — When High Court in revision can look into evidence stated.**

When in a criminal case the lower Court has overlooked certain important aspects of the case and has not given proper consideration to the statements of the accused, the High Court can in revision look into the evidence. AIR (Vol 33) 1946 Mad 223 : ILR (1946) Mad 749 : 1945 MWN 249 : (1945) 2 MLJ 435.

**——S. 439 — Lower Court considering inadmissible evidence — Revisional Court can go into evidence.**

When a Revisional Court holds that in deciding on the guilt of the accused, the lower Courts have taken into consideration inadmissible evidence, it is incumbent on the Revisional Court to satisfy itself that the remaining evidence, which the lower Courts could properly take into consideration, is sufficient to establish as against the applicant proof of his guilt beyond reasonable doubt. AIR (Vol 28) 1941 Rang 324 : 1941 Rang LR 566 : 43 Cr LJ 373 : 198 Ind Cas 455 (DB).

**——S. 439 — Lower Courts relying on inadmissible evidence — Case for revision, if made out.**

The accused was prosecuted on the strength of a Police report made by C alleging that the accused and his father owed money to C and while attempting to settle the account with the accused and his father, the accused snatched the bahi from C's hand, ran away, tore out and destroyed the relevant entries and threw the mutilated bahi away, whereafter it was picked up by C. The accused went to a Police Station and had reported that he had had a quarrel with C over a time-expired account in his village; that C had not produced any account and that C was now charging him falsely with having torn out certain leaves of the bahi. The accused was convicted under Ss. 379 and 477, Penal Code. In revision :

Held, that the contents of the report made by the accused were not admissible as evidence of what actually occurred but on the other hand, the fact that the accused did make a report, and the general nature of his allegations, were admissible as showing the conduct of the accused in relation to the alleged offence.

Held, also, that the fact that a civil suit was brought by C against the accused and his father and the nature of the decree were not inadmissible in evidence, but the proceedings and nature of allegations made during the course of the civil suit were certainly not admissible in evidence.

Held, further, that there was a case for revision as the lower Courts relied on evidence inadmissible for the purposes to which they put it. AIR (Vol 23) 1936 Pesh 72 : 37 Cr LJ 603 : 161 Ind Cas 885.

——S. 439 — **Onus on wrong party — Prejudice to party — Interference.**

The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. But where the trial Judge had taken an erroneous view as to the law in regard to onus, his mind was coloured by that view and he was thereby disabled from weighing evenly the evidence, thus placing the party at a disadvantage, the High Court can interfere in revision. AIR (Vol 19) 1932 Mad 513 : 36 MLW 219 : 140 Ind Cas 674.

——S. 439 — Where confession of an accused has been excluded by the trial Magistrate under S. 24, it cannot be taken into consideration in revision even though such confession may be excluded wrongly. AIR (Vol 17) 1930 Sind 168 : 31 Cr LJ 947 : 24 SLR 338 : 1930 Cr C 654 : 126 Ind Cas 53 (DB).

——S. 439 — Finding of fact based on false and inadmissible evidence will be interfered with. AIR (Vol 14) 1927 All 147 : 8 LRA Cr 4 : 28 Cr LJ 91 : 7 AI Cr R 33 : 99 Ind Cas 123.

——S. 439 — Revision was allowed on the ground of omission to examine important defence witness without sufficient cause. AIR (Vol 12) 1925 Pat 55 : 3 Pat 591 : 25 Cr LJ 1255 : 82 Ind Cas 263 (DB).

——S. 439 — **General remarks that evidence is unreliable is not a proper disposal and the order is revisable.**

The general remark in an order under S. 146, Cr. P. Code, that the oral evidence is not reliable, without referring to it and without giving any reason, is not a disposal of the evidence upon the record, it amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. AIR (Vol 10) 1923 Pat 588 : 1 Pat LR Cr 152 : 4 PLT 579 : 24 Cr LJ 432 : 72 Ind Cas 544.

——S. 439 — **Evidence — Power of High Court to go into.**

Where the Magistrate's appreciation of the oral evidence is influenced by the wrong admission of an inadmissible document, the High Court is entitled to go into the whole evidence in revision. AIR (Vol 9) 1922 Pat 265 : 1 Pat LT 121 : 21 Cr LJ 374 : 2 UPLR (Pat) 53 : 55 Ind Cas 854.

——S. 439 — **Evidence — Revision, grounds for.**

A revision lies where the accused is prejudiced by inferences unwarranted by the evidence being drawn in the case. AIR (Vol 4) 1917 Low Bur 93 : 18 Cr LJ 116 : 37 Ind Cas 468.

——S. 439 — **High Court — Powers of — Revision — Error in law — Error in appreciation of the evidence — Practice — Grounds of interference.**

To justify the interference of the High Court in revision it must be shown that there exists an error in law and that the accused has been prejudiced by that error. An error in appreciation of evidence is not error of law. (1902) 4 Bom LR 686 (686) (DB).

**(d) Appreciation of evidence.**

——S. 439 — **Finding of fact — Interference — Rule — Misappreciation of evidence — Effect.**

A finding on a question of fact cannot be disturbed by the High Court in its revisional jurisdiction, even if the finding has been arrived at on an improper consideration of the evidence, because mere misappreciation of evidence would not be a sufficient ground for disturbing a finding of fact. AIR (Vol 37) 1950 Pat 508.

——S. 439 — **Trial Judge's appreciation of evidence.**

Although the High Court should ordinarily have very strong grounds for differing from the appreciation of evidence of the trial Judge who had the advantage of seeing the witnesses and noting their demeanour, where the whole story set up by prosecution is so unnatural and parts of it so suspicious that the High Court feels that benefit of doubt should be given to the accused, the High Court will interfere and set aside the conviction. AIR (Vol 24) 1937 Sind 22 : 30 SLR 456 : 38 Cr LJ 350 : 167 Ind Cas 75 (DB).

——S. 439 — **Appreciation by lower Court.**

Where the Court dealing with a case is a Court of Revision, it will not approach the matter as if it were a Court of Appeal. So long as the proceedings of the Magistrate are in order and so long as the Magistrate has fairly estimated the evidence before him in his own mind, his decision should not be disturbed even if the High Court should be of the opinion that on the evidence, another conclusion might have been reached. AIR (Vol 22) 1935 Rang 192: 36 Cr LJ 1044: 156 Ind Cas 968.

——S. 439 — **Interference by High Court — When proper.**

In the ordinary course, the High Court will not interfere in revision unless it can be shown that the Magistrate has gravely misapprehended the trend of the evidence or has overlooked some important points which, if he had taken into consideration would have caused him to come to a different conclusion. (1935) 36 Cr LJ 1215 : 157 Ind Cas 472.

——S. 439 — **High Court, when can consider evidence.**

If the Courts below approach the consideration of the case in a fair way and subject the evidence both for the prosecution and for the defence to legitimate criticisms, the High Court is relieved of the necessity of weighing the evidence in criminal revisions. Where, however, it is clear from the judgment of the Courts below that the evidence has not been fairly considered, it is imperative to examine the evidence with a view to test the accuracy of the decisions of the Courts below. AIR (Vol 21) 1934 All 735 : 3 AWR 655 : 36 Cr LJ 33 : 152 Ind Cas 120.

——S. 439 — **High Court should not interfere with findings of facts.**

The High Court should not interfere in revision with findings of facts merely because, after examining the evidence, the Court may be inclined to take a different view of evidence from that taken by the Courts below. AIR (Vol 15) 1928 Pat 13 : 104 Ind Cas 450 : 28 Cr LJ 834.

——S. 439 — Revision application based on misappreciation of evidence by trying Court — Application should be rejected. AIR (Vol 13) 1926 Nag 115 : 23 NLR 99 : 89 Ind Cas 388 : 26 Cr LJ 1348.

——S. 439 — The mere fact that the District Magistrate places a different value on the discrepancies in evidence is not a sufficient reason for a re-trial. AIR (Vol 8) 1921 Lah 214 : 60 Ind Cas 55 : 3 LLJ 97 : 22 Cr LJ 199.

——S. 439 — **Proceedings under S. 110, Cr. P. Code — Evidence.**

The High Court in revision set aside the order of the Court below binding over the petitioner under S. 110 Cr. P. C. on the ground that as to some important evidence the lower Courts in their judgments failed to consider it at all while

as to others they were accepted and relied on, without any critical examination. AIR (Vol 6) 1919 Cal 359 : 23 CWN 488 : 20 Cr LJ 551 : 51 Ind Cas 839 (DB).

**——S. 439 — Proceedings under S. 110 — Revision by High Court.**

In questions arising under Ss. 107 and 110, the moment it is shown, that there is something which the courts have done either in excess of power or by a too summary exercise of powers or by misapplying the rules of evidence or by not giving due effect to the defence evidence, an application for revision may be admitted but the High Court should not interfere on the merits except in exceptional cases. AIR (Vol 3) 1916 All 48 : 17 Cr LJ 461 : 36 Ind Cas 141.

**——S. 439 — Evidence — Misappreciation of — Whether High Court can go into.**

In revision, the High Court can go into the question of appreciation of evidence. AIR (Vol 1) 1914 Mad 241 : 15 Cr LJ 285 : 23 Ind Cas 493 (DB).

**——S. 439 — Proceedings under S. 110 — High Court's interference in revision.**

If the Court hearing appeal under S. 406 has really gone through the evidence record, the High Court will interfere in revision with proceedings under S. 110 only in very exceptional cases. (1909) 6 ALJ 487 : 9 Cr LJ 528 : 2 Ind Cas 225.

**10. Expunging remarks.**

**——Ss. 439 and 561-A — Powers of High Court — Expunction of defamatory passage — Procedure.**

If the expunction of defamatory passages touches the fabric of the judgment itself, or is calculated to affect the conclusions of the Magistrate or Judge, the proper procedure is to issue notice to the parties and to deal with the case as a whole in revision, expunging the remarks if it be thought proper, either in the exercise of the High Court's revisional powers under S. 439, Cr. P. Code, read with S. 423 (d) or read with S. 561-A of the Code. It is not, however, necessary to adopt such a course and to go into the merits if the remarks complained of are not inseparable from the judgment as a whole and do not form an integral part of it. AIR (Vol 34) 1947 Sind 66 : 48 Cr LJ 700 : ILR (1946) Kar 437 : 231 Ind Cas 107 (DB).

**——Ss. 439, 561-A — Government of India Act, 1935, (25 and 26 Geo. V, Ch. 42), S. 224 (1) — No appeal from judgment containing objectionable remarks against witness — Application by such witness.**

The superintendence given to the High Court under sub-s. (1) of S. 224 of the Government of India Act, 1935, is not to be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

Section 439, Criminal P. C., will not enable the High Court to expunge passages from a judgment which is not under appeal. So also, all that S. 561-A, Criminal P. C., does is to preserve the inherent powers of the High Court without conferring any additional power and no Court can claim inherent power to alter the judgment of another Court. AIR (Vol 28) 1941 Pat 544 : 7 BR 736 : 42 Cri LJ 546 : 194 Ind Cas 248.

——S. 439 — High Court has no power to expunge passages from the judgment of inferior Court, which has not been brought before it in regular appeal or revision. AIR (Vol 27) 1940 Bom 266 : 41 Cr LJ 855 : ILR (1940) Bom 415 : 42 Bom LR 478 : 190 Ind Cas 205.



**——S. 439 — Remarks, though objectionable, not harsh and uncalled for.**

In passing orders, the Magistrate should use more decorum and more restraint in choosing words. But where the language used in reference to a party, although objectionable, is not so harsh or uncalled for as to be corrected judicially, the High Court would not interfere and expunge the objectionable part of it in revision. AIR (Vol 25) 1938 Mad 654 : 1938 MWN 252 : 47 LW 340 : (1938) 1 MLJ 453 : 39 Cr LJ 922 : 177 Ind Cas 584.

——S. 439 — Observations in judgment of the District Magistrate prejudicial to character of a person not connected with case — High Court in revision can expunge the remarks. (1935) 153 Ind Cas 262 : 35 PLR 373 : 36 Cr LJ 383 (1).

**——S. 439 — Proper procedure.**

Where the party applies to the High Court for expunging objectionable remarks in the judgment of the trial court the procedure to be adopted is to file an appeal against the judgment and not to refer a revision for the mere purpose of having the remarks expunged. 1930 MWN 791.

——S. 439 — A person, who was not a witness in the case and against whom no witness had deposed anything, was condemned by the Magistrate in his judgment without giving him an opportunity of being heard, and the remarks were absolutely unfounded so far as the record went.

Held, that the remarks ought to be expunged from the record. AIR (Vol 16) 1929 Lah 201 : 112 Ind Cas 686 : 29 Cr LJ 1102.

**——S. 439 — Adverse remarks about character of stranger to proceedings without opportunity to be heard — Objectionable passages must be expunged.**

It is an elementary duty of a Judge in a criminal case to exclude evidence which is not legally admissible. A Magistrate should not in his judgment in a criminal case make observations prejudicial to the character of a person who is neither a party nor a witness in the proceedings on materials which are not legally admissible as evidence. Even if the evidence is legally admissible, the Magistrate has no right to make such observations against a person without giving him an opportunity to be heard. It would be an abuse of judicial privilege for a Magistrate to pass strictures on third persons like this. It would be a denial of justice to allow such reflections upon the character of a person to stand and the High Court should order the expungement of the objectionable passages from the judgment. AIR (Vol 12) 1925 Lah 392 : 89 Ind Cas 270 : 6 Lah 166 : 26 PLR 315 : 26 Cr LJ 1326.

**——S. 439 — Remarks by appellate Court doubting correctness of Trial Court's acquittal of an accused when no appeal was made from such acquittal.**

The High Court in revision will not permit the continuance on record of the expressions of a lower Appellate Court tending to show its opinion that an accused though acquitted by Trial Court and in spite of the absence of appeal from the Trial Court's acquittal, was really guilty. The reason is that a person must be deemed to be innocent of the charge made against him once he is acquitted of the offence in regular course of law and there has not been any appeal made to a superior tribunal. Therefore it is not proper for an appellate Court when disposing of an appeal of one of two co-accused who were tried together and one of whom was discharged to employ expressions which amount to a finding

that the acquittal of the accused in question was wrong. AIR (Vol 12) 1925 Lah 129: 82 Ind Cas 173 : 25 Cr LJ 1245.

——S. 439 — **Expunging remarks — Remarks of Sessions Judge — Application to expunge.**

A Sessions Judge in convicting accused persons, passed strictures on the complaint of a police officer, as a result of which he was dismissed from service. He applied to the High Court to have the remarks deleted.

Held, that it would be an extraordinary exercise of powers of the High Court (assuming that it possessed them) to order that the remarks complained of should be deleted. AIR (Vol 5) 1918 Bom 241 : 19 Bom LR 912 : 19 Cr LJ 97 : 43 Ind Cas 321 (DB).

——S. 439 — **Expunging remarks — Damaging remarks against witness — Power of Chief Court to expunge such remarks — Revision.**

The Chief Court can, in its revisional jurisdiction expunge any damaging remarks passed by a Subordinate Court, against the character of a witness without any trustworthy proof on record and without hearing any explanation, the witness may have to offer. 12 PWR 1911 Cr : 193 PLR 1911 : 12 Cr LJ 393 : 11 Ind Cas 577 (DB).

**11. Finding of fact.**

(a) **General.**
(b) **Based upon circumstances or circumstantial evidence.**
(c) **Erroneous, resulting in miscarriage of justice.**
(d) **Absence of evidence or inadmissible evidence.**

**(a) General.**

——S. 439 — **Finding of fact — Interference — Bribery cases.**

There is nothing to make a distinction between a revision concerning a bribery matter or any other revision in regard to the principle that concurrent findings of fact will not be interfered with in revision by the High Court. 1950 ALJ 764: AIR (Vol 37) 1950 All 507: 51 Cr LJ 1363.

——S. 439 — **Grounds of interference — Interference with fact — Grounds.**

AIR (Vol 37) 1950 Kutch 41 : 51 Cr LJ 1062.

——S. 439 — **Finding of fact — Interference in revision.**

Finding of fact based upon good material cannot be disturbed in revision. AIR (Vol 37) 1950 Nag 92: 51 Cr LJ 510: 1950 NLJ 346: ILR (1950) Nag 526.

——S. 439 — **Finding of fact — Revision — Proceedings under S. 147 — Finding as to danger of breach of peace — Interference in revision.**

The question whether there was a danger of a breach of the peace justifying an order under S. 147, Cr. P. Code, is one of fact, and the High Court will not therefore interfere with the finding of the magistrate on the question in revision. AIR (Vol 36) 1949 All 616: 50 Cr LJ 929.

——S. 439 — **Finding of fact — Interference.**

Where the lower Court has arrived at a finding of fact, and there is evidence on which it could have come to such finding, the High Court will not interfere with it in revision. whether it be right or wrong. AIR (Vol 36) 1949 Cal 56: 49 Cr LJ 598: (DB).

——S. 439 — **Finding of fact — Interference — Finding as to marriage.**

A finding in proceedings under S. 488, that the parties were married as husband and wife is one of fact and cannot be challenged in revision. AIR (Vol 35) 1948 Cal 186: 49 Cr LJ 283.

——S. 439 — **If can be assailed in revision.**

In case under S. 225, I. P. C., the findings which were justified by evidence that the accused No. 4 escaped from arrest and that accused Nos. 1 and 2 assisted her escape cannot be challenged in revision. AIR (Vol 32) 1945 Mad 409: 58 MLW 142: (1945) 1 MLJ 334: 1945 MWN 186: 47 Cr LJ 220: 221 Ind Cas 615.

——S. 439 — **Revision against question of fact.**

The High Court cannot, in revision, interfere with questions of fact. AIR (Vol 32) 1945 Nag 200: 1945 NLJ 231: ILR (1945) Nag 542.

——S. 439 — Finding of fact by the lower Court cannot be challenged. AIR (Vol 31) 1944 Bom 248 : ILR (1944) Bom 437 : 46 Bom LR 444 : 46 Cr LJ 208: 217 Ind Cas 167 (DB).

——S. 439 — Ordinarily, High Court will not interfere with findings of facts of the lower Court when they are based on evidence. All that it can do in revision is to see whether trial was regularly conducted and whether the law has been properly understood and applied to the facts that are proved or admitted. AIR (Vol 31) 1944 Nag 285: ILR (1944) Nag 732: 1944 NLJ 451.

——S. 439 — **Finding of fact supported by prima facie evidence.**

It is not the practice of the High Court in revision to disturb a clear finding of fact by the lower Court in a case in which there was prima facie evidence to support the finding. AIR (Vol 28) 1941 All 321: 1941 AWR (HC) 240: 1941 ALJ 352: 1941 OWN 898: 42 Cr LJ 839: ILR (1941) All 617: 196 Ind Cas 295 (DB).

——S. 439 — **Practice.**

While dealing with an application for revision and not an appeal, the High Court is bound to accept the findings of fact arrived at by the Sessions Judge. AIR (Vol 28) 1941 Oudh 98: 1940 OWN 1018: 42 Cr LJ 35: 1940 AWR 441: 16 Luck 260: 190 Ind Cas 805 (DB).

——S. 439 — **Altering finding but maintaining sentence.**

A Court of Revision has the power of the Court of Appeal to "alter the finding maintaining the sentences or with or without altering the finding, reduce the sentence" & therefore, to pass sentences under Ss. 143 and 144 Penal Code while setting aside the conviction under Ss. 295 and 379, provided the sentences do not exceed those passed by the lower Appellate Court. AIR (Vol 28) 1941 Pat 492: 42 Cr LJ 579: 7 BR 785: 23 PLT 81: 194 Ind Cas 476.

——S. 439 — **Finding on possession.**

Finding of a Magistrate on the point of possession is a finding of fact with which High Court ordinarily refuses to interfere. AIR (Vol 25) 1938 Pat 105: 39 Cr LJ 379: 173 Ind Cas 756.

——S. 439 — Though High Court does not ordinarily interfere with a finding of fact in revision, it will go into questions of fact where non-appealable sentences have been passed. 1937 MWN 51.

——S. 439 — **Question whether place is public place is one of fact.**

Whether a place is a place to which the public have or are permitted to have access within the provisions of S. 12, Bombay Prevention of Gambling Act, is a question of fact. The High Court will not ordinarily, in revision, interfere with the findings of a competent Magistrate on questions of fact. AIR (Vol 23) 1936 Sind 90: 30 SLR 72: 37 Cr LJ 876: 164 Ind Cas 58 (DB).

——S. 439 — **Finding that conspiracy existed.**

Where a finding has been arrived at that there did exist a general conspiracy, the finding is one which cannot be challenged before the High

Court in revision. AIR (Vol 22) 1935 Cal 316: 36 Cr LJ 982: 62 Cal 749: 156 Ind Cas 678 (DB).

——S. 439 — Concurrent findings.

It is not the practice of the High Court in the exercise of its revisional powers to interfere lightly with any decision on a point of fact in which two Subordinate Courts have concurred. AIR (Vol 22) 1935 Sind 105: 36 Cr LJ 1464: 158 Ind Cas 498 (DB).

——S. 439 — In a criminal appeal, the High Court will not interfere in revision with the finding of the lower Court on a question of fact. AIR (Vol 20) 1933 Oudh 195: 34 Cr LJ 793: 10 OWN 233: 144 Ind Cas 577.

——S. 439 — Where the grounds set forth in an application for revision really challenge the findings of fact arrived at by the lower Appellate Court, they are not proper grounds for a criminal revision. AIR (Vol 20) 1933 Oudh 117 : 10 OWN 47: 34 Cr LJ 649 (1): 143 Ind Cas 835.

——S. 439 — It is not the rule of the High Court to interfere with decisions on fact upon evidence except for special reasons. AIR (Vol 18) 1931 Cal 619: 58 Cal 1081: 35 CWN 374: 32 Cr LJ 1237: 134 Ind Cas 915 (DB).

——S. 439 — Finding of fact — Finality of.

High Court will not go into questions of fact in revision. AIR (Vol 15) 1928 Bom 221: 112 Ind Cas 97: 30 Bom LR 631: 11 AI Cr R 233: 29 Cr LJ 977 (DB).

——S. 439 — There are very occasional instances in which in a criminal revision the revising Court is justified in examining the findings of fact and varying them. AIR (Vol 14) 1927 Oudh 132: 100 Ind Cas 705: 1 Luck 301: 29 OC 374: 28 Cr LJ 321.

——S. 439 — Finding of fact — Miscellaneous.

Whether a manager in the office of a Municipality is a public servant is a question of fact and should not be raised for the first time in revision. (In this case he was assumed to be a public servant.) AIR (Vol 14) 1927 Mad 1011: 53 MLJ 723: 51 Mad 86: 39 MLT 615: 26 MLW 529: 1927 MWN 764: 28 Cr LJ 1005: 105 Ind Cas 829: 9 AI Cr R 180.

——S. 439 — No interference with findings of fact.

It is only rarely and in exceptional circumstances that the Sind Judicial Commissioner's Court interferes in revision with findings of fact of the lower appellate Court and only in cases when the findings are supported by no legal evidence or are so manifestly erroneous as to have resulted in a miscarriage of justice. AIR (V 14) 1927 Sind 54 : 98 Ind Cas 124 : 21 SLR 130 : 27 Cr LJ 1276 (DB).

——S. 439 — Finding of fact under S. 147 cannot be traversed by revisional proceedings, and as indicated by Sub-s. (4) the aggrieved party should seek his remedy in the Civil Court. AIR (V 13) 1926 Mad 154 : 22 MLW 831.

——S. 439 — The High Court in criminal revision will interfere with questions of fact in exceptional cases. AIR (V 8) 1921 Oudh 115 : 63 Ind Cas 407 : 24 OC 225 : 22 Cr LJ 647.

——S. 439 — In revision the High Court will not interfere with a finding of fact, if it is within the competence of the lower Court. AIR (V 7) 1920 Pat 775 : 60 Ind Cas 422 : 22 Cr LJ 230 (DB).

——S. 439 — Finding of fact — Powers of revision — Other remedy open.

The High Court in revision is not bound to see whether the same facts constitute any other offence than the one which the accused has been convicted. Before invoking the revisional powers of the High Court the party must wherever possible seek his remedy in the Sessions Court or before the District Magistrate. AIR (V 6) 1919 All 258 : 20 Cr LJ 347 : 1 UPLR (HC) 45 : 17 ALJ 800 : 50 Ind Cas 827.

——S. 439 — Finding of fact — High Court's power — Questions of fact.

The High Court may in revision investigate the fact of any case if necessary, but as a general rule it does not interfere with findings of fact fairly and properly arrived at, by the Court below. AIR (V 6) 1919 Pat 534 : 4 PLJ 289 : 20 Cr LJ 375 : (1919) Pat HCC 262 : 50 Ind Cas 983 (DB).

——S. 439 — Finding of fact.

The practice of the Allahabad High Court is that unless very strong grounds for an opposite course are found, the findings of the lower Appellate Court should be accepted and not of the Court of first instance on the facts of the case. AIR (V 4) 1917 All 394 : 18 Cr LJ 435 : 38 Ind Cas 995.

——S. 439 — Finding of fact.

Findings of fact are not revised except on most exceptional grounds by the Court of Judicial Commissioner, C. P. and Berar. AIR (V 4) 1917 Nag 203 : 13 NLR 169 : 18 Cr LJ 993 : 42 Ind Cas 721.

——S. 439 — Finding of fact.

A finding of fact cannot be questioned in revision when there is some evidence to support it. AIR (V 1) 1914 Lah 101 : 20 PWR 1914 Cr : 123 PLR 1914 : 15 Cr LJ 524 : 24 Ind Cas 836.

——S. 439 — Finding of fact — High Court — Revision — Questions of fact.

The High Court does not ordinarily consider questions of fact in criminal revisions except where the matter has been before only one Court below. AIR (V 1) 1914 Oudh 305 : 1 OLJ 541 : 15 Cr LJ 721 : 26 Ind Cas 169.

——S. 439 — Finding of fact — Revision.

A finding of fact cannot ordinarily be interfered with on revision. 36 PWR 1913 Cr : 319 PLR 1913 : 14 Cr LJ 595 : 21 Ind Cas 467.

——S. 439 — Finding of fact — Revision.

The orders of Criminal Courts should not be interfered with in revision upon facts except in rare cases and for very exceptional reasons. 11 PR Cr 1911 : 146 PLR 1911 : 32 PWR Cr 1911 : 12 Cr LJ 217 : 10 Ind Cas 156.

——S. 439 — Jurisdiction of High Court in revision — Finding of fact of lower court, interference with.

Although as a rule the findings of fact of the lower tribunal are accepted by the High Court in revision cases there are exceptions. (1905) 9 CWN 974 (982): 2 Cr LJ 836.

**(b) Based upon circumstances or circumstantial evidence.**

——S. 439 — Grounds for interference — Suggestions merely made by defence but no evidence adduced — Magistrate not expressing direct opinion on same — Judgment — If bad.

The Court in weighing the evidence in a Criminal case must take into consideration the suggestions made by the defence and either accept or negative the same. But the mere fact that the Court does not give its opinion directly upon the defence case apart from stating the defence would not render the decision liable to be set aside in revision. Where the defence merely makes some suggestions which are not supported by any evidence and do not give any evidence at all, the Court does not act contrary to law in not expressing any direct opinion on the same. AIR (V 39) 1952 Cal 218.

——S. 439 — Finding of fact — Interference — Powers of High Court in revision.

The High Court will not ordinarily interfere with findings of fact arrived at by the lower Court in revision under S. 439, Cr. P. Code; where, however, the High Court finds that the consideration of the evidence by the lower Court is inadequate or that the lower Court has not properly applied its mind to the task, the High Court will itself consider the evidence and go into the merits and interfere. The High Court has the power and the duty to see that there is no miscarriage of justice caused either by reason of an incorrect interpretation of the law by the lower Court or by reason of the latter's failure to appreciate the evidence properly. AIR (V 36) 1949 Oudh 78 : 50 Cr LJ 586 : 1948 AWR (CC) 118 : 1948 OACC 118 : 1948 OWN 219.

——S. 439 — If the High Court in an application in revision is satisfied that the material before the Court is so hopeless that no reasonable Court would or could ever convict the accused of the offence alleged, the High Court would enter into the facts, although as a general rule it will but rarely go into the facts in a criminal revision. AIR (V 35) 1948 Pat 409 : 49 Cr LJ 696 (DB).

——S. 439 — **Question of fact not disputed in lower Court.**

High Court setting in revision cannot allow the applicant to introduce before it questions of fact which, as they were not disputed, by implication were admitted in the lower Court. AIR (V 26) 1939 Sind 337 : ILR 1940 Kar 91 : 41 Cr L J 246 : 185 Ind Cas 832 (DB).

——S. 439 — **Case ab initio improbable — Conviction can be set aside notwithstanding concurrent findings of fact.**

When a case seems ab initio improbable and there is enmity between the parties, the element of doubt is so very strong therein that the conviction must be set aside giving benefit of doubt to the accused even on revision notwithstanding the concurrent findings of fact by the Courts below. AIR (V 26) 1939 Oudh 156 : 1939 OWN 265 : 1939 AWR 57: 40 Cr LJ 463 : 180 Ind Cas 467.

——S. 439 — Whether the girl is or is not over 14 years of age is a pure question of fact. The Magistrate has jurisdiction to decide that fact, and where he seems to have taken every care to get all possible evidence upon the record, there is no reason why the High Court should go into this question of fact. AIR (V 23) 1936 All 269 : 1936 AWR 71 : 1936 ALJ 303 : 37 Cr LJ 522 : 162 Ind Cas 47.

——S. 439 — **Object of criminal act, whether question of fact — Concurrent findings.**

The question whether the principal object of the criminal act was acquisition of property or interference with another person's enjoyment is primarily a question of fact for the Courts below and ordinarily, would not be taken up in revision if the Courts below have concurred in finding that the acts proved and the intention with which they were done constituted the offence of theft. AIR (V 23) 1936 Pat 38 : 16 PLT 891 : 2 BR 210 : 37 Cr L J 309 (1) : 160 Ind Cas 443.

——S. 439 — **Value of accounts.**

The question of the value of accounts as evidence is one of fact and the view of the lower Court with regard to accounts to all intents and purposes must be accepted as a finding of fact by the High Court in revision. AIR (V 22) 1935 Cal 316 : 36 Cr LJ 982 : 62 Cal 749 : 156 Ind Cas 678 (DB).

——S. 439 — **Likelihood of breach of peace — Question of fact — High Court, if should go into the question.**

Where the Magistrate has satisfied himself as to whether there was a likelihood of breach of peace after due inquiry, it is not necessary for the High Court to go into that question of fact. AIR (V 21) 1934 Nag 112 : 35 Cr LJ 1381 : 30 NLR 311 : 151 Ind Cas 348.

——S. 439 — **Concurrent findings — Inference based on non-existing circumstances.**

Ordinarily, the High Court will not differ from the finding of lower Courts on facts directly establishing an offence where the findings are concurrent. But the High Court has not to deal so much with such facts as with inferences drawn from circumstances deposed to by certain witnesses and where the lower Court has based its inference on circumstances which really did not exist, it is obviously right for the High Court to interfere in the interests of an accused person who has been convicted. AIR (Vol 21) 1934 Rang 42: 35 Cr LJ 849: 148 Ind Cas 1035 (2).

——S. 439 — **Concurrent findings — High Court interfered.**

Where in a case under Explosives Act, there was a finding that the phatakas were not a toy work but neither of the Courts below had inspected the phatakas :

Held that the High Court would, on examining the phatakas, interfere in revision in spite of the concurrence of opinion of the lower Courts. AIR (Vol 20) 1933 Sind 171: 34 Cr LJ 1046: 145 Ind Cas 621 (DB).

——S. 439 — The High Court in revision should not ordinarily interfere with findings of fact recorded by the Court of first appeal when there is evidence which, if believed, supports such findings. But where there are circumstances, as for instance, the convicting Magistrate not having had the benefit of weighing the prosecution evidence first hand, or the absence of expression of any definite opinion on any important point regarding the credibility of the prosecution story, the High Court will be induced to yield to the prayer for a re-scrutiny of the whole evidence. A I R (Vol 20) 1933 Sind 139 : 34 Cr LJ 802: 144 Ind Cas 427 (DB).

——S. 439 — The High Court does not ordinarily interfere in revision with findings of fact, but the question whether a criminal has been sufficiently identified, and whether his conviction on the evidence of one witness only should stand is a point more of law than of fact. AIR (Vol 18) 1931 Sind 13: 32 Cr LJ 543: 130 Ind Cas 378 (DB).

——S. 439 — Although a finding of fact is not usually interfered with in revision, where the finding is not based on any positive evidence but upon inferences drawn from certain circumstances arising from evidence and all materials on which the finding is based are set forth in the judgments of the Courts below, it is open to the accused to ask the High Court to consider whether the conclusions arrived at by the Courts below are warranted by those materials. AIR (Vol 17) 1930 Pat 209: 121 Ind Cas 321: 31 Cr LJ 249: 1930 Cr C 417: 11 PLT 319 (DB).

——S. 439 — **Question of fact, when will be gone into.**

As a rule it is not usual for the High Court to go into the facts of a case or to go behind the findings of fact arrived at by the Courts below; but in a case which depends wholly on circumstantial evidence the question whether the circumstances taken as a whole amount to conclusive proof of the guilt of the accused or not has often to be considered even by a Court of revision. AIR (Vol 16) 1929 Pat 112: 117 Ind Cas 879: 30 Cr LJ 835.

——S. 439 — **Miscarriage of justice.**

Ordinarily the High Court will not interfere with findings of facts in the exercise of its jurisdiction under Section 439, but it has jurisdiction to review even questions of facts, as the words of Section 435 of the Code clearly indicate, and will do so, where

there is a clear miscarriage of justice. Where the order of the Magistrate was in defiance of all legal and almost unrebutted evidence produced by one party to establish his existing possession of the property in question the order was set aside. AIR (Vol 11) 1924 Oudh 366: 11 OLJ 330: 25 Cr LJ 1066: 81 Ind Cas 890: 27 OC 290.

**——S. 439 — Going into facts for finding out miscarriage of justice is within the power.**

The High Court is competent to enter into a discussion of evidence and can go into facts to find out if there has been a miscarriage of justice. The controlling power of the court is a discretionary power and it must be exercised with reference to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallised as it would become, in course of case, by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the legislature has committed to them. This discretion, like other judicial discretions, ought as far as possible, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case. AIR (Vol 11) 1924 Pat 758: 83 Ind Cas 673: 5 PLT 538: 1924 PH CC 177: 26 Cr LJ 113.

——S. 439 — Party found in possession a few days before the preliminary order — Nothing on record to suggest change of possession — High Court is not bound to vacate in revision the order in his favour though there be no finding that he was in possession on the date of order. AIR (Vol 9) 1922 Mad 356: 65 Ind Cas 444: 23 Cr LJ 92: 14 MLW 678: 1921 MWN 866: 42 MLJ 147.

**——S. 439 — Finding of fact — High Court — Powers of.**

In dealing with an application under S. 439, the High Court must see whether the trial Court has acted in accordance with the law in dealing with the evidence and whether the conviction should be allowed. AIR (Vol 7) 1920 All 85: 3 UPLR (A) 113: 56 Ind Cas 856.

**——S. 439 — Finding of fact — Power to interfere.**

In a Criminal revision the High Court will not look into the evidence at all unless satisfied that a special occasion is made out for it which may be from the manner the trial has been conducted in the Courts below, or the omission to consider some outstanding circumstances. When such an occasion arises, it is the duty of the High Court to go into evidence. Per Roe, J. — The High Court cannot reopen the case to make its own estimate of the credibility of witnesses. 20 W R Cr 40 overruled. AIR (Vol 4) 1917 Pat 662: 2 PLW 298: 18 Cr LJ 915: 42 Ind Cas 147 (FB).

**——S. 439 — Finding of fact — Revision — Concurrent findings in two courts.**

When a complainant was an enemy of the accused and other circumstances also made the case doubtful against the accused, he could be acquitted despite concurrent findings by two Courts. AIR (Vol 1) 1914 Lah 66: 28 PWR 1914 Cr: 168 PLR 1914: 15 Cr LJ 591: 25 Ind Cas 343.

**——S. 439 — Finding of fact.**

When a case is ab initio improbable and there is enmity between the parties, the conviction must be set aside on revision notwithstanding concurrent findings of fact by the Courts below. 28 PWR Cr 1912: 10 PLR 1912 sup: 13 Cr LJ 712: 16 Ind Cas 520.

**——S. 439 — Finding of fact — Jurisdiction — Concurrent finding of fact.**

The High Court will interfere in revision even with concurrent findings of fact where there has been material irregularity in marshalling and weighing the evidence as for example when sufficient care is not taken to see whether the approver's evidence is corroborated. 3 PWR Cr 1911: 12 Cr LJ 35: 9 Ind Cas 232.

(c) Erroneous, resulting in miscarriage of justice.

——S. 439 — Finding of fact — Interference in revision.

In revision the High Court will not interfere with findings of fact save in exceptional cases. But when the lower appellate Court has not given reasons for its findings of fact, it may not be possible for the High Court to adhere to the general rule. AIR (Vol 39) 1952 All 433: 1950 ALJ 669.

**——S. 439 — Interference.**

A finding of fact which is either perverse or has been arrived at contrary to well-established principles of law can be interfered with in revision. AIR (Vol 33) 1946 All 227 : 1945 AWR (HC) 298 (2).

**——S. 439 — Finding of fact depending on correct interpretation of law.**

Ordinarily, it is not the practice of the High Court to disturb findings of fact in revision, but where the finding of fact depends on a correct interpretation of the law, it can examine the case on the merits. AIR (Vol 28) 1941 All 87: 1940 AWR 645: 1940 ALJ 878: 42 Cr LJ 352: ILR (1940) All 751: 193 Ind Cas 189.

**——S. 439 — Practice.**

Normally, a Court of Revision will not interfere with concurrent findings of fact, but where the Courts below have not really approached the case with either a clear appreciation of the issues involved, or a clear understanding of the principles of criminal law, the interference is proper. AIR (Vol 24) 1937 Mad 968: 1937 MWN 733: 39 Cr LJ 146: 47 MLW 140: 172 Ind Cas 501.

**——S. 439 — View of lower Courts not contrary to law or reason.**

When the view taken in a case by lower Courts is not so contrary to law or reason as to require interference by the High Court, it is unnecessary to go into the facts of the case in revision. AIR (Vol 20) 1933 Nag 33: 34 Cr LJ 1038: 145 Ind Cas 550.

**——S. 439 — Concurrent findings of fact.**

The High Court is always reluctant to interfere in revision against findings of fact of two Courts, and more so in a case which has been tried summarily. But where it is clear that the lower Courts have not had before their minds the contentions of the parties, interference is proper. AIR (Vol 20) 1933 Sind 396: 35 Cr LJ 276: 28 SLR 22: 147 Ind Cas 66 (DB).

——S. 439 — The High Court does not interfere in revision with an error or omission or irregularity unless the same has caused a failure of justice, and as regards question of fact though the Court's jurisdiction to interfere in respect of the correctness of findings of fact, even when findings of fact are concurrent, is unquestionable, the High Court will not, as a rule, go into the evidence save in exceptional cases as where the judgment on the facts is manifestly wrong and palpably just. A I R (Vo 19) 1932 Oudh 113: 9 OWN 116: 33 Cr LJ 811: 139 Ind Cas 636.

**——S. 439 — Manifest and gross miscarriage of justice.**

If the Court, sitting in revision, decides to interfere on findings of fact, it must be only because it is convinced that there has been a manifest and gross miscarriage of justice. AIR (Vol 16) 1929 Sind 26: 111 Ind Cas 856: 22 SLR 453: 29 Cr LJ 936 (DB).

**——S. 439 — Findings of fact will be accepted.**

It is the settled practice of the Sind J. C.'s Court that in dealing with revision applications, the Court

accepts findings of the lower appellate Court as correct unless such findings are based on no legal evidence or are manifestly erroneous. AIR (Vol 14) 1927 Sind 39: 98 Ind Cas 49: 21 SLR 107: 27 Cr LJ 1233 (DB).

——S. 439 — In Criminal revisions it is not, generally speaking, within the High Court's function to go behind findings of fact to support which there is evidence on record. In regard to the grounds of law the High Court does not interfere with an error or omission or irregularity unless the same has caused failure of justice; and as regards questions of facts, though the Court's jurisdiction to interfere in respect of the correctness of findings of facts is unquestionable, it will not as a rule go into the evidence save in exceptional cases as where judgment on the facts is manifestly wrong and grossly and palpably unjust. AIR (Vol 13) 1926 Oudh 557: 3 OWN (Supr) 178: 27 Cr LJ 1193: 97 Ind Cas 953.

——S. 439 — Where both the lower Courts have concurred in a finding of fact and there is nothing illegal or erroneous in the procedure of the Magistrate the High Court is usually averse to interfere in revision, except in exceptional cases. AIR (Vol 12) 1925 Lah 42: 6 LLJ 326: 26 Cr LJ 393: 84 Ind Cas 937.

——S. 439 — The High Court will set aside the finding of a lower Court when the inference drawn by the lower Court from proved facts seems to be unwarranted. AIR (Vol 12) 1925 Nag 123: 81 Ind Cas 897: 25 Cr LJ 1073.

——S. 439 — The trying Magistrate is entitled to his opinion on facts and his question is not liable to be set aside in revision even where he has not acted, according to a superior Court, with "fair mindedness and breadth of vision." AIR (Vol 12) 1925 Oudh 558: 85 Ind Cas 367: 26 Cr LJ 527.

**——S. 439 — Finding of fact if perverse or contrary to law can be upset.**

In the ordinary course of things findings of facts are accepted by a revisional Court as binding upon it but revision would be an idle farce if the revisional Court had not the power which has been exercised 100, possibly 1000 times throughout the High Courts in India to look into the evidence for itself and see if these findings can be justified by what appears upon the record. A revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well-established principles of law. AIR (Vol 11) 1924 All 299: 77 Ind Cas 183: 46 All 64: 21 ALJ 765: 4 LRA Cr 221: 25 Cr LJ 327.

**——S. 439 — Questions of fact should ordinarily be accepted.**

Criminal Revision is not a second appeal on questions of fact. It is the custom in these cases to accept facts as found unless there is anything on the face of the record against the course being adopted, or the accused has been prejudiced by the action and procedure of the Courts below. AIR (Vol 10) 1923 Nag 155: 71 Ind Cas 667: 24 Cr LJ 203.

——S. 439 — Finding of fact.

Per Beachcroft, J. — A High Court can in revision enter into questions of fact but only sparingly especially when it is shown very clearly that they are wrong. AIR (Vol 5) 1918 Cal 208: 18 Cr LJ 437: 38 Ind Cas 997 (FB).

**——S. 439 — Finding of fact — Interference when.**

It is not usual for a High Court in revision to interfere with a finding of fact, unless the lower Courts have erred in their inferences from facts as found and have found applicants guilty of offences which are not constituted by such facts. AIR (Vol 1) 1914 Sind 163: 8 SLR 199: 16 Cr LJ 230: 27 Ind Cas 902 (DB).

**——S. 439 — Finding of fact.**

If the finding of a Sessions Judge on appeal is inconsistent with his conclusion it is only a ground for rehearing the appeal and not for revision. The question whether the right of private defence exists may be treated as a question of law in revision by the High Court. (1913) 17 CLJ 394: 14 Cr LJ 205: 19 Ind Cas 951 (DB).

**——S. 439 — Finding of fact — Inquiry into.**

The High Court ordinarily when acting in revision takes the facts as found by a Magistrate but there is nothing to limit the Court's powers of interference to cases of error in law. (1913) 14 MLT 200: (1913) MWN 728: 14 Cr LJ 529: 21 Ind Cas 129 (FB).

**——S. 439 — Finding of fact.**

In criminal cases there is no such statutory restriction to the exercise of the High Court's jurisdiction. As a matter of practice the High Court does not ordinarily interfere with the conclusions of the lower Appellate Court on questions of fact, but the High Court can interfere with a finding of fact when the occasion requires it, and the High Court will do so on being satisfied that the finding is manifestly erroneous and a miscarriage of justice would result from it. (1912) 16 CLJ 453: 17 CWN 379: 13 Cr LJ 897: 17 Ind Cas 993 (FB).

**——S. 439 — Finding of fact — Revision — Conditions for.**

Where a lower Appellate Court has fallen into a material error as to facts the revision will lie. 224 PLR 1912: 38 PWR Cr 1912: 13 Cr LJ 774: 17 Ind Cas 406.

**——S. 439 — Revision — Finding of fact.**

It is unusual for the High Court in criminal cases to interfere in revision with a finding of fact unless it is one so manifestly erroneous that a miscarriage of justice would result from its remaining uncorrected. (1904) 6 Bom LR 1096 (1096): 1 Cr LJ 1111 (DB).

**(d) Absence of evidence or inadmissible evidence.**

**——S. 439 — Restrictions.**

Although the powers of the High Court to interfere with findings of fact in revision are not in any way restricted by S. 439 of the Criminal P. C., in practice they are only exercised in exceptional cases and under exceptional circumstances. They are, however, invariably exercised in cases where it is established that the findings of fact reached by the two Courts below are based either on no evidence or on inadmissible evidence or on legally inadequate evidence or are perverse. AIR (Vol 22) 1935 Nag 90: 36 Cr LJ 744: 155 Ind Cas 450.

**——S. 439 — When can be disturbed in revision.**

The finding of fact arrived at by the lower Appellate Court cannot be challenged in revision but where that finding of fact is not based upon the evidence on the record and is proved to be wrong from the record itself, then it is open to the applicant even in revision to challenge that finding of fact. AIR (Vol 22) 1935 Oudh 241: 1935 OWN 126: 36 Cr LJ 477: 154 Ind Cas 258.

**——S. 439 — No error in estimating evidence.**

It is not proper for the High Court to alter the findings of the trial Magistrate when it cannot be shown that he has made any grievous error in his estimation of the evidence. AIR (Vol 22) 1935 Rang 359: 37 Cr LJ 6: 159 Ind Cas 81.

——S. 439 — For the purpose of revision, findings of facts arrived at by the Courts below are not usually interfered with and unless it can be shown

that there was no evidence at all against any of the petitioners or at least no evidence which could reasonably be accepted by any Court of law as sufficient to justify an order under S. 108, Criminal P. C., interference would not be justified. AIR (Vol 20) 1933 Lah 236: 35 Cr LJ 408: 35 PLR 157: 147 Ind Cas 266.

**——S. 439 — Finding of fact — Interference.**

The High Court does not as a rule interfere in revision with findings of facts unless it can be said that these findings are based on no evidence or are obviously incorrect. AIR (Vol 17) 1930 Cal 645: 127 Ind Cas 553: 34 CWN 580: 1930 Cr C 1206.

**——S. 439 — Finding of fact — Revision.**

A finding of fact based on no evidence or on inadmissible evidence is liable to be set aside in revision. AIR (Vol 2) 1915 Lah 392: 16 Cr LJ 202: 7 PWR 1915 Cr: 94 PLR 1915: 27 Ind Cas 762.

**——S. 439 — Finding of fact not based on evidence.**

Where there was no evidence to support the charge, the High Court set aside the concurrent finding of the Courts below. AIR (Vol 1) 1914 Lah 84: 113 PLR 1914: 18 PWR 1914 Cr: 15 Cr LJ 521: 24 Ind Cas 833.

**——S. 439 — Finding of fact — Revision.**

Even a concurrent finding of fact by the lower courts without due regard to the evidence on the record is liable to be set aside on revision. 22 PWR (Cr) 1912: 13 Cr LJ 555: 15 Ind Cas 971.

**12. Grounds for.**

**(a) General.**
**(b) Limitation.**
**(c) Procedure.**

**(a) General.**

**——Ss. 439 and 423 — Accused acquitted of charge under S. 302 but convicted under S. 147, Penal Code — No appeal against order of acquittal — Appeal against conviction pending before High Court — Reference by Judge to High Court stating that accused was acquitted by mistake and should have been convicted — Reference, held could not be entertained.**

P, who was one of the several accused, was acquitted of the charge under S. 302, Penal Code, and was convicted only under S. 147 of the same Code. No appeal was filed against this order of acquittal. While the appeal filed by the accused against their convictions was pending in the High Court, a reference was received from the Sessions Judge stating that P had been acquitted of the charge under S. 302 by mistake, and that he too should have been convicted under that section :

Held, that the reference could not be entertained. Rightly or wrongly, P had been acquitted so far as the charge under S. 302 was concerned. Since there was no appeal against the order of acquittal, the High Court could not, on the basis of the communication of the Sessions Judge, convert the order of acquittal into an order of conviction. AIR (Vol 33) 1946 All 457 (DB).

**——S. 439 — Witnesses believed as against some accused but not as against others — It is no ground for revision.**

That the Courts below have believed the witnesses as against some of the accused when they have disbelieved them as against the others is not a ground upon which revision application can be founded. It is no doubt a valid ground in an appeal. AIR (Vol 33) 1946 All 7: 1945 ALJ 359: 1945 AWR (HC) 274: 1945 OWN (HC) 293: 47 Cr LJ 415: 222 Ind Cas 332.

**——S. 439 — Interference, when called for.**

Although the High Court, in the exercise of its revisional powers, can set aside a conviction and sentence, it will not do so unless the record shows that the evidence is not capable of sustaining the conviction and sentence. AIR (Vol 32) 1945 Mad 111: (1944) 2 MLJ 183: 1944 MWN 555: 57 LW 509 (DB).

**——S. 439 — Witnesses fully cross-examined — Second cross-examination refused — Accused not prejudiced — No interference.**

Where a person against whom proceedings under S. 110 had been started, was represented by Counsel and the witnesses had been fully cross-examined already on occasion, he cannot be said to have been prejudiced because his application for a second cross-examination was refused. The High Court will not interfere in revision in such a case. AIR (Vol 30) 1943 All 23: 1942 ALJ 557: 1942 AWR (HC) 326: ILR (1942) All 945: 44 Cr LJ 187: 204 Ind Cas 274.

**——S. 439 — Non-cognizable offence — Order of Magistrate just — Fact that complaint was not filed by complainant himself but by Police — Whether ground for interference.**

When an order passed by the Magistrate is just, the fact that the offence was not a cognizable one and that the complainant should himself have filed the complaint and not the Police, is not a sufficient reason for interfering in revision. AIR (Vol 30) 1943 Mad 169: (1942) 2 MLJ 613: 55 LW 746: 1942 MWN 760 (2): 44 Cr LJ 321: 205 Ind Cas 56.

**——S. 439 — Failure to question accused under S. 139-A.**

Notice under S. 133, Criminal P. C., issued — Magistrate's failure to question accused under S. 139-A of the Code, on date of hearing — Way encroached upon admitted to be public way — Failure to question, held no irregularity — In such a case, held, High Court will not interfere in revision. AIR (Vol 30) 1943 Pat 3: 9 BR 56: 43 Cr LJ 923: 203 Ind Cas 70.

**——S. 439 — Proceedings under S. 133.**

The High Court will not, in revision, interfere with an order under S. 133, Criminal P. C., merely because the procedure of the Magistrate was irregular. The High Court will only interfere if substantial injustice has been done. AIR (Vol 29) 1942 All 443: 1942 ALJ 558: 44 Cr LJ 76: 1942 AWR 312: 203 Ind Cas 495.

**——S. 439 — Non-compliance with S. 342.**

No omission to comply with S. 342 can render conviction liable to be set aside in revision unless it has in fact occasioned a failure of justice. AIR (Vol 29) 1942 Oudh 342: 1942 OWN 303: 43 Cr LJ 503: 1942 AWR (CC) 204: 200 Ind Cas 90.

**——S. 439 — Decision based on plenty of material — No interference.**

When the Magistrate had plenty of material before him on which to arrive at a conclusion as to who was the person entitled to the possession of the article and has decided the case on that material, there is no ground for interference with the decision in revision. AIR (Vol 29) 1942 Sind 89: ILR (1942) Kar 72: 43 Cr LJ 804: 202 Ind Cas 220.

**——Ss. 439, 203 — Order of dismissal under S. 203 — Setting it aside in revision.**

The order of dismissal of a complaint under S. 203, Criminal P. C., cannot be set aside in revision merely because the Magistrate adopted a procedure which is to be deprecated. AIR (Vol 28) 1941 Pat 419: 7 BR 420: 42 Cr LJ 332: 192 Ind Cas 836.

**——S. 439 — Error of law resulting in sentence of six months.**

Where there has been a clear error in law resulting in a sentence of six months' rigorous imprisonment upon the applicant, the High Court should interfere in revision. AIR (Vol 28) 1941 Sind 82: 42 Cr LJ 623: ILR (1941) Kar 324: 194 Ind Cas 759 (DB).

——S. 439 — No failure of justice — No interference.

Procedure of S. 514 not followed in holding surety to his bond — Surety not called upon to show cause — Omission is not justifiable — Where, however, it has not caused any failure of justice, High Court will not interfere in revision. AIR (Vol 27) 1940 Pat 375: 21 PLT 194: 41 Cr LJ 214: 6 BR 221: 185 Ind Cas 598.

——S. 439 — The High Court will interfere in revision only when substantial questions arise. AIR (Vol 26) 1939 All 166: 1938 ALJ 1217: 1939 AWR 69: 40 Cr LJ 347: 180 Ind Cas 230.

——S. 439 — Illegal order under S. 259 — Accused not prejudiced — No interference.

The making of an illegal order does not necessarily vitiate the proceedings. There is no universal rule that disobedience, even of a mandatory provision in a statute, has the consequence of nullification of the proceedings irrespective of any question of prejudice to the accused or other party. Where an accused has not been in any way prejudiced by a certain procedure followed by the Court and unless it were necessary to do so, it would obviously be undesirable to interfere in revision when the effect of the interference would merely be that the evidence which has been recorded will have to be recorded over again, with consequent waste of time and money.

A complaint was brought against the petitioner charging him with offences under Ss. 420, 406 and 403, I. P. C. The case was fixed for hearing. The complainant was absent on that day and the Magistrate then made the order presumably under S. 259, Criminal P. C., "complainant absent. Accused discharged." A fresh complaint was filed on the same facts. This complaint was proceeded with, evidence was heard and ultimately a charge was framed. All this time, the accused was not represented by an Advocate. But after charge was framed, he engaged an Advocate to defend him and a point was then taken that the order of discharge was not a legal order and that it vitiated all subsequent proceedings :

Held, the High Court would not interfere in revision as the accused had not been prejudiced by the procedure followed. AIR (Vol 26) 1939 Bom 89: 41 Bom LR 90: 40 Cr LJ 346: 180 Ind Cas 241 (DB).

——S. 439 — Conviction on tainted evidence of accomplices.

Ordinarily it is not usual for the High Court to interfere in revision with a decision of the lower Court when that decision is based upon a consideration of the evidence on the record, but where the evidence is that of accomplices and the lower Appellate Court has not given due weight to this factor and has upheld the conviction of the applicants upon the tainted evidence of accomplices, the conviction cannot be upheld by the High Court in revision :

Held, that as the whole case against the accused was engineered by another person, and the conviction was based upon the testimony of accomplices whose evidence the High Court wholly mistrusted, the conviction could not legally stand. AIR (Vol 23) 1936 Oudh 401: 37 Cr LJ 951: 1936 OWN 829: 164 Ind Cas 428 (2).

——S. 439 — Evidence.

Where the lower Court comes to a conclusion after taking a wrong view of the evidence, it will be interfered with in revision. (1934) 36 PLR 300.

——S. 439 — Evidence evenly balanced in weakness.

Where there is no reasonable probability of the conviction of the accused, the evidence in the course of inquiry being evenly balanced in weakness, it would be an injustice to allow proceedings to take their course and the accused to stand their trial, and such an injustice would be a ground for interference by the High Court in revision. AIR (Vol 20) 1933 Rang 119: 34 Cr LJ 781: 144 Ind Cas 369.

——S. 439 — To justify interference in revision the Court must be satisfied that the lower Court has erred and erred prejudicially on some question of law, or has so grossly erred in the principles which it has applied to the weighing of the evidence that interference is called for. AIR (Vol 15) 1928 All 1: 8 LRA Cr 163: 8 AI Cr R 557: 26 ALJ 99: 29 Cr LJ 92: 106 IC 684 (DB).

——S. 439 — Omission to draw an adverse inference under S. 114, Evidence Act — No ground.

A Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it; but it cannot be taken to be a principle of law that the Court must presume it, and if the Court does not make such a presumption under the circumstances of a case, it is no ground for interfering in revision. AIR (Vol 14) 1927 Oudh 318: 103 Ind Cas 560: 1 LC 195: 28 Cr LJ 704: 8 AI Cr R 414.

——S. 439 — Appealable case — Revision — When entertainable.

As a general rule when the petitioner has had an opportunity of appealing and has not utilised that opportunity the High Court will not permit a criminal revision petition. But where as a result of disallowing a revision in the case of an accused who having had an opportunity of appeal has not appealed, long sentence of imprisonment would be sustained, while according to the view of the High Court the conviction can only be for a smaller offence punishable with a very short term of imprisonment it is open to the High Court to hear the case under its general powers of revision and if necessary to interfere. AIR (V 12) 1925 Mad 239: 86 Ind Cas 283 : 26 Cr LJ 747 : 20 MLW 914 (DB).

——S. 439 — Order of commitment under S. 437 by the District Magistrate — High Court can revise both on point of law and facts. AIR (V 12) 1925 Pat 279 : 81 Ind Cas 913 : 6 PLT 146 : 25 Cr LJ 1089.

——S. 439 — Examination of witnesses after argument — If a ground.

Omission by party to ask for further argument when Magistrate has examined witness after close of both party's case and after submission of the arguments is a bar to raising objection to the Magistrate's act as a ground of revision. AIR (V 11) 1924 Cal 980 : 81 Ind Cas 931 : 28 CWN 783: 25 Cr LJ 1107 (DB).

——S. 439 — The practice of the High Court has long been not to interfere in the criminal revision on the facts found by the lower appellate Court, but the rule is not an absolute one. Therefore in a particular case the High Court may go into facts and if there is a reasonable doubt as to the guilt of accused, it will give him the benefit of doubt and set aside the conviction. AIR (V 9) 1922 All 122: 66 Ind Cas 177 : 20 ALJ 276 : 23 Cr L J 241.

——S. 439 — Pleader not heard — No ground.

Where the appeal is disposed of on the merits under Section 423, there is no power in High Court under Section 439 to set aside the judgment of the Court below merely upon the ground that the pleader of the Counsel on behalf of the petitioner was not heard in the Court below. AIR (V 9) 1922 Pat 587 · 71 Ind Cas 246 : 1 Pat 589 : 4 PLT 98 : 24 Cr L J 118 (DB).

(b) Limitation.

——S. 439 — Improper order allowing accused to escape trial — Delay in application for revision.

Where the result of an improper order is to allow an accused to escape his trial, the High Court should not allow such order to stand on the ground of mere delay in application for revision, which was for good and sufficient cause. AIR (Vol 28) 1941 Sind 97 : ILR (1942) Kar 246 : 42 Cr LJ 645 : 195 Ind Cas 14 (DB).

**——S. 439 — Delay in trial.**

Mere delay in the trial, during which the father of the accused, who might have given pertinent evidence, died, is no ground for not sanctioning the prosecution, unless the accused makes out that the delay was avoidable and deliberate. AIR (V 16) 1929 Mad 510 : 118 Ind Cas 112 : 2 M Cr C 164 : 1929 Cr C 11 : 30 Cr L J 866.

——S. 439 — Case posted at 7 a. m. — Complainant appearing a little late — Complaint dismissed — Revision lies. AIR (V 14) 1927 Mad 139 : 98 Ind Cas 607 : 27 Cr LJ 1391.

**——S. 439 — Delay — Ground for non-interference — Practice.**

Unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a good ground for non-interference. 1905 AWN 65 : 27 A 468 (469) : 2 Cri L J 154.
Also (1907) AWN 204 (204).

**(c) Procedure.**

**——S. 439 — Procedure according to statute followed — Manner of constitution of jury.**

When the procedure has been in accordance with the statute, the manner in which the jury were constituted will obviously not be a ground for interference in revision. AIR (V 28) 1941 Pat 362 : 22 PLT 327 : 7 BR 875 : 195 Ind Cas 107.

**——S. 439 — Trial of three cases — Revision, when can be allowed on that ground.**

Where there are three cases, those three cases should be kept distinct, evidence led in each case separately, and conclusions drawn on the evidence led in each particular case. However, in considering whether the revision petition should be allowed on that ground, one has to consider whether the petitioners suffered any prejudice by the three cases being clubbed together. In most cases of improper clubbing together of cases, it would undoubtedly be held that the accused had suffered prejudice by being called upon to meet three cases at the same time, but where it was only necessary to produce a few documents and to examine one witness, it could not be said that the petitioners were prejudiced in their defence by such irregular procedure. AIR (V 25) 1938 Mad 910 : 1938 MWN 865 : (1938) 2 MLJ 382 : 48 MLW 350 : 39 Cr LJ 935 : 170 Ind Cas 737.

**——S. 439 — High Court can refuse to interfere if sustantial justice has been done.**

Even if an illegality more than an irregularity had been committed, the Court has discretion to refuse to interfere in revision if sustantial justice had been done. AIR (V 23) 1936 Lah 1015 : 38 PLR 332 : 38 Cr L J 123 : 168 Ind Cas 71.

**——S. 439 — High Court, when will interfere.**

The High Court setting in revision is not a Court of first instance dealing with questions of fact, and though it will, in certain circumstances, interfere on questions of fact, ordinarily it will not do so. It will interfere only on the clearest and strongest grounds as when, for instance, there is no evidence to justify the finding of the lower Court or when it appears to the Court that the proceedings are so defective that the conscience of the Court is touched or there has clearly been a miscarriage of justice. AIR (V 23) 1936 Sind 243 : 38 Cr LJ 117 : 30 SLR 368 : 165 Ind Cas 950 (DB).

**——S. 439 — Cross-cases — Evidence taken separately one after the other — One argument and one judgment — No prejudice caused.**

Where in two cross-cases, the evidence in each was taken one after the other but they were heard by one argument and one judgment was delivered:
Held, that strictly speaking, the procedure was irregular if not illegal but as no prejudice was thereby caused to the accused in their defence, the High Court would not interfere. AIR (V 22) 1935 Cal 548 : 36 Cr LJ 1339 : 157 Ind Cas 1042 (DB).

**——S. 439 — Facts justifying framing of charge — Magistrate's discretion.**

If the trying Court thinks that there is a prima facie case against the accused and frames the charge, it would be inadvisable to interfere at that stage unless it can be shown that the Magistrate's order is clearly perverse in the face of all the evidence brought before him; and the Sessions Judge cannot show that the Magistrate's order is perverse or wrong by trying the case in the manner he would do had he been the Magistrate himself. This is not what a Revisional Court should do. So long as there are facts which justify the framing of a charge, the Magistrate must be left to exercise his discretion and authority and continue the trial. AIR (V 22) 1935 Rang 292 : 36 Cr L J 1293 : 158 Ind Cas 33 (2).

**——S. 439 — Interference in revision.**

The High Court is not invariably bound to interfere in revision because there is an irregularity in the form of the judgment, unless there is some reason to believe that there has been a failure of justice. AIR (V 19) 1932 Bom 473 : 34 Bom L R 1110 : 33 Cr L J 802 : 139 Ind Cas 608 (DB).

**——S. 439 — Grounds for.**

The object of this revisional legislation was to confer upon criminal Courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals. It will be better, even in cases of communal disturbance, if Government were to refrain from appealing to the revisional jurisdiction of this Court, unless they feel that violence has been done to some general principle which requires immediate and authoritative interference. AIR (V 15) 1928 All 287 : 9 AI Cr R 305 : 9 LRA Cr 47 : 108 Ind Cas 567 : 29 Cr L J 446 (DB).

——S. 439 — Accused must allege hardship on account of illegality of procedure which he makes a ground for revision. AIR (V 13) 1926 Nag 348 : 27 Cr LJ 475: 93 Ind Cas 699.

**——S. 439 — Disposal of case on extra-judicial grounds — Revision lies.**

Where a Court disposed of an application for prosecution of a witness for perjury on grounds of inconvenience to Court and not on the ground of the probability of his conviction on evidence,
Held, that the Court acted on extra-judicial grounds and a revision lies. AIR (V 12) 1925 Nag 412 : 89 Ind Cas 390 : 26 Cr LJ 1350.

——S. 439 — Even where accused has not moved the High Court, the High Court is competent to act in the exercise of its criminal revisional jurisdiction.

Per Madgavkar, A. J. C. — It is the practice of the Judicial Commissioner's Court not to interfere in revision when the convicted person has failed to exercise his right of appeal. Even where revisions are allowed the Court confines its interference as a rule to points of illegality or error in procedure and

not to interfere with findings of fact unless a miscarriage of justice is shown to have resulted. AIR (V 11) 1924 Sind 129 : 76 Ind Cas 230 : 25 Cr L J 134 : 17 SLR 245 (DB).

**13. Interference.**

See N. 23.

**14. Interlocutory order.**

**——S. 439 — Error of law — Order of adjournment — Interference.**

In some circumstances a mere order of adjournment may amount to an error of law, for example, an adjournment for an unreasonably long period or an adjournment for a reasonble period but after a number of adjournments where the position is that the last adjournment though not unreasonable in itself becomes cumulatively with the preceding adjournments unreasonable. But if there is nothing legally wrong with the order quo order of adjournment, the High Court will not interfere in revision with the order. AIR (Vol 36) 1949 Cal 573 : 50 Cr LJ 979.

——S. 439 — The High Court will, especially at an interlocutory stage, not interfere in revision unless the impropriety is a flagrant one and prompt action is necessary to prevent an injustice. AIR (Vol 27) 1940 Nag 390: 1940 NLJ 449: 42 Cr LJ 208: ILR (1942) Nag 333: 191 Ind Cas 636.

——S. 439 — The High Court can interfere with an interlocutory order in revision where it is found that prima facie injustice has been done. (1938) 40 PLR 776.

**——S. 439 — Proceedings of interlocutory nature.**

Even in the case of proceedings of an interlocutory nature, the High Court will interfere to quash proceedings in cases where it is clear that interference is necessary where no offence has obviously been committed. AIR (Vol 20) 1933 Bom 409: 35 Bom LR 845: 57 Bom 690: 35 Cr LJ 230: 146 Ind Cas 688 (DB).

——S. 439 — Although a Court of Revision should be most reluctant to interfere in a pending case but where upon the alleged facts, there is no justification for the charge against the accused he should not, for a moment longer than is necessary, be allowed to remain in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish. AIR (Vol 20) 1933 Rang 297 : 35 Cr LJ 52: 146 Ind Cas 402.

——S. 439 — Where a remedy ultimately lies by way of appeal it is unnecessary for the High Court to move in revision. If the Court is acting without jurisdiction, the party need not concern himself at all about the trial. If, on the other hand, it is not so clear, and it is a moot point whether or not the lower Court has jurisdiction, then that matter should be thrashed out fully in both Courts below before it is brought, if necessary, to the High Court. AIR (Vol 18) 1931 Mad 419: 33 LW 475: 60 MLJ 495: 1930 MWN 1271: 32 Cr LJ 895: 54 Mad 595: 132 Ind Cas 319.

——S. 439 — The High Court will not interfere in a case during its pendency in a Subordinate Court unless it is of an exceptional nature; and the usual test of its being of such a nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is one fit for its interference at an intermediate stage. AIR (Vol 18) 1931 Pat 140: 12 PLT 69: 32 Cr LJ 782: 10 Pat 596: 131 Ind Cas 785.

**——S. 439 — Interlocutory order.**

There is ordinarily no justification for a High Court to take up in revision what are really interlocutory matters in a criminal Court. AIR (Vol 17) 1930 Lah 346 : 31 PLR 893 : 128 Ind Cas 50 : 1930 Cr C 394 (DB).

——S. 439 — An application in revision lies over an interlocutory order passed by a criminal Court. AIR (Vol 16) 1929 Oudh 543: 123 Ind Cas 222: 31 Cr LJ 479 : 6 OWN 937 : 1929 Cr C 677.

——S. 439 — High Court will not interfere with an interlocutory order framing a charge, but it has power to examine proceedings when charge is framed and if necessary set it aside. AIR (Vol 14) 1927 Lah 731: 9 LLJ 440: 8 AI Cr R 447: 103 Ind Cas 835 : 28 Cr LJ 755.

——S. 439 — It would be under very rare and exceptional circumstances that the High Court would interfere on the revisional side in connexion with an interlocutory order. It is highly undesirable that the High Court should, on any or every pretext, interfere with proceedings in the subordinate Courts unless on very exceptional grounds. On the contrary, however an effort should be made to allow the proceedings in these Courts to take their natural course. AIR (Vol 13) 1926 Nag 304 : 22 NLR 34 : 27 Cr LJ 707 : 94 Ind Cas 899.

——S. 439 — There is ordinarily no justification for a superior Court to take up in revision matters which are interlocutory matters in a Criminal Court. Refusal by trying Magistrate to summon himself as a witness is an interlocutory matter. AIR (Vol 13) 1926 Oudh 556: 3 OWN 720: 27 Cr LJ 1191: 97 Ind Cas 951.

——S. 439 — Interlocutory order — Neither revision nor appeal lies. AIR (Vol 13) 1926 Oudh 280: 1 Luck 48: 13 OLJ 662: 3 OWN 104: 27 Cr LJ 191: 91 Ind Cas 1007.

**——S. 439 — Proceedings, meaning of — Interlocutory proceedings — Interference in revision.**

As a general rule the High Court will not interfere in interlocutory proceedings. AIR (Vol 7) 1920 All 8: 2 UPLR (A) 75: 21 Cr LJ 379: 55 Ind Cas 859.

**15. Jurisdiction.**

(a) **General.**
(b) **Practice.**

**(a) General.**

**——S. 439 — Powers of High Court — Alteration of implied finding of acquittal into one of conviction.**

Where there has been an acquittal of a charge, the High Court has no power to convert in revision a finding of acquittal into one of conviction and the conviction can only be made by way of an appeal by the Provincial Government. The conviction under S. 165, I. P. Code, of an accused person who was charged under S. 161, I. P. Code, necessarily implies an acquittal under S. 161, and the High Court has no jurisdiction in revision to alter the conviction from one under S. 165 to one under S. 161, I. P. Code. AIR (Vol 34) 1947 Cal 162: 224 Ind Cas 625: 47 Cr LJ 662 (DB).

——S. 439 — Scope — Order under S. 81, Punjab Municipal Act — Revision — Interference — Jurisdiction. See 29 Ind Cas 549: AIR (Vol 34) 1937 Lah 183.

——S. 439 — Ss. 439, 514 — Frontier Crimes Regulation (III of 1901), Ss. 10 and 20 — Case referred to Judge under S. 10, Frontier Crimes Regulation — Security bond taken by District Magistrate forfeited — The case is thereafter governed by S. 20 of the Regulation and not by Criminal P. C. — No revision lies to High Court from the order of forfeiture — Revision lies to the Commissioner. AIR (Vol 31) 1944 Lah 396: 46 PLR 23: 46 Cr LJ 16: 215 Ind Cas 160.

**——S. 439 — Unappealable sentence.**

It is the nature of the sentence which does or does not give a right of appeal, and it is hardly open to the accused to say that they should have been given higher sentence so that they might have a right of appeal.

Where a Magistrate did not act in such a way that the High Court should interfere in unappealable sentence, the High Court should not interfere in its extraordinary jurisdiction in revision. A I R (Vol 23) 1936 All 147: 1936 ALJ 209: 37 Cr LJ 417: 1936 AWN 129: 161 Ind Cas 307.

——S. 439—The High Court has no power to review an order passed by itself in exercise of its revisional jurisdiction. It possessed no inherent power to review its judgment before the amendment of 1923 and it cannot be said that S. 561-A, Criminal P. C., either modifies the provisions of S. 369 of the Code or clothes the Court with any fresh power.

The revisional sections do not, in themselves, give the High Court power to revise an order of its own and although it may be open to it to call for the record of a case which has already been dealt with in revision, there is no power to pass any order which would have the effect of setting aside or modyfying an order passed in revision by itself. AIR (Vol 22) 1935 All 466: 57 All 867: 1935 ALJ 317: 1935 AWR 337: 36 Cr LJ 1286: 157 Ind Cas 1044 (DB).

**——S. 439 — Powers under S. 76 (8), Madras Village Courts Act.**

The revisional jurisdiction given to the joint Magistrate under S. 76 (8) of the Madras Village Courts Act is no greater than that which he has under S. 439, Criminal P. C. AIR (Vol 21) 1934 Mad 716 : 1934 MWN 1022 : 36 Cr LJ 550 : 58 Mad 256 : 68 MLJ 534 : 41 LW 708 : 154 Ind Cas 602.

**——S. 439 — Jurisdiction — How obtained.**

Jurisdiction by way of appeal or revision will not be inferred, but must be expressly given by statute. AIR (Vol 17) 1930 Bom 486 : 32 Bom LR 1138 : 1930 Cr C 1022 : 54 Bom 664 : 32 Cr LJ 397 (DB).

**——S. 439 — Jurisdiction — Executive order — Orders under Police Act — Revision.**

The orders of a Magistrate passed by him as an executive officer purporting to act under the Police Act and not as a Court of law or as a Magistrate acting in judicial capacity, are not revisable. The question of the power of the Magistrate to pass such an order was one to be dealt with by his superiors on the executive side and the High Court had no jurisdiction to reverse the said orders under the provisions of the Cr. P. C. That in view of the finding that the Magistrate was not acting as a Court of law, S. 107, Government of India Act, had no application. AIR (Vol 17) 1930 Lah 539 : 1930 Cr C 687 : 31 PLR 725 : 32 Cr LJ 296 : (DB).

——S. 439 — Every illegality does not call for interference by appellate or revisional court. AIR (Vol 17) 1930 Sind 315 : 1930 Cr C 1147 : 32 Cr LJ 521 (DB).

**——S. 439 — Jurisdiction — Railways Act — High Court will not go into merits when it had no jurisdiction to revise order.**

Per Percival, J. C. — A person travelled without a ticket but with guard's permission. He was asked to pay extra charge which he refused. Application to a Magistrate under S. 113 (4), Railways Act, was rejected. It was contended that though High Court were to hold that revision was incompetent, still it should go into the merits of the Magistrate's order.

Held, that High Court could not go into the merits of the order, when it had no jurisdiction to revise that order. AIR (Vol 17) 1930 Sind 162 : 24 SLR 389 : 31 Cr LJ 592 : 1930 Cr C 646 : 126 Ind Cas 58 (DB).

——S. 439 — High Court has no jurisdiction under S. 439 (4) to convert an order of acquittal into one of conviction on an application in revision as it would not be an easy matter to interfere with an order of acquittal on revision without directly or indirectly contravening the spirit if not the letter of S. 439, sub-s. 4. High Court would be adverse to exercising the revisional jurisdiction in cases of acquittal in case such jurisdiction exists except perhaps when an interference is urgently demanded in the interest of justice. AIR (Vol 16) 1929 Bom 306 : 53 Bom 564 : 31 Bom LR 529 : 1929 Cr C 135 : 30 Cr LJ 1062 : 119 Ind Cas 643 (DB).

**——S. 439 — Order of Sub-divisional officer under Bengal Alluvial Lands Act (V of 1920).**

Order passed by Collector as such under the Alluvial Lands Act cannot be revised by Criminal Bench of the High Court under S. 439.

Per Suhrawardy, J. — Order passed by a Sub-Divisional Officer under the Alluvial Lands Act directing that some huts which were erected on the disputed char were to be sold and the sale proceeds credited to the treasury, is not passed in judicial capacity but as an executive officer and as such cannot be revised by the High Court. AIR (Vol 16) 1929 Cal 768 : 57 Cal 282 : 31 Cr LJ 441: 33 CWN 836 : 1929 Cr C 480 : 122 Ind Cas 640 (DB).

**——S. 439 — Jurisdiction — Objection to.**

Magistrate deliberately ignoring facts ousting his jurisdiction — High Court will interfere in revision. AIR (Vol 14) 1927 Mad 307 : 25 MLW 86 : 28 Cr LJ 164 : 7 AI Cr R 280 : 99 Ind Cas 596.

**——S. 439 — Jurisdiction — Miscellaneous — Appellate order of a civil Court refusing to file a complaint.**

An appellate order by a civil Court confirming refusal to lodge a complaint by its subordinate Court is not open to revision by High Court under S. 439, Cr. P. Code, as the order is not a criminal Court. AIR (Vol 14) 1927 Oudh 14 : 3 OWN 905 : 28 Cr LJ 16 : 7 AI Cr R 47 : 7 AI Cr R 240 : 99 Ind Cas 48.

**——S. 439 — Enhancement of sentence — Jurisdiction — Acquittal under S. 302, I. P. C. and conviction under S. 323, I. P. C. — High Court can convict under S. 325, I. P. C.**

Under S. 439 of the Cr. P. Code the High Court is precluded from converting the finding of acquittal under S. 302 into one of conviction under S. 302, I. P. C., if there is no Government appeal. But the High Court is not precluded from convicting the accused under S. 325 where they have been acquitted under S. 302 and convicted under S. 323, I. P. C. AIR (Vol 13) 1926 All 332 : 24 ALJ 414 : 27 Cr LJ 564 : 7 LRA Cr 153 : 7 LRA Cr 100 : 94 Ind Cas 132 (DB).

——S. 439 — Conviction by a Judge of Judicial Commissioner's Court cannot be altered by that Court in revision. AIR (Vol 13) 1926 Nag 323 : 27 Cr LJ 339 : 92 Ind Cas 851 (DB).

**——S. 439 — Magistrate convicting accused for lesser offence within his jurisdiction — Facts also constituting grave offence not within his jurisdiction — Legality.**

When a Magistrate convicts the accused of an offence triable by him though the facts disclosed also constitute a graver offence, not triable by him, his proceedings are not void under the provisions of S. 530. High Court will not interfere, when no objection was taken either before the

Magistrate or in the Court of appeal to the jurisdiction of the trial Court and the accused are not prejudiced. AIR (Vol 13) 1926 Pat 393 : 7 PLT 496 : 27 Cr LJ 1017 : 96 Ind Cas 873.

——S. 439 — Accused convicted of one offence though facts found would constitute more serious offence — High Court would not interfere unless sentence is inadequate or accused is deprived of right of appeal. AIR (Vol 13) 1926 Pat 36 : 7 PLT 272 : 26 Cr LJ 1559 : 90 Ind Cas 439.

——S. 439 — Order overruling objection that jurisdiction is barred by S. 403 — **High Court can set aside order.**

The revisional powers conferred on the High Court by S. 439 of the Cr. P. Code include the power of setting aside an order overruling an objection taken on behalf of the accused to the jurisdiction of the Magistrate to entertain the charge, on the ground that a similar complaint had been previously made against the accused and dismissed. 45 PR 1885 Cr., Diss. AIR (Vol 12) 1925 Lah 439 : 7 LLJ 252 : 26 PLR 353 : 26 Cr LJ 1508 : 90 Ind Cas 292.

——S. 439 — Revision lies where lower Court has assumed jurisdiction by ignoring aggravating facts. AIR (Vol 12) 1925 Mad 367 : 20 MLW 919 : 25 Cr LJ 1193 : 82 Ind Cas 57.

——S. 439 — Necessary party not asked to file written statement — No specific statement as to danger of breach of peace — Proceedings will be set aside in revision. AIR (Vol 12) 1925 Oudh 484 : 26 Cr LJ 630 : 85 Ind Cas 918.

——S. 439 — High Court cannot revise order of its own Judge or Judges. AIR (Vol 10) 1923 Mad 426 : 46 Mad 382 : 24 Cr LJ 439 : 1923 MWN 94 : 44 MLJ 450 : 72 Ind Cas 599 (DB).

——S. 439 — Possession delivered by Civil Court — Failure to maintain by Magistrate is an error of jurisdiction. A I R (Vol 10) 1923 Pat 76 : 3 PLT 628 : 24 Cr LJ 279 : 71 Ind Cas 999.

**——S. 439 — Jurisdiction — Consent.**

The consent of a party concerned cannot affect the absolute disqualification imposed by S. 556, Cr. P. Code. AIR (Vol 9) 1922 Lah 30 : 4 LLJ 452 : 14 PWR Cr 1922 : 61 PLR 1922 : 23 Cr LJ 446 : 67 Ind Cas 622.

**(b) Practice.**

**——S. 439 — District Magistrate transferring case under S. 528 (1) — High Court, if can revise order — Duty of aggrieved party in such case.**

In its revisional jurisdiction the High Court can interfere with the order of the District Magistrate transferring a case under S. 528 (2), Criminal P. C. But the aggrieved party must, before approaching the High Court apply to the Sessions Judge under the rules of the High Court. AIR (Vol 30) 1943 Nag 236 : 1943 NLJ 269 : 44 Cr LJ 643 : ILR (1943) Nag 637 : 207 Ind Cas 431.

——S. 439 — High Court would not ordinarily entertain revision unless application has previously been made to the Sessions Court or District Magistrate as the case may be. But where the application made in due time has been dismissed by the Sessions Judge, then the applicant can come in revision before the High Court. But where he withdraws that application, this course is not open to him. But so far as the High Court Rules (Bom.) are concerned, it can take the application to the Sessions Court as sufficient compliance with the spirit of the rule and it can, therefore, properly entertain the application in revision against the Magistrate's order. AIR (Vol 29) 1942 Bom 148 : 44 Bom LR 246 : 43 Cr LJ 708 : ILR (1942) Bom 249 : 200 Ind Cas 724.

**——S. 439 — Revision admitted — If should not be thrown out on ground that Sessions Judge was not first approached.**

Once an application in revision has been admitted, it should not be thrown out on the ground that the applicant ought first to have gone to the Sessions Judge. AIR (Vol 29) 1942 Oudh 438 : 1942 AWR 275 : 1942 OWN 425 : 43 Cr LJ 739 : 201 Ind Cas 466.

**——S. 439 — First Revisional Court holding alleged nuisance proved — Case held could not be re-opened on merits in second revision.**

In its order on revision, the first Revisional Court stated that the finding of the lower Court that the alleged nuisance was proved was correct. In the second revision, the party attempted to re-open the case on merits:

Held, that in the circumstances, it was too late to re-open the case on the merits. AIR (Vol 28) 1941 Lah 305 : 43 PLR 341 : 42 Cr LJ 825 : 196 Ind Cas 225.

**——S. 439 — No revision before Court of Session — Chief Court if can entertain — Wrong advice of Counsel.**

It is the uniform practice prevailing in the Chief Court to refuse to entertain an application in revision against an appellate order of the District Magistrate where the applicants have not gone in revision to the Court of Session, which has concurrent jurisdiction. The advice given by the Counsel that the application for revision would lie in the Chief Court is not "a special circumstance" which would entitle the applicants to file the application in the Chief Court. AIR (Vol 28) 1941 Oudh 268 : 1941 OWN 193 (2) : 42 Cr LJ 349 : 1941 AWR 78 : 193 Ind Cas 47.

**——S. 439 — High Court, if can entertain revision direct.**

Though it is not usual for the High Court to entertain applications in revision direct, they must, after they have been admitted, be disposed of on the merits. AIR (Vol 28) 1941 Pat 548 : 22 PLT 510 : 43 Cr LJ 110 : 8 BR 145 : 197 Ind Cas 74.

**——S. 439 — Offence committed under S. 212, Madras Estates Land Act (I of 1908).**

Although the offence said to have been committed is one under S. 212 of the Madras Estates Land Act, and the complainant had applied in revision to the District Collector under S. 205 of the Act, yet the procedure to be adopted is governed by the Criminal P. C., and if the Magistrate does not act as he should, under S. 202, Criminal P. C., then undoubtedly the complainant would be entitled to file a revision petition before the District Magistrate and the High Court would have jurisdiction under the Code to interfere, if necessary, in the interests of justice. AIR (Vol 25) 1938 Mad 879 : (1938) 2 MLJ 372 : 1938 MWN 973 : 39 Cr L J 984 : 48 L W 801 : 177 Ind Cas 957.

**——S. 439 — Oudh Chief Court — District Magistrate confirming conviction and sentence of accused under S. 447, Penal Code — Forum of revision — Sessions Judge or Chief Court.**

The Oudh Chief Court is precluded from entertaining an application for revision, by reason of the practice of the Court refusing to entertain an application in revision, where the applicant has not gone in revision to the Sessions Judge from an appellate order of the District Magistrate confirming the conviction and sentence passed on the accused under S. 447, I. P. C. (1937) 38 Cr LJ 1024 : 1937 OWN 1044 : 171 Ind Cas 167.

**——S. 439 — Applicant not first applying for revision before Sessions Judge or District Magistrate.**

The High Court of Oudh is precluded from entertaining an application in revision against an order of the First Class Magistrate when the applicant has not gone in revision either to the Sessions Judge or to the District Magistrate. (1934) 35 Cr LJ 475 : 10 OWN 733 : 147 Ind Cas 797.

**——S. 439 — Revision, whether a subsequent stage of the case.**

The exercise of jurisdiction under S. 439, Criminal P. C., is subject to the limitations imposed by the section, purely discretionary and an application in revision cannot be said to be a subsequent stage of the same case within the meaning of S. 454, Criminal P. C. AIR (Vol 20) 1933 Cal 240 : 34 Cr LJ 671 : 60 Cal 676 : 143 Ind Cas 892 (DB).

**——S. 439 — Revision filed without approaching District Magistrate or Sessions Court — Allahabad High Court — Practice.**

It has been the settled practice of the Allahabad High Court to refuse to hear an application for revision even after an ex parte admission of the application, when the applicant has not first applied to the District Magistrate or to the Sessions Judge for revision and it is not advisable to vary the practice though there may not be any rule of statute law on the subject. AIR (Vol 16) 1929 All 272 : 1929 ALJ 514 : 10 LRA Cr 97 : 12 AI Cr R 57 :: 30 Cr LJ 1079 : 119 Ind Cas 444.

——S. 439 — Revision application entertainable by District Magistrate or Sessions Judge. Such application was not entertained by High Court unless District Magistrate of Sessions Judge has been previously moved in the matter under S. 435. AIR (Vol 16) 1929 Nag 13 : 10 AI Cr R 333 : 29 Cr LJ 618 : 109 Ind Cas 810.

**——S. 439 — Application to lower Court is essential before applying High Court.**

A previous application for revision to the lower Court should be considered an essential step in the procedure and failure on the part of the applicant to submit his application to the lower Court will operate as a bar to the application being entertained by the High Court.

There is no authority for the view that it is unnecessary to make an application to the lower Court for the revision of an order merely because that order is an appellate order. AIR (Vol 14) 1927 All 834 : 7 AI Cr R 248 : 8 LRA Cr 36 : 28 Cr LJ 475 : 101 Ind Cas 603.

**——S. 439 — Allahabad High Court practice — Application to Sessions Judge is necessary.**

In the matter of applications for revision on the criminal side, an application to the Sessions Judge is an essential step in the procedure. Failure on the part of the applicant to submit his application through the lower Court will operate as a bar to the application being entertained by the High Court. AIR (Vol 14) 1927 All 829 : 7 AI Cr R 438 : 8 LRA Cr 67 : 28 Cr LJ 544 : 102 Ind Cas 352.

**——S. 439 — Lahore High Court practice.**

The usual practice of the Lahore High Court is to decline to consider an application under S. 439 unless and until the petitioner satisfies the Court that the Sessions Judge or the District Magistrate has been moved in the matter unsuccessfully. Where such petition was made to the Lahore High Court, after moving unsuccessfully the District Magistrate sitting as a Court of appeal, but not the Sessions Judge, the High Court did not decline to entertain the petition. AIR (Vol 14) 1927 Lah 689 : 28 Cr LJ 815 : 104 Ind Cas 255.

——S. 439 — Order under S. 523, Cr. P. C., can be examined. AIR (Vol 11) 1924 Lah 76 : 4 Lah 38 : 24 Cr LJ 670 : 73 Ind Cas 702.

**——S. 439 — High Court can be approached as a last resort.**

Even though High Court has concurrent jurisdiction with District Magistrate or Sessions Judge in the matter of ordering further enquiry it is a right course to adopt to insist on the party exhausting all his remedies in an inferior Court, before he comes up to High Court. The fact that an order for compensation passed along with an order of discharge is revisable by the High Court only, does not alter the procedure. AIR (Vol 11) 1924 Mad 228 : 18 MLW 651 : 1923 MWN 837 : 25 Cr LJ 310 : 76 Ind Cas 1030.

**——S. 439 — Order wholly without jurisdiction — High Court will interfere.**

Although under Cl. (4) of S. 144, Cr. P. Code, it is incumbent on the petitioners to go in the first instance before the District Magistrate before coming up in revision to the High Court and ordinarily, that is the practice in the High Court still the High Court will interfere where the order of the Sub-Divisional Magistrate is wholly without jurisdiction. AIR (Vol 11) 1924 Pat 145 : 5 PLT 90 : 1 Pat LR Cr 223 : 24 Cr LJ 947 : 75 Ind Cas 531.

——S. 439 — Revision application lying to a lower Court — Revision not to be entertained in the High Court. AIR (Vol 9) 1922 Oudh 147 : 25 OC 37 : 9 OLJ 280 : 24 Cr LJ 275 : 71 Ind Cas 995.

**——S. 439 — Construction of — C. P. Code, S. 115 — Distinction.**

Under Letters Patent though the civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction the criminal revisional jurisdiction is not included in the criminal appellate jurisdiction. AIR (Vol 4) 1917 Cal 705 : 43 Cal 1143 : 20 CWN 1071 : 17 Cr LJ 339 : 35 Ind Cas 515 (DB).

**——S. 439 — Concurrent jurisdiction of High Court and Sessions Judge — Practice.**

Where any Court having concurrent jurisdiction is not resorted to, the High Court will decline to exercise jurisdiction but will delegate the party to the lower court unless there are special reasons to the contrary. This is the practice in Calcutta, Allahabad and Bombay and should not ordinarily be departed from. AIR (Vol 4) 1917 Pat 596 : 2 PLW 115 : 18 Cr LJ 863 : 41 Ind Cas 831.

**——S. 439 — Power of High Court to revise — Without resorting to Sessions Court.**

The wide jurisdiction conferred by the Criminal Procedure Code on the High Court ought not to be fettered by hard and fast rules : High Court may interfere in revision even if the Sessions Court was already approached on the matter. 14 Bom 33, Not Foll. AIR (Vol 3) 1916 Mad 713 : 2 LW 1126 : 16 Cr LJ 794 : 31 Ind Cas 650.

**——Ss. 439 and 435 — Construction of.**

Section 439 must be read along with and subject to the provisions of S. 435. (1913) 40 Cal 477 : 17 CLJ 245 : 14 Cr LJ 197 : 17 CWN 647 : 19 Ind Cas 197 (DB).

**——S. 439 — Proceedings, meaning of — Extradition Act (XV of 1903), S. 7 — Warrant — Revision.**

The Chief Court has no power to interfere in respect of warrant issued by a Political Agent of a Native State under the Extradition Act, on the ground either that there is no prima facie case or that the circumstances did not justify the exercise of such a power. 3 PR 1909 Cr : 36 PWR 1908 Cr : 9 Cr LJ 3 : 1 Ind Cas 198.

——Ss. 439, 476 — **High Court's power — Revision — Order passed by a Munsif directing the prosecution of a party to a civil suit.**

Where a Munsif, acting under S. 477, Cr. P. C., directed the prosecution of a party to a civil suit pending before him: Held by Stanley C. J. and Blair J. that the High Court had no jurisdiction in the exercise of its revisional powers on the Criminal Side under S. 439, Cr. P. C., to interfere with such order.

Per Bannerji J. contra: — The High Court has power to revise such an order under S. 439, Cr. P. C., whether such order be made by a Civil, Criminal or Revenue Court. (All the authorities collected and ref. to). 1904 AWN 15 : 26 A 249 (256, 265) (FB).

16. Jurisdiction under S. 115, Civil P. C.

See N. 27.

17 — Jury trial.

See Criminal P. C., S. 297.

18. Limitation.

——S. 439 — **Revision petition admitted by the Court — Plea of limitation does not apply as there is no period prescribed for such application.**

Once a revision petition has been admitted by the High Court it has got to be considered on its merits and the plea of limitation does not apply particularly when there is no period of limitation prescribed by the statute for such application.

Hence, where a revision petition against the order rejecting petition under S. 488, Criminal P. C., is filed and is admitted by the High Court, the plea that the application is barred by time as it was filed long after the order was made by the Magistrate, is not maintainable. AIR (V 33) 1946 Pat 104 : 47 Cr LJ 821.

——S. 439 — **Application filed beyond 90 days — Practice.**

Per Malik, J. — There is a well-established practice not to entertain a belated criminal revision. An application filed beyond 90 days is generally rejected merely on that ground. AIR (V 32) 1945 All 207 : 1945 ALJ 204 : ILR (1945) All 450 : 1945 AWR (HC) 167 : 1945 OWN (HC) 195 : 47 Cr LJ 132 : 221 Ind Cas 256 (DB).

——S. 439 — **Finding as to delay — No interference in revision.**

The High Court should not ordinarily consider in revision, the propriety of a finding about delay in filing an appeal. AIR (V 30) 1943 Sind 157: ILR (1943) Kar 122: 45 Cr LJ 76: 209 Ind Cas 119 (DB).

——Ss. 439, 435 — **Revision petition admitted — Question of limitation — Revision coming before High Court — It can deal with it under Ss. 435 and 439 — It need not see whether affidavit was properly sworn by accused.**

Where a revision has been admitted, the question of limitation is not of much importance in a criminal revision about which no limitation has been fixed by statute.

In such a case, once the case has come before the High Court, it can deal with the matter under Ss. 435 and 439, Criminal P. C., and it is not necessary for the High Court to see whether the petition of revision is in order and the affidavit was properly sworn to by the accused. AIR (V 29) 1942 Pat 150 : 22 PLT 976 : 43 Cr LJ 537 : 8 BR 534 : 199 Ind Cas 218.

——S. 439 — **Revision against acquittal by private complainant — Limitation of sixty days — Rule, if flexible — Exclusion of time.**

The rule that a revision by a private complainant against acquittal of accused should be filed within 60 days of acquittal, plus the period required for copying is not an inflexible one and might be departed from in exceptional circumstances. If the reasons given by the applicant for the delay are not sufficient, the Court can dismiss the application. The proper procedure in such a case is for a complainant to file an application in revision before the High Court within time, and without waiting for a decision of his application to the District Magistrate to take steps for an appeal. The applicant cannot claim the exclusion of time taken in moving the District Magistrate to file an appeal. Both the proceedings are distinct though the object is the same. 60 days is quite a liberal allowance without further extension, and it is very desirable that if there is to be a re-trial, it should take place as soon as possible :

Held, after considering that the applicant was not diligent in filing revision and that there was no merit in the application, that the case was not of such an extraordinary nature that the application made at late stage and without the support of the Provincial Government would be entertained. AIR (V 27) 1940 Nag 259 : 1940 NLJ 319 : 41 Cr LJ 745 : 189 Ind Cas 479 : ILR (1942) Nag 255.

——S. 439 — **Practice.**

As a general practice the High Court will not entertain, in the absence of most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned. AIR (V 27) 1940 Pat 135 : 6 BR 155 : 41 Cr LJ 171 : 185 Ind Cas 346.

——S. 439 — **Practice of Patna High Court.**

In accordance with the practice of the Patna High Court, applications in revision are not usually entertained unless presented within sixty days of the order applied against. Where there is nothing in the facts of the case, of special importance, there is no reason to depart from the usual practice. AIR (V 23) 1936 Pat 109 : 2 BR 172 (1) : 37 Cr LJ 234 (1) : 160 Ind Cas 152 (1).

——S. 439 — **Practice of Lahore High Court.**

So far as the Lahore High Court is concerned, there is no rule of practice that criminal revisions, which are filed after the expiry of sixty or ninety days must be rejected simply on the ground of delay and laches. The discretion of the Judge is unfettered. He may take into consideration the factor of delay in disposing of the application but that factor cannot be treated as the sole determining element and the case will have to be decided on its general merits. AIR (V 21) 1934 Lah 264 : 35 Cr LJ 1447 (2) : 151 Ind Cas 943 (DB).

——Ss. 439, 438 — **Practice — Fresh period of sixty days, if accrues from date of refusal to make reference — Exceptional circumstances — Burden of proof.**

The High Court, as a general practice, will not entertain, in the absence of the most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of sixty days from the date of the decision or order impugned. A fresh period of sixty days does not accrue from the date when the Sessions Judge refuses to make a reference under S. 438 of the Criminal P. C. Where the Court is moved after the expiry of the period of sixty days, the question is whether there exist such exceptional circumstances in the particular case as to induce the Court to depart from its usual practice. (1934) 152 Ind Cas 311 : 15 PLT 569 : 1 BR 33 : 36 Cr LJ 97 (1).

——S. 439 — **Delay in filing, sufficiently explained by accused.**

Where in an application for revision, the accused is able to give a sufficient explanation of the

delay that had taken place before the High Court was moved or before the matter attracted the notice of the High Court on a reference, the High Court can entertain the application. AIR (V 20) 1933 Cal 647 (2) : 35 Cr LJ 29 : 146 Ind Cas 366 (DB).

**——S. 439 — Mere delay in drawing up formal proceedings by Magistrate.**

The rule that the High Court will not ordinarily interfere in revision on an application presented more than two months after the date of the order complained of, is not a rule of law and does not take away the power of the High Court to interfere in any case as the High Court has power to do so even of its own motion and in the absence of any application at all on a perusal of the record. Mere delay of the Magistrate in drawing up the formal proceeding instead of drawing it up immediately on receipt of Police report, is no ground for interference in revision, in the absence of substantial injustice resulting from the Magistrate's order. AIR (V 20) 1933 Pat 601(2) : 35 Cr LJ 91 : 146 Ind Cas 551 (2).

——S. 439 — The admission of an application for revision under S. 439, Criminal P. C., is a matter entirely within the discretion of the Revisional Court. If an application for revision is made after unreasonable delay, that alone can be a sufficient ground for the Court to reject it. It would not be unreasonable to regard the period prescribed for limitation in the case of appeals as a standard of reasonable time within which applications for revision should ordinarily be filed. When an application for revision has been filed after the expiry of the period allowed for an appeal, the Court should ask the applicant to give reasons for the delay and if these reasons are not sufficient, the Court can dismiss the application. AIR (Vol 19) 1932 Oudh 242: 9 OWN 334: 7 Luck 699 : 137 Ind Cas 684 : 33 Cr LJ 506 (DB).

**——S. 439 — No time limit is placed on High Court's power of revision.**

Art. 181 has no application to an application made to High Court in revision of an order of a Criminal Court of inferior jurisdiction. It does not appear that the Legislature ever intended that there should be a time limit placed upon the power to interfere by way of revision in criminal case. There is no reason also why the same principle should not be applied to Civil Revisions. These powers are exercised by High Court quite irrespective of any right on the part of the aggrieved party to move the Court. AIR (Vol 17) 1930 Oudh 401: 126 Ind Cas 395: 7 OWN 663: 1930 Cr C 941: 31 Cr LJ 1012.

**——S. 439 — Admission or non-admission of application is in discretion of Court.**

The admission or non-admission of applications for revision is entirely discretionary and it is not necessary for the Court to prescribe any hard and fast rule, but the Court should not as matter of practice admit applications for revision unless it is satisfied that they are made within a reasonable time, and the reasonable time would appear to be the time granted by statute for admitting appeals. When an application for revision has been made after the expiry of the period allowed for an appeal it is proper that the Court should ask the applicant to give reasons for the delay and if those reasons are not sufficient to dismiss the application. AIR (Vol 17) 1930 Oudh 401: 126 Ind Cas 395: 31 Cr LJ 1012: 7 OWN 663: 1930 Cr C 941.

**——S. 439 — Patna High Court Rules — Revision — Limitation for.**

It is the practice of the Patna High Court not to entertain, save under the most exceptional circumstances an application in revision, after the expiry of 60 days, from the date of the decision or order impugned; and a further period of 60 days does not become available to the applicant from the date when the Sessions Judge refuses to make reference under S. 438 as the period of 60 days is intended to cover the proceedings of normal length before the Sessions Judge. AIR (Vol 16) 1929 Pat 404: 119 Ind Cas 401: 8 Pat 468: 30 Cr LJ 1053: 11 PLT 18: 1929 Cr C 201 (DB).

——S. 439 — Offence of embezzlement — Sentence of imprisonment should generally be given —Accused convicted under S. 408, Penal Code, given the benefit of S. 562, Cr. P. Code — Lapse of considerable time — High Court refused to interfere in revision. AIR (Vol 15) 1928 Lah 926: 107 Ind Cas 775: 10 AI Cr R 27: 29 Cr LJ 291.

**——S. 439 — Practice of Calcutta High Court.**

It is an established practice of the Calcutta High Court that an application against an order of the Court below in criminal cases should be made within 60 days from the date of the order. The practice is uniform, and only in special circumstances it can be departed from.

That the application could not be made in time owing to the oversight on the part of the petitioner's legal advisers is not a ground for departing from the settled practice. AIR (Vol 14) 1927 Cal 574: 103 Ind Cas 63: 54 Cal 394: 28 Cr LJ 639: 8 AI Cr R 257 (DB).

**——S. 439 — Revision to High Court against order under S. 107.**

Persons who come to High Court in revision against an order under S. 107 are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain. AIR (Vol 13) 1926 All 767 : 91 Ind Cas 652 : 49 All 228 : 25 ALJ 44 : 27 Cr LJ 1132 : 7 LR Cr 174.

**——S. 439 — Allahabad High Court practice.**

Although there is no law of limitation applicable to revision applications, it is the settled practice of the Allahabad High Court not to admit them unless they are made within a reasonable time after the order complained of. AIR (Vol 13) 1926 All 577: 96 Ind Cas 877: 7 LRA Cr 130: 27 Cr LJ 1021.

**——S. 439 — Appeal cannot be treated as revision.**

Under the Cr. P. Code no application for revision lie in case in which an appeal lies and therefore it is impossible for an appeal filed beyond limitation to be treated as an application for revision as far as criminal procedure goes. AIR (Vol 13) 1926 Sind 215: 20 SLR 90: 27 Cr LJ 780: 95 Ind Cas 316 (DB).

——S. 439 — An application for criminal revision is according to the practice of Cal. H. C. to be made within 60 days plus the period for obtaining copies. It can be extended in special circumstances. AIR (Vol 4) 1917 Cal 849: 43 Cal 1029: 20 CWN 1170: 17 Cr LJ 419: 35 Ind Cas 979 (DB).

**——S. 439 — Limitation — High Court Calcutta Practice.**

An application for revision to the High Court must be made at the earliest possible moment. The usual practice of the Calcutta High Court is to allow 60 days time for the accused except in exceptional cases when it can be extended. The time occupied in prosecuting with due diligence an application to the Sessions Judge for a reference to the High Court and obtaining a decision thereon, must not be included in the 60 days allowed. AIR (Vol 4) 1917 Cal 680: 25 CLJ 564: 18 Cr LJ 694: 40 Ind Cas 694 (DB).

——S. 439 — **Limitation — Sindh Judicial Commissioner Court Rules (R. 3, Ch. IV) — Interferences by revision in Criminal cases is purely discretionary.**

In order to prevent stale applications and to obviate the hardship likely to ensue to the accused if the criminal order is kept in doubt for a long time, R. 3, Ch XV of Sindh, J. C. Court Rules enacted that any application for revision of criminal orders must he presented within 60 days from the date of the order. (1911) 5 SLR 265: 13 Cr LJ 531: 15 Ind Cas 803 (DB).

### 19. New Plea.

——S. 439 — **New plea — Claim to copies of statements of witnesses under S. 162 — When to be made — Plea of arguments in revision — Permissibility.**

A plea that the accused is entitled to obtain copies of writings containing statements of witnesses under S. 162, Cr. P. Code, is not a matter which can be raised for the first time in revision at the stage of arguments. It is a matter primarily for the trial Court itself to decide. When it is not raised even in the revision petition the Court will not consider it and will refrain from deciding it or giving any opinion on it. (1949) 30 PLT 327 (DB).

——S. 439 — **New Plea — Point involving questions of fact and law.**

A point involving questions of fact as well as law ought to be raised in the Courts of fact and not in revision for the first time. AIR (V 35) 1948 Pat 29: 48 Cr LJ 950.

——S. 439 — **Person sentenced for act not then offence — No plea taken in lower Court but brought to notice of Revisional Court.**

Where a person has been punished for doing an act viz., selling kerosene at above the price noted by the Collector, which, at the time when he did it was not an offence, and it is brought to the notice of a Court having revisional jurisdiction that he has been convicted and sentenced for doing an act which is not an offence, it is the duty of the Court to interfere though no plea is taken in the lower Courts. AIR (V 30) 1943 Mad 587 : (1943) 1 MLJ 468 : 1943 MWN 343 : 45 Cr LJ 74 : 209 Ind Cas 123.

——S. 439 — **Point going to root of jurisdiction.**

A point about the maintainability of the applications which goes to the root of the jurisdiction of the Court, can be urged in revision before the High Court, though not aruged before the lower Appellate Court. AIR (V 29) 1942 Bom 273: 44 Bom LR 606: ILR (1942) Bom 649: 202 Ind Cas 597.

——S. 439 — **No objection taken in trial or Appellate Court — If can be taken before High Court revision.**

An objection to intimation of proceedings must be taken at an early stage, and where no objection is raised in the trial Court against the validity of the complaint, nor is the matter agitated in appeal before the Court of Session, the validity of the complaint cannot be questioned in a revision petition to the High Court. AIR (V 25) 1938 Pat 99: 16 Pat 650: 19 PLT 21: 39 Cr LJ 353: 4 BR 332: 173 Ind Cas 742 (DB).

——S. 439 — Pleas not raised before the trial Magistrate cannot be allowed in revision. AIR (V 24) 1937 Lah 702: 39 PLR 459: 38 Cr LJ 1026: 171 Ind Cas **16.**

——S. 439 — A contention which should properly be raised in the lower Courts, but not so raised, will not be allowed to be raised for the first time in revision. AIR (V 16) 1929 Mad 188: 112 Ind Cas 566: 29 Cr LJ 1062: 2 MCr C 60: 11 AICrR 362.

——S. 439 — Points of facts not put before trial Court cannot be raised. (1927) 99 Ind Cas 33: 24 MLW 484: 28 Cr LJ 2.

——S. 439 — Provisions of S. 360 not complied with — Objection cannot be raised for the first time in revision. AIR (V 14) 1927 Pat 100: 99 Ind Cas 109: 8 PLT 166: 28 Cr LJ 77.

——S. 439 — **Plea of misjoinder can be taken for the first time in revision.**

An accused can take the point of misjoinder in revision when the joint trial is bad, even though the point was not taken in the Courts below. No question of prejudice arises in such a case. AIR (V 12) 1925 Cal 248: 81 Ind Cas 343: 45 Cr LJ 807 (DB).

——S. 439 — Non-compliance with S. 360 cannot be raised for first time in revision. AIR (V 12) 1925 Pat 414: 86 Ind Cas 459: 4 Pat 488: 6 PLT 154: 3 Pat LR Cr 110: 26 Cr LJ 811: 1925 PHCC 112 (DB).

——S. 439 — Violation of S. 233 — Objection as to, can be taken before High Court in revision. AIR (V 8) 1921 Pat 291: 2 PLT 47 (DB).

——S. 439 — Applicants in revision should, as a rule, be confined to the grounds upon which the rule nisi is granted. AIR (V 7) 1920 All 268: 18 ALJ 673: 60 Ind Cas 420: LR 1 A (Cr) 182: 22 Cr LJ 228: 42 All 646.

### 20. Notice.

——S. 439 — **Enhancement of sentence — Notice to accused — Necessity for — Enhancement in appeal.**

Where a sentence appears to be inadequate, notice regarding enhancement should be issued ordinarily when an appeal is admitted. But in a case in which a sentence of transportation for life has been imposed by the lower Court on the main charge and an inadequate sentence has been imposed as a matter of form on what seems to have been treated as a minor charge, and the appellate Court after hearing the appeal sets aside the sentence of transportation for life, it is not necessary in those circumstances for the appellate Court to issue a fresh notice to the accused to show cause against the enhancement of the sentence passed on the minor charge, and it can without adjourning the appeal call upon his counsel to show cause at once. AIR (V 35) 1948 Lah 47: 49 PLR 100: 230 Ind Cas 295: 48 Cr LJ 599 (DB).

——S. 439 — **Notice — Rule issued to lower Court — Duty to send explanation on points raised in rule — Practice.**

Rules (notices) are issued by the High Court to Magistrates below for the purpose of ascertaining what they have to say regarding the allegations made in the petitions; and it is the duty of the Magistrates below to peruse the petitions and either give the necessary explanation regarding the points raised or to state at least that they have nothing to add to what is already contained in their judgments under revision. There must be something to show that the Magistrate applied their minds to the grounds on which the rules were issued. (1947) 231 Ind Cas 398: 48 Cr LJ 785 (Cal).

**——S. 439 — Compensation order — When can be set aside without notice to accused.**

Although the interests of justice require that ordinarily an accused person should have notice of any proceeding in which an order awarding compensation to him is to be set aside, he cannot be deemed an accused person on his defence within the meaning of S. 439 (2), Criminal P. C., so that if after proper attempts have been made, he cannot be served, an illegal order for compensation passed under S. 250, Criminal P. C., must not necessarily stand for ever. Moreover, S. 439 (2), Criminal P. C., must be read with sub-s. (1) of the same section, and the frame of the whole section has application to an accused person charged with some offence and not to an accused person to whom compensation has been ordered to be paid and who is in the position, so far as the order of compensation is concerned, of the complainant. AIR (V 24) 1937 Sind 125 : 31 SLR 51: 38 Cr LJ 783 : 169 Ind Cas 431 (DB).

**——S. 439 — Case heard without notice to accused.**

An order under S. 439, setting aside an order of the lower Court under S. 562 (1 A), Cr. P. Code and convicting the accused under Penal Code, S. 324, was passed under the impression that accused was served with a notice of hearing. It subsequently turned out that no such notice was issued. The High Court thereupon issued a notice and re-heard the case. AIR (V 14) 1927 Cal 702: 31 CWN 960: 104 Ind Cas 447: 8 AICrR 438: 28 Cr LJ 831 (DB).

**——S. 439 — Appeal against convictions — Notice for enhancement is not necessary.**

Where the accused have preferred an appeal and they have had an opportunity of being heard personally or by pleader, it is open to the appellate Court to change their conviction to one under a graver section, without further calling upon them or issuing to them a formal notice, when the Public Prosecutor asks to do so. AIR (V 14) 1927 Sind 85: 27 Cr LJ 1265: 98 Ind Cas 113 (DB).

——S. 439 — Appeal pending — Notice for enhancing sentence should not be issued till dismissal of appeal. AIR (V 12) 1925 Bom 268: 87 Ind Cas 424: 27 Bom LR 355: 49 Bom 450: 26 Cr LJ 968 (DB).

——S. 439 — Omission to serve notice of appeal on complainant or officer appointed under S. 422, Cr. P. Code, is no ground for interfering in revision when no injustice has been done. AIR (V 11)) 1924 Mad 837: 84 Ind Cas 249: 20 MLW 327: 26 Cr LJ 249.

——S. 439 — Order enhancing sentence without notice to accused is void and Court can re-hear the case. (Case-law discussed.) AIR (V 11) 1924 Mad 640: 46 MLJ 456: 84 Ind Cas 850: 47 Mad 428: 20 MLW 18: 34 MLT 218: 26 Cr LJ 370 (DB).

**——S. 439(2) — Notice to accused.**

Under S. 439 no order can be made against the accused without giving him an opportunity of being heard in the court passing the order and the fact that a hearing was given before making the reference is not a sufficient compliance with S. 439. AIR (V 5) 1918 Cal 169: 22 CWN 168: 19 Cr LJ 701: 46 Ind Cas 157 (DB).

**——Ss. 439(2) and 471 — Notice — Warrant of arrest — Issue of, without notice.**

A warrant of arrest is not an order to the prejudice of the accused within S. 439(2) Cr. P. Code and can therefore be issued without previous notice to him. An order under S. 471 (1) Cr. P. Code is an order which the acquitting Court, whether original or appellate is bound to make under S. 423(3). AIR (V 2) 1915 Low Bur 84: 8 Bur LT 286: 8 LBR 290: 16 Cr LJ 670: 30 Ind Cas 654.

**21. Orders in revision.**

**——S. 439 — Revision dismissed — Specific order that accused must surrender to his bail not necessary.**

Where an applicant in revision is on bail, it is not necessary on dismissal of the revision application to pass a specific order that he should surrender to his bail because bail is itself only granted till such time as orders are passed on the revision application. AIR (V 30) 1943 All 23: 1942 ALJ 557 : ILR (1942) All 945 : 44 Cr LJ 187 : 1942 AWR 326 : 204 Ind Cas 274.

**——S. 439— Order under S. 147.**

In revision the High Court can make an order under S. 147 which the Magistrate ought to have made on his finding. AIR (V 28) 1941 Lah 210 : 43 PLR 166 : 42 Cr LJ 651 : 195 Ind Cas 10.

**——S. 439 — Costs — Maintenance proceedings.**

Section 488 (7), gives the High Court power in revision in dealing with application under this section to make such order as to costs as may be just. AIR (V 28) 1941 Rang 135: 42 Cr LJ 690: 1941 Rang LR 65 : 195 Ind Cas 190 (DB).

**——S. 439 — Ss. 439, 440 — That counsel should be heard only on question of sentence.**

An order passed by a Judge in revision that Counsel should not be heard on the question of the finding but that there should be a hearing on the question of sentence only, is perfectly legal and one which he has full jurisdiction to pass. AIR (V 27) 1940 All 426 : 1940 ALJ 462 : 41 Cr LJ 876 : 1940 AWR 379 : ILR (1940) All 539 : 190 Ind Cas 225.

——S. 439 — Where a party applies for revision and obtains an order issuing notice to show cause, he should confine himself to the ground on which the order was based. AIR (V 7) 1920 All 268 : 60 Ind Cas 420 : 42 All 646 : 18 ALJ 673 : 22 Cr LJ 228 : 1 LRA (Cr) 182.

**22. Pending proceedings.**

**(a) General.**
**(b) When interference warranted.**

**(a) General.**

**——S. 439 — Revision against framing of charge —Interference.**

Where an accused comes up in revision against an order of the trial Court framing a charge against him and contends that the offence, if at all, is made out as against the other co-accused, and not as against him, it is not for the Court of revision at that stage to interfere and give a finding one way or the other as that would prejudice the other accused. It would always be open to the petitioner in revision to appeal against the judgment of the trial Court, if he feels aggrieved. AIR (V 37) 1950 Ajmer 34 (2) : 51 Cr LJ 1248 (1).

**——S. 439 — Powers of High Court — Order of Deputy Commissioner under S. 7, Influx from Pakistan (Control) Act, 1949.**

An illegal order of the Deputy Commissioner under S. 7, Influx from Pakistan (Control) Act, 1949, directing a person to leave India for Western Pakistan, cannot be revised under S. 439, Cr P. Code, as the order is passed by the Deputy Commissioner in his executive capacity and is an administrative and not a judicial order. The power

of revision can be exercised only in respect of proceedings pending in an inferior criminal Court. ILR (1950) Nag 361 : AIR (V 37) 1950 Nag 161 : 51 Cr LJ 817 : 1950 NLJ 308 (DB).

**——S. 439 — Powers of High Court — Expunging evidence in pending case.**

The High Court in revision has no power to expunge evidence in a pending case. It is for the trial Court in the first instance to deal with the evidence in accordance with law. Until then, the matter is at large, and the High Court cannot in revision deal with a hypothetical future grievance of a party. To put it shortly the High Court cannot in revision revise an order which has not yet been passed. AIR (V 36) 1949 Cal 573 : 50 Cr LJ 979.

**——S. 439 — Principles governing interference — Funds of deceased father standing in bank in name of sons as joint executors — One of sons withdrawing and putting same at his own personal account — Charge under S. 405, Penal Code held justified — High Court, held will not interfere in revision.**

In revision the High Court will interfere in pending criminal cases only in exceptional cases such as where a person is being harassed by an illegal prosecution; where there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress; where the evidence on record for the prosecution clearly does not justify a charge of any offence, or where the trial is on the face of it an abuse of the process of the Court. One test of the exceptional nature of the application is that a bare statement of the facts without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage.

An exception to the general rule is the case where a question of territorial jurisdiction arises, that is as to which of two or more Courts should inquire into any offence. Where such a question arises during the pendency of the trial, it must be decided by the High Court.

Where the funds of the deceased father standing in the bank in the name of his sons as joint executors are withdrawn and deposited at his own account by one of the sons, a charge against him under S. 405, I.P.C., is justified and the High Court will not interfere in revision. AIR (V 29) 1942 Rang 48: 1941 Rang LR 599: 43 Cr LJ 492: 199 Ind Cas 473 (DB).

——S. 439 — Sessions Court should not readily ask the High Court to interfere with pending proceedings in a criminal Court. If there is a false, vexatious or frivolous case, the trial Court may and should take action under S. 250, Criminal P. C., when it acquits the accused. (1938) 40 PLR 311.

**—S. 439 — Practice.**

It is not the rule of the Court to interfere with decisions on facts upon evidence, except for special reasons. The objections to making a reference or to interfering in revision are still stronger when the proceeding is a pending proceeding instituted in accordance with law and carried on regularly and in which no error of procedure is suggested to have been committed by the Magistrate. AIR (V 23) 1936 Pat 626 : 17 PLT 794 : 3 BR 104 : 38 Cr LJ 2 : 165 Ind Cas 931.

**——S. 439 — Allegation of misappropriation against accused — Charges framed — Case not completed.**

Two persons A and B were appointed executors under a will executed by the deceased testator whose widow C was one of the beneficiaries under the will. Included in the property left by the deceased was a sum of money in fixed deposit with a bank standing in the name of the deceased and his widow C. C withdrew the whole of the principal sum in fixed deposit and invested it in the firm of A and B. A complaint was made on the ground that the widow had only a life interest in the property. It was claimed for the prosecution that the executors, aided and abetted by the widow had misappropriated the fixed deposit and the Magistrate was satisfied by the evidence brought for the prosecution that there was sufficient material for the framing of a charge:

Held, that as the mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular and in some others, both irregular and criminal, and to decide in which of these categories the present case fell, it was necessary to have the whole case before the Court; the High Court would not at this stage of the case, be justified in interfering with the proceedings and in quashing the charges drawn. AIR (V 20) 1933 All 211 : 1933 ALJ 30 : 34 Cr LJ 956 : 145 Ind Cas 400.

**——S. 439 — Unfinished proceedings.**

Except in exceptional cases, the High Court will not interfere with unfinished proceedings. AIR (V 20) 1933 Sind 412 : 35 Cr LJ 519 (2) : 147 Ind Cas 1019 (DB).

**——S. 439 — Practice of Sind Judicial Commissioner's Court.**

It has been the invariable practice of the Sind Judicial Commissioner's Court not to interfere with the proceedings in the Court of a Magistrate except where the complaint on the face of it does not disclose any offence. AIR (V 20) 1933 Sind 196: 27 SLR 214 : 34 Cr LJ 884 : 145 Ind Cas 136 (DB).

**——Ss. 439, 435 — Accused anticipating defence by petitions before he is charged and applying for revision of orders on such petitions.**

The practice of accused persons anticipating their defence before they are charged and put upon their defence, by petitions to the Court and bringing up the orders on those petitions before the High Court in revision is quite misconceived. An accused person must wait till he is charged before he defends himself, and if he is convicted, his first remedy is in most cases by way of appeal. AIR (V 18) 1931 Mad 240 : 54 Mad 251 : 33 MLW 542 : 32 Cr LJ 779 : 60 MLJ 691 : 1931 MWN 766 : 131 Ind Cas 624.

**——S. 439 — Exceptional cases — Test for determining.**

The High Court does not interfere in a case pending in a subordinate Court unless it is of an exceptional nature. One test of its being of exceptional nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. Where in a proceeding under S. 488, Cr P. Code by a wife against her husband the trial Magistrate passed an order that certain letters from his wife produced by the husband were inadmissible under S. 122, Evidence Act, the case was forwarded to High Court for setting aside the order.

Held, that the order being purely an interlocutory order the High Court could not interfere, it being not convinced that the case was of any exceptional nature and a fit one for its interference at an intermediate stage. AIR (V 17) 1930 Lah 881: 32 Cr LJ 145 : 128 Ind Cas 542 : 1930 Cr C 977 : 31 PLR 809.

——S. 439 — Charge framed and only defence remaining to be heard — High Court will not interfere.

It is only in very exceptional instances that the High Court will interfere in revision with the action of a Subordinate Court in respect of any pending case, and especially when such a case has reached the stage where a charge has been drawn up and only the defence of the accused remains to be heard. AIR (V 14) 1927 Sind 231 : 28 Cd LJ 644 : 103 Ind Cas 100 (DB).

——S. 439 — A person renders himself liable to prosecution for false statements made in an affidavit in support of an application under S. 439 as required by S. 539-A. AIR (V 14) 1927 Sind 128 : 99 Ind Cas 600 : 28 Cr. LJ 168 : 7 AI Cr R 336 (DB).

——S. 439 — Procedure followed very irregular and extraordinary — Revision rejected.

Where the trial Magistrate consulted the appellate Magistrate as to the course to be followed in a particular case and the latter gave advice on the matter to the former.

Held, that the procedure followed was extremely irregular and extraordinary but did not justify interference by the Court so long as the proceedings had not come to a termination. AIR (V 12) 1925 Mad 315 : 85 Ind Cas 37 : 20 MLW 937 : 26 Cr LJ 421.

——S. 439 — Pending cases.

It is undesirable that the discretionary powers of Court should become crystallized but it would seriously impede the administration of justice if parties were encouraged to come to the High Court from time to time before the completion of a trial and only in exceptional cases should the Court interfere in revision in pending cases. AIR (V 12) 1925 Sind 328: 88 Ind Cas 189: 18 SLR 274: 26 Cr LJ 1101 (DB).

——S. 439 — It is desirable that the Court of revision should give no preliminary finding in a case triable by a Subordinate Court. AIR (V 8) 1921 Sind 48 : 23 Cr LJ 31 : 64 Ind Cos 511 : 15 SLR 149 (DB).

——S. 439 — Fabrication of several documents at same time — Charge framed as to some — Second trial — Same offence — Revision — Criminal Procedure Code Ss. 403, 439.

Six documents were fabricated at one and the same time. The petitioner was charged with the fabrication of these documents, but the charge was at first framed only as to three. The petitioner was acquitted by the High Court. He was subsequently charged with the fabrication of the other three. Held, further that the fabrication of all the documents being one single transaction, and having been treated at the former trial as such, no second trial should take place, notwithstanding that there was no legal bar. The power under S. 439 ought to be exercised with great care and regard to pending trials only in the most exceptional cases. (1905) 2 ALJ 673 (675) : 1905 AWN 238 : 2 Cr LJ 790 (DB).

(b) When interference warranted.

——Ss. 439 and 561-A — Quashing proceedings in pending case — Principles.

It is unusual for the High Court to interfere in revision in cases pending in subordinate Courts. It would be proper for it to interfere in order to quash proceedings only in two contingencies, (1) if the prosecution allegations, even when accepted as true, do not establish any offence against the accused, and (2) where an offence is established if the allegations are believed, but there is no evidence at all to support allegations. AIR (Vol 37) 1950 EP 83: 51 PLR 374: 51 Cr LJ 590.

—— Ss. 439, 435, 438 — Limitations — Decision turning on credibility of evidence — Interference on reference to quash the charges, on ground that facts disclosed no offence — Propriety — Duty of Sessions Judge — Nagpur High Court Criminal Circular No. 38, R. 7.

The High Court has power to interfere in revision with a pending case. That is a residuary power which being of a discretionary character is incapable of precise and rigid definition. The High Courts can interfere in cases where there is a material error or defect in law or procedure, misconception or misreading of evidence, failure to exercise or wrong exercise of jurisdiction or where the facts admitted or proved do not make out any offence.

But the revisional authority, extensive as it is, rarely travels beyond the region of law or procedure to correct error in decision on the facts. Where its exercise is called for in a pending case, S. 439, Criminal P. C., must be read in conjunction with S. 435, Criminal P. C. In a pending case, no question as to the correctness or propriety of a finding can arise ; consequently the superior Court can examine the proceedings of the inferior Court only to satisfy itself as to their regularity.

The only question material for consideration in such a case is : whether the proceedings in the Criminal Court after the charge are regular. They would not be regular if the facts sought to be proved do not constitute an offence. Continuation of such proceedings would, therefore, manifestly be but an abuse of the process of the Court and a harassment of the accused on trial.

In such circumstances, considerations of justice themselves dictate the termination of proceedings. Where, however, the facts alleged and sought to be proved do constitute an offence and the decision turns on the credibility of witnesses and inferences to be drawn after a close and critical examination of the documentary evidence, it cannot be gainsaid that interference by the High Court with the proceedings of the inferior Court which, under the law, has the jurisdiction to decide in the first instance would amount to an improper and illegitimate use of its revisional authority. Where the case falls in the latter category, the Sessions Judge cannot refer the case to the High Court for quashing the charges on the ground that the facts disclosed no offence.

In such a case, the omission on the part of the Sessions Judge to call for the trying Magistrate's explanation as to what influenced him to frame the charge aggravates the irregularity of reference which is virtually on points of fact. That irregularity vitiates the reference and makes it unacceptable. AIR (Vol 29) 1942 Nag 38 : 1941 NLJ 573 : 43 Cr LJ 323 : ILR (1942) Nag 494 : 198 Ind Cas 228.

——S. 439 — Interference, when warranted.

In a pending case, the High Court should not interfere unless it is of an exceptional nature. Where the procedure adopted by the lower Appellate Court is somewhat exceptional, and the balance of convenience is in favour of deciding the points especially as it is clear on the face of the record and recognized by the Appellate Court itself that the examination of the accused in the case has been defective, High Court can interfere. AIR (Vol 25) 1938 Nag 283 : 1938 NLJ 90 : 40 Cr LJ 197 : ILR (1939) Nag 686 : 179 Ind Cas 317.

——S. 439 — **Interference in pending proceedings.**

The power of interference in pending cases is generally exercised not only when the error is patent on the face of the record, but also when grave injustice would result unless prompt redress were given. AIR (Vol 21) 1934 Nag 138.

——S. 439 — **Interference — When permissible.**

The High Court has power to interfere in any case and at any stage of it but ordinarily the High Court will not interfere at an interlocutory stage of criminal proceedings in a Subordinate Court but the High Court is under an imperative obligation to interfere in order to prevent the harassment of a subject of the Crown by an illegal prosecution. It would also interfere whenever there is any exceptional and extraordinary reason for doing so. One of the tests to apply in order to determine whether any particular case is of that exceptional nature or not is to see whether a bare statement of the facts of the case should be sufficient to convince the High Court that it is a fit case for its interference at an intermediate stage. Another test to be applied is to see whether in the admitted circumstances of the case, it would be a mock trial if the case is allowed to proceed. Broadly speaking, the High Court will generally interfere in the interests of justice and to stop abuse of process of law. AIR (V 20) 1933 Oudh 387 : 10 OWN 807 : 35 Cr LJ 148 : 9 Luck 61 : 146 Ind Cas 661.

——S. 439 — **Interference, when proper — Tests.**

The High Court will, as a rule, allow proceedings to go on and take their course in the lower Court and will not interfere with a pending proceeding even though irregularly conducted, unless there is an exceptional ground for interference. A safe and practical test to determine if the High Court would interfere is to see whether a bare statement of the facts of the case without any elaborate argument would suffice to persuade the High Court that the case was a fit one for interference.

Where a person has been charged with an offence but the charge does not disclose any offence, the only case in the circumstances is to set aside the charge and quash the proceedings. AIR (V 20) 1933 Sind 169 : 34 Cr L J 1049 : 145 Ind Cas 617 (DB).

——S. 439 — **Part heard trial.**

Only upon allegations of the gravest departure from procedure should the High Court take the conduct of a case, before its termination, out of the hands of the trial Court. AIR (V 14) 1927 Mad 975 : 53 MLJ 528 : 51 Mad 84 : 26 MLW 487: 1927 MWN 752 : 39 MLT 452 : 28 Cr LJ 979 : 9 AI Cr R 139 : 105 Ind Cas 803.

——S. 439 — **High Court would interfere where bare statement of the facts of the case justifies interference.**

The circumstances which will justify the interference of the High Court in a pending case cannot be laid down with precision. But one safe practical test would be that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage. AIR (V 12) 1925 Nag 345 : 88 Ind Cas 181 : 26 Cr LJ 1093.

——S. 439 — **High Court can interfere in proceeding for granting bail.**

Proceedings in which it is or it has been determined whether bail from the accused person should be taken or not come within the definition of "any proceeding" under S. 439 and the High Court can under that section interfere and control the propriety as well as the regularity of such proceedings. AIR (V 12) 1925 Nag 228 : 82 Ind Cas 755 : 25 Cr LJ 1363.

——S. 439 — **High Court — When interferes.**

Although the High Court would not interfere much with the discretion of the Magistrates who are vested with ample powers to dispose of a case before it has proceeded to its due termination, it would so interfere on occasions where the circumstances clearly call for its interference. Courts should look with much suspicion on criminal actions which are brought forward by partners of a still subsisting partnership against one another, so as to make a prosecution an extremely oppressive mechanism for compelling a partner to admit or pay up a claim or enter into some compromise in a matter which is really one, more suitable for settlement in a civil suit than a case for a criminal prosecution. AIR (V 12) 1925 Sind 231 : 89 Ind Cas 247 : 26 Cr LJ 1303 (DB).

——S. 439 — **Interference is exceptional.**

Although it is unusual to interfere in revision with a pending case the High Court will interfere in exceptional cases, e. g., where a pleader was charged under S. 409 for retaining fees the legal recovery of which was time barred. AIR (V 11) 1924 Nag 47 : 73 Ind Cas 335 : 6 NLJ 119 : 24 Cr L J 591.

——S. 439 — Complaint not inquired into — Order to show cause why complainant should not be prosecuted can be revised. AIR (V 7) 1920 All 303: 50 Ind Cas 369: 22 Cr LJ 81.

——S. 439 — **Pending Proceedings — Interference.**

The High Court will not interfere with a pending criminal case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress. AIR (V 7) 1920 Nag 31 : 21 Cr LJ 343 : 55 Ind Cas 679.

——S. 439 — **Pending Proceedings — Interference rare.**

The High Court, does not as a rule interfere in any pending proceeding unless there is some strong ground for interfering. AIR (V 6) 1919 Cal 872 : 20 Cr LJ 30 : 48 Ind Cas 510 (DB).

——Ss. 439 and 435 — **Pending proceedings — Revision.**

When a complaint against eight persons was tried against five, the other three having absconded and when at a later stage they surrendered, they were not put on their trial, and the Magistrate came to the conclusion that no charge was established against the five tried.

Held, that if no useful purpose will be served by the continuance of proceedings against the three not tried, their prosecution should not be proceeded with and the High Court is competent to interfere in revision in the matter. AIR (V 5) 1918 All 106 : 16 ALJ 458 : 19 Cr LJ 727 : 46 Ind Cas 407.

——Ss. 439 and 435 — **Pending Proceedings — Revision.**

Where circumstances show that no action should have been taken in a particular matter or any proceedings instituted therein, the High Court could quash the proceedings taken. AIR (V 5) 1918 All 100 : 16 ALJ 734 : 19 Cr LJ 730 : 46 Ind Cas 410.

——S. 439 — **Pending Proceedings — Interlocutory order — Interference — Powers of High Court.**

The High Court can interfere in revision with interlocutory orders, but the power must be exer-

cised with great care and only in most exceptional cases. It is not advisable to interfere in a pending case unless there is some manifest and patent injustice apparent from the face of the proceedings and calling for prompt redress. AIR (V 5) 1918 Nag 31 : 20 Cr LJ 764 : 53 Ind Cas 492.

**——Ss. 439 and 435 — Pending proceedings — Interference — Ends of Justice.**

The High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that in the interests of justice it should do so, though this power has to be exercised with great care. Case-law discussed. AIR (V 3) 1916 Mad 408 : 39 M 561 : 28 MLJ 505 : 2 LW 463 : 17 MLT 398: (1915) MWN 365 : 16 Cr LJ 477 : 29 Ind Cas 109.

**——S. 439 — Pending Proceedings — Interference when proper.**

As a rule a Court of Revision does not interfere with a pending case but where the real object of the complainant is not to vindicate the law or his own character but to subject the accused to heavy financial loss and very serious and long continued annoyance by the very process of the trial itself, the Court will quash the proceedings. AIR (V 1) 1914 Sind 85 : 8 SLR 143 : 16 Cr LJ 141 : 27 Ind Cas 205 (DB).

**——S. 439 — Pending proceedings — Power of High Court to interfere in.**

The High Courts interfere in respect of pending criminal cases in exceptional cases but where a case is prima facie vexatious an interference is clearly required to prevent an abuse of complainant's right. 1 PWR Cr (1909) : 36 PLR 1909: 9 Cr LJ 151 : 1 Ind Cas 93.

**——S. 439 — Vexatious complaint — Purdanashin female, proceedings against.**

Held, that the court would rarely interfere in revision in respect of pending criminal cases, but when circumstances clearly require interference to prevent an abuse of right it would do so. The chief court on revision directed that the name of the wife of one of the accused be struck out of the complaint and no further proceedings be taken against her on the ground that there could be no jurisdiction for bringing her into the complaint. (1909) PLR No 36 pp. 146 (147): 1 Ind Cas 93 (1) : 1 PWR 1909 Cr : 9 Cr LJ 151.

### 23. Powers of High Court.

**(a) General.**
**(b) Ends of justice.**
**(c) Extent of.**
**(d) Interference with sentence.**
**(e) Record of case.**
**(f) Revisional powers.**

### (a) General.

**——S. 439 — Powers of High Court — Limited order of remand — Revision against order of discharge.**

Under S. 439 (1), Cr. P. Code, the High Court has ample jurisdiction in revision against an order of discharge to send the case back on remand for the retrial of any particular offence while upholding the decision of the Court below with respect to other offences. Such an order is binding upon the lower Court and also on the High Court unless it is set aside in appropriate proceedings. AIR (V 37) 1950 Cal 346 : 51 Cr L J 1298.

**——S. 439 — Powers of High Court in revision.**

The powers of the High Court, acting in revision, are the same as those of an appellate Court. AIR (V 36) 1949 All 599 : 50 Cr LJ 923.

**——S. 439 — Powers of High Court — Trial held on Sunday — Conviction — Setting aside — Plea of guilty after refusal of adjournment for legal aid — Effect of.** AIR (V 34) 1947 Bom 388 : 48 Cr L J 631 : 49 Bom L R 148.

——Ss. 439 and 522 — Powers of High Court to reverse order under S. 522. See AIR (V 32) 1945 All 226 : 47 Cr L J 89.

**——S. 439 — Refusal of District Magistrate to make reference on order of acquittal — High Court allowing complainant's revision — Whether implies District Magistrate should have made reference.**

Interference by the High Court with an acquittal order is reversed for exceptional circumstances and for cases in which there appears to have been a failure of justice due to some error in a matter of principle, but no hard and fast rule can be laid down. Where the trying Magistrate has failed to appreciate the questions of fact which he had to determine in order to adjudicate on the plea of right of private defence and, therefore, there has been no proper trial of these questions, a re-trial will be ordered.

Where the District Magistrate or Sessions Judge merely differs from the first Court's appreciation of facts, or where he suspects an error of law, then, unless the error of law is manifest, unless the case involves a matter of principle, and unless there has been a serious failure of justice, unless, in short, he is clearly of opinion that the public interest demands that there should be intervention by the High Court, he is under no obligation to refer the case. Where the only interests affected are those of private parties, he will more often do better by leaving the party aggrieved to pursue his remedy by an application to the High Court. The High Court has ample powers in revision and the widest possible discretion and if the High Court eventually allows such an application, it is not thereby implied that the District Magistrate or Sessions Judge ought to have made a reference. AIR (V 24) 1937 Pat 110 : 18 PLT 227 : 3 BR 377 : 38 Cr LJ 470 : 167 Ind Cas 894.

**——S. 439 — Absence of appeal.**

If the illegality of a sentence is patent and has come to the notice of the High Court, even in the absence of an appeal by the accused, the High Court should deal with the matter in the exercise of its powers under S. 439, Criminal P. C. AIR (V 21) 1934 Oudh 151 : 11 OWN 444 : 35 Cr LJ 915 : 9 Luck 546 : 149 Ind Cas 195 (DB).

——S. 439 — Where the sentence is irregular, High Court will not interfere under revisional powers which are intended for the redress of genuine grievances and not of mere formal defects. AIR (V 20) 1933 Pat 179(1) : 14 PLT 71 : 34 Cr LJ 407 : 142 Ind Cas 624 (DB).

——S. 439 — Powers of High Court — Reference — Held, that the High Court has power to pass orders on a reference by a Judge in respect of his own order. AIR (V 17) 1930 All 817 : 129 Ind Cas 260 : 32 Cr L J 364 : 1930 ALJ 1076 : 1930 Cr C 1201.

**——S. 439 — Powers of High Court — Dismissal of complaint.**

Complaint enquired into by two Magistrates and dismissed — Sessions Judge refusing to take action in revision— High Court will interfere only if there is strong probability that further enquiry will result in conviction. AIR (V 17) 1930 Nag 150 : 122 Ind Cas 384 : 31 Cr LJ 413.

**——S. 439 — Powers of High Court — Enquiry.**

A further enquiry may be ordered only in cases where a Magistrate has not taken sufficient trouble or has come to a perverse decision. But a Court of revision is not entitled to order further inquiry merely for the reason of the disagreement with

the conclusion of the Magistrate. AIR (V 16) 1929 All 588 : 117 Ind Cas 345 : 10 LRA Cr 102 : 30 Cr L J 755 : 12 AI Cr R 94 : 1929 Cr C 176.

——S. 439 — High Court can enquire into validity of reasons for discharging jury. AIR (V 16) 1929 Cal 343 : 33 CWN 425 : 56 Cal 1032 (DB).

**——S. 439 — Powers of High Court — Juvenile offenders.**

Section 439, sub-S. (1) gives the High Court the necessary power to pass an order under sub-S. (2), S. 8, Reformatory Schools Act, of detaining a boy accused in a Reformatory, not only on appeal but also in revision. Criminal Reference No. 41 of 1924 held wrongly decided. AIR (V 15) 1928 Bom 348 : 112 Ind Cas 344 : 11 AI Cr R 308 : 29 Cr LJ 1016 : 30 Bom LR 952 (DB).

**——S. 439 — Powers of High Court — Inherent powers.**

Land wrongly attached under S. 88 — High Court can interfere under inherent powers. AIR (V 13) 1926 Lah 662 : 27 Cr LJ 1025 : 8 LLJ 608: 27 PLR 825 : 96 Ind Cas 977.

**——S. 439 — Powers of High Court — Nature of — Rule for one relief can be utilized for any other relief.**

Where the Rule issued by High Court was to show cause why the appeal should not be reheard by the Sessions Judge,

Held, it was within the competence of High Court to make any order as it may think fit, e. g., it may order that the order of the Sessions Judge be set aside. AIR (V 12) 1925 Cal 1182 : 42 CLJ 124 (DB).

——S. 439 — Powers of High Court — Costs.

The High Court has no power to award costs incurred before it on the hearing of a Criminal Revision against an order passed under Chapter XII (Ss. 145-148) of the Cr. P. C. AIR (V 12) 1925 Mad 438 : 48 MLJ 106 : 86 Ind Cas 147 : 48 Mad 262 : 26 Cr LJ 707 : 21 MLW 688 (FB).

**——S. 439 — Powers of High Court — Commitment — Court can exercise powers conferred by S. 423 (1) (c).**

It is competent for a Court under S. 439 of the Cr. P. Code to exercise the powers of an Appellate Court conferred by S. 423(1) (c) and a fortiori to reverse or alter an order of commitment passed by a Sessions Judge under S. 423 (1) (b). AIR (V 12) 1925 Oudh 233 : 82 Ind Cas 767 : 11 OLJ 748 : 25 Cr L J 1375.

——S. 439 — A Revising Court has power to order further enquiry even when the Subordinate Magistrate has recorded all the evidence of the prosecution. Where the Sessions Judge after going carefully through the evidence came to the conclusion that the finding of the Magistrate was either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded and where this was his considered opinion, the High Court refused to hold that his order directing a further enquiry was illegal, improper or incorrect. AIR (V 12) 1925 Oudh 180: 87 Ind Cas 111 : 11 OLJ 611 : 26 Cr L J 959.

**——S. 439 — Powers of High Court — Dismissal for default.**

A criminal revision petition dismissed in default without any decision on the merits can be reheard. AIR (V 11) 1924 Lah 310 : 69 Ind Cas 638.

**——S. 439 — Fresh petition does not lie.**

The High Court cannot and will not entertain a petition on a matter already disposed of, when the order disposing of it is still in force and has not been set aside. A revision petition dismissed for default cannot be restored. AIR (V 10) 1923 Mad 276 : 44 MLJ 27 : 69 Ind Cas 634 : 17 MLW 23 : 1922 MWN 821 : 23 Cr LJ 746.

**——S. 439 — Acquittal on charge of murder — No appeal by Government — High Court cannot convert acquittal into conviction.**

Accused was charged with both murder and culpable homicide not amounting to murder, but he was acquitted on the former charge and convicted on the latter. On a perusal of the Sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly.

Held, the High Court has no power except through the medium of an appeal on behalf of the Local Government to convert the acquittal into a conviction. AIR (V 9) 1922 All 487 : 65 Ind Cas 858 : 44 All 332 : 20 ALJ 190 : 23 Cr LJ 202 (DB).

**——S. 439 — Proceeding, meaning of — Subordinate Criminal Courts — Revision.**

The High Court has power to revise an order made by magistrate under Part I of S. 2 of the Workman's Breach of Contract Act. AIR (V 6) 1919 Bom 158: 21 Bom LR 277: 20 Cr LJ 316: 43 Bom 607 : 50 Ind Cas 492 (DB).

**——S. 439 — Revision — Powers of High Court.**

The High Court has power to control the propriety as well as the legality of a finding, sentence, or order, of any inferior Court. (1913) 9 NLR 81: 14 Cr LJ 385 : 20 Ind Cas 209.

**——Ss. 439 and 435 — Appealable cases.**

High Court in Cr. revision can interfere with the Magistrate's order though the order is not appealable. The High Court's power of revision is not limited to the appealable cases. 57 PLR 1911 : 33 PR (Cr) 1910 : 12 Cr LJ 50 : 8 Ind Cas 1161 (DB).

**——S. 439 — Joint trial.**

If several offenders are tried together and found guilty on exactly similar facts and fined, the chief court on the application of one of the persons fined, can deal with all the fines. 37 PLR 1910 : 30 PWR Cr 1909 : 11 Cr LJ 17 : 9 PR 1909 Cr : 4 Ind Cas 611.

**——S. 439 — Powers to interfere.**

Where a case is prima facie vexatious, an interference is clearly required to prevent an abuse of such right as the complainant may have, to an action in the criminal Courts. 1 PWR 1909 Cr : 36 PLR 1909 : 9 Cr LJ 151 : 1 Ind Cas 93.

**(b) Ends of justice.**

**——S. 439 — Interference in revision — Delay in filing application — Effect of.**

The High Court will not always interfere under S. 439, Cr. P. Code, even though the order of the Court below is wrong in law or the trial in the Court below is illegal and not merely irregular if no prejudice is shown to have resulted to the accused. The power of interference is to be exercised only for the purpose of correcting injustice and not merely illegality. Where there has been great delay in filing the application for revision, the applicant cannot ask the High Court to exercise its powers under S. 439, Cr. P. Code. AIR (Vol 38) 1951 Nag 206 : ILR (1950) Nag 866 : 1950 NLJ 433.

**——S. 439 — Interference in revision — Cases of illegality.**

A Court sitting in revision is not bound to interfere even though an illegality has been committed by the lower Court if it finds that substantial justice has been done. But where the sentence of fine is illegal and wholly inadequate, the Court can in revision enhance the sentence. AIR (Vol 36) 1949 All 213 : ILR (1949) All 484 : 1948 ALJ 469 : 1948 OWN 383: 1948 ALW 381: 50 Cr LJ 322 (DB).

——S. 439 — Interference — Practice.

It is not the practice of the Patna High Court to interfere in revision unless it considers that there is any possibility that there has been a miscarriage of justice. AIR (Vol 35) 1948 Pat 29 : 48 Cr LJ 950.

——S. 439 — Discretion of High Court — If complete and unqualified — Rules circumscribing discretion — Propriety.

The powers exercisable by the High Court under S. 439, Cr. P. Code, are expressly made exercisable by "it" in its discretion. The intention of the Legislature was to confer upon the High Court complete and unqualified discretion whether or not to exercise any of its powers in cases falling within that section. The High Court is not entitled to lay down any rule, applicable to any class of case, which would have the effect of providing that the discretion conferred upon it by S. 439 is to be exercised within such rule only, and even if it were possible for the Court to lay down any such rule it should not do so but should leave the discretion permitted by the section as free to be exercised by the Court, whenever the occasion arises, according to the justice of the case, as the legislature obviously intended it to be. Pak LR (1948) Lah 131 (DB).

——S. 439 — Discretion of High Court — Order under S. 522 on conviction — Conviction set aside — High Court, if bound to restore property to accused.

An order made under S. 522, Cr. P. Code, restoring to the complainant possession of a property in respect of which the accused was convicted of an offence involving use or show of criminal force or criminal intimidation, need not necessarily be set aside by the High Court in revision under S. 439, Cr. P. Code, merely by reason of the accused having been subsequently acquitted of the offence. In dealing with an application by the acquitted accused for restoration of the property to him on the revision side, the High Court after taking into consideration all the surrounding circumstances, may make such order as may be just and equitable. 5 P R (Cr) 1895 (FB); 1923 Lah 15 and 118 Ind Cas 392, disapproved. Pak LR (1948) Lah 131 (DB).

——S. 439 — Grounds of interference.

The High Court will not interfere in revision unless and until it comes to the conclusion that there has been a failure of justice in the lower Court. A mere defect in the judgment of the lower Court will not justify the High Court in setting aside that judgment. (1947) 48 Cr LJ 473: 229 Ind Cas 620 (Lah).

——S. 439 — Grounds of interference. AIR (Vol 33) 1946 Pat 122 : 13 BR 109 : 48 Cr LJ 173 : 227 Ind Cas 631.

——S. 439 — Order under S. 522.

Where the Magistrate dismisses an application for possession under S. 522 (1), because it was made more than a month after conviction, the High Court can, under S. 522 (3), make an order for possession in a proper case in revision. AIR (Vol 29) 1942 Bom 148 : 44 Bom LR 246 : 43 Cr LJ 708 : ILR (1942) Bom 249 : 200 Ind Cas 724.

——S. 439 — Practice.

It is not the practice of the High Court to interfere with a jury verdict if it is a reasonable verdict but where the verdict of the majority in a case is both unreasonable & perverse, the High Court will not have the slightest hesitation in setting it aside. AIR (Vol 28) 1941 Oudh 567 : 1941 OWN 874 : 42 Cr LJ 728 : 1941 AWR (CC) 260 : 17 Luck 128 : 195 Ind Cas 371.

——S. 439 — Duty of High Court — Only question is to see whether substantial justice has been done and if interference is necessary in interests of justice.

In an application for revision, the main question which the High Court has to consider is whether substantial justice has been done and whether it should interfere in the interests of justice, though in an appeal, the applicants would be entitled to demand an adjudication upon all questions of fact or law which they wished to raise :

Held, on the facts, that substantial justice had been done and there was no ground for interference. (1936) 37 Cr LJ 1022 (1) : 164 Ind Cas 701 (All).

——S. 439 — Where the additional Sessions Judge sentenced the accused to undergo rigorous imprisonment for two years, and to whipping of twenty-five stripes after the sentence of imprisonment passed by his order has been undergone :

Held, that the last portion of the order was clearly incorrect in this sense that the time mentioned for inflicting the corporal punishment was not in accordance with law.

If a lower Court finds that it has passed an illegal order and informs the High Court of the mistake and the High Court is of the opinion that the order is illegal, it is competent to the High Court to set right the illegality. The form of the information being immaterial, the High Court can do so even it has dismissed the appeal against the order. AIR (Vol 21) 1934 Pat 551 : 15 PLT 475 : 36 Cr LJ 100 : 1 BR 37 (2) : 152 Ind Cas 291.

——S. 439 — Accused not claiming to be tried as European British subject in trial Court — Whether can claim to be so dealt with in High Court.

Where under Government notification, it was ordered that the Calcutta High Court should exercise original and appellate jurisdiction and discharge the functions of a High Court in criminal proceedings in the Nicobar Islands against European subjects:

Held, that the High Court could interfere in the case of such a subject even though he had not pleaded that he was European British subject in the trial Court. AIR (Vol 20) 1933 Cal 240 : 60 Cal 676 : 34 Cr LJ 671 : 143 Ind Cas 892 (DB).

——S. 439 — Perverse judgment of trial Court.

Where the trial Court's judgment is perverse on the question of sentence, the High Court ought to interfere. AIR (Vol 19) 1932 Lah 258 : 33 PLR 215 : 33 Cr LJ 500 : 137 Ind Cas 716 (DB).

——S. 439 — Interference to stop injustice.

Ordinarily, if a Magistrate has ordered an accused person to be tried, the trial must proceed. But when the High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will interfere to stop patent injustice calling for a prompt redress. AIR (Vol 19) 1932 Pat 72 : 12 PLT 937 : 33 Cr LJ 349 : 136 Ind Cas 842.

——S. 439 — A trial in respect of a gross sum alleged to have been embezzled between two specified dates does not bar a second trial in respect of another sum embezzled on intermediate days but

not included in the gross sum for which the earlier charge was framed. But High Court can, in proper cases, exercise its power under S. 439, Criminal P.C. and prevent a second trial for the ends of justice. AIR (Vol 18) 1931 All 209 : 32 Cr LJ 376 : 1931 ALJ 98 : 53 All 411 : 129 Ind Cas 558.

——S. 439 — The revisional powers of the High Court under S. 439, Criminal P. C., are discretionary and the High Court is not necessarily obliged to interfere to set aside every illegal order that comes to its notice, without due regard to the circumstances of the particular case. But it is right to interfere when the accused has been prejudiced by the illegalities and applies to the Court for revision. AIR (Vol 18) 1931 Rang 161 : 32 Cr LJ 1068 : 133 Ind Cas 489.

——S. 439 — Every irregularity or illegality does not ipso facto vitiate a trial or call for the exercise of the powers of interference by the appellate or revisional Court unless it has resulted in a failure of justice; it is sufficiently covered by the very wide provisions of S. 537 of the Code. AIR (Vol 17) 1930 Sind 315 : 1930 Cr C 1147 : 24 SLR 446 : 130 Ind Cas 442 : 32 Cr LJ 521 (DB).

**——S. 439 — Revisional powers are for correction of injustice.**

Powers of revision are given to second appellate Court for the correction of injustice, and not for the correction of mere illegalities. AIR (V 15) 1928 Nag 172 : 10 AI Cr R 173 : 29 Cr LJ 486 : 109 Ind Cas 214.

——S. 439 — The sentence to be passed after conviction must be left to the Judge or Magistrate who tries the case and the High Court ought not to interfere in revision unless the sentence is so severe or so lenient that it can be said that a proper discretion has not been exercised. AIR (Vol 8) 1921 Bom 456 : 23 Bom LR 358 : 22 Cr LJ 324 : 61 Ind Cas 52 (DB).

**——S. 439 — Withdrawal of charge.**

The High Court can pass whatever orders are required in the interest of justice when a charge for non-compoundable offence has been withdrawn by the Crown. The High Court is not bound to recognise the alleged right of the complainant to have the guilty punished. AIR (Vol 5) 1918 Mad 494: 18 Cr LJ 329: 38 Ind Cas 441.

**——S. 439 — Appealable and non-appealable sentences.**

Where the Sessions Judge hearing the case on the merits on the appeal of those having the right of appeal, comes to the conclusion that the convictions were bad as against all the persons concerned, he must refer to the High Court the case of those persons against whom non-appealable sentences were passed and the High Court will deal with the matter under S. 439, Cr. P. C. AIR (Vol 4) 1917 All 372: 39 All 549: 15 ALJ 574: 18 Cr LJ 684: 40 Ind Cas 332.

**——S. 439 — Defective judgment.**

If the judgment of the Appellate Magistrate makes it probable that he has not fully heard and considered the appeal, his disposal should not be allowed to stand. (1910) 11 Cr LJ 331: 7 MLT 182: 5 Ind Cas 928.

**(c) Extent of.**

**——S. 439 — Finding of acquittal cannot be converted into one of conviction in revision — Powers of High Court.**

Where there has been an acquittal of a charge, the High Court has no power to convert in revision a finding of acquittal into one of conviction and that the conversion can only be made by way of an appeal by the Provincial Government. Although there is no acquittal in explicit terms, the language used by the Magistrate giving the benefit of doubt under S. 161 and convicting under S. 165, necessarily implies an acquittal under S. 161 and the High Court cannot in revision alter the conviction from one under S. 165 to one under S. 161. AIR (Vol 34) 1947 Cal 162: 224 Ind Cas 625: 47 Cr LJ 662 (DB).

**——S. 439 — Power to interfere with forfeiture orders under different Acts.**

High Court can interfere with any order of forfeiture under Defence of India Rules, Hoarding and Profiteering Prevention Ordinance, Drugs Control Order, 1943 or Essential Drugs Census Order of 1943. It can set aside the order of forfeiture, even though the conviction is upheld. AIR (Vol 33) 1946 Cal 1: 49 CWN 548: 47 Cr LJ 465: 222 Ind Cas 459 (DB).

**——S. 439 — Privileges granted by lower Court's order — If can be curtailed in revision.**

Ordinarily, the High Court would be loath to pass any order which would curtail any privileges granted to accused persons by an order of the Court below, but where the accused are emphatic that they do not desire the privileges afforded to them, and have stated so even before the order in the lower Court was passed and have reiterated the same before the High Court, the order of the lower Court can be set aside. AIR (Vol 24) 1937 Nag 285: 38 Cr LJ 1058: ILR (1937) Nag 541: 171 Ind Cas 262.

——S. 439 — Powers of Appellate Court under S. 423, and High Court under S. 439, explained and distinguished. AIR (Vol 22) 1935 PC 89: 39 CWN 626: 1935 OWN 576: 1935 MWN 469: 1 BR 487: 1935 AWR 691: 36 Cr LJ 838 (2): 41 LW 792: 68 MLJ 653: 37 PLR 314: 16 PLT 387: 61 CLJ 259: 1935 ALJ 802: 37 Bom LR 557: 62 Cal 983: 62 IA 129: 155 Ind Cas 386.

**——S. 439 — Guilty persons should not be allowed to escape on basis of unsubstantial technicality.**

It is not the function of the High Court when exercising its revisional jurisdiction to allow guilty persons to escape the just reward of their misdoings on the basis of an unsubstantial technicality. AIR (Vol 22) 1935 Cal 316: 36 Cr LJ 982: 62 Cal 749: 156 Ind Cas 678 (DB).

**——S. 439 — Taking notice suo motu.**

Ground that proceedings were barred under S. 403 (1), not taken in revision — The High Court can take notice of it suo motu. AIR (Vol 22) 1935 Nag 23: 1935 Cr C 111.

——S. 439 — Rights of accused in challenging his conviction under Ss. 423 and 439 explained. AIR (Vol 21) 1934 Cal 105: 37 CWN 1122: 35 Cr LJ 554: 61 Cal 6: 147 Ind Cas 1124 (DB).

**——S. 439 — Questions which Magistrate should decide — Whether can be decided by High Court.**

What the High Court may properly be asked to do in revision is to put right any incorrect or irre-

gular or improper sentence or order which a Subordinate Court may have delivered or to check any such irregularity as S. 537 does not condone. What they should not be asked to do is to decide in first instance those questions which the Magistrate ought to decide for himself. AIR (Vol 21) 1934 Sind 20: 35 Cr LJ 891: 148 Ind Cas 985 (DB).

**——S. 439 — Powers under S. 107, Government of India Act, 1915.**

Section 51, Emergency Powers Ordinance (II of 1932) takes away the revisional powers of the High Court derived under Criminal P. C., and under Letters Patent but not under S. 107, Government of India Act. Under this power, the High Court has a discretion to revise or set aside any conviction but the discretion has to be exercised on judicial grounds and only when the justice of the case demands it:

Held, on merits by Beaumont C. J. and Broomfield J. (Nanavati J. dissenting) that the High Court would not interfere under these powers on the ground of a mere excessive severity of the sentence. AIR (Vol 20) 1933 Bom 1: 34 Bom LR 1523: 34 Cr LJ 199: 57 Bom 93: 141 Ind Cas 720 (SB).

——S. 439 — Where a petition under S. 488, Criminal P. C., is filed, the Magistrate is bound to enquire into the truth of allegation that the husband had turned out the wife and as to whether she had good reasons for not living with her husband. If such an enquiry is not made and Magistrate has allowed maintenance, further enquiry may be directed by High Court on reference under S. 438, Criminal P. C., setting aside order of maintenance. AIR (Vol 20) 1933 Pesh 101 (1): 35 Cr LJ 491: 147 Ind Cas 772 (DB).

**——S. 439 — Powers under S. 423.**

Section 439, Criminal P. C. authorizes the High Court to exercise any of the powers conferred on a Court of Appeal by S. 423. Where in an application for revision, the High Court is not asked to transfer a case from one Court to another but only to pronounce that an order making such a transfer was made on improper and inadequate grounds, the High Court has ample powers to interfere in revision. AIR (Vol 20) 1933 Sind 205: 34 Cr LJ 861: 144 Ind Cas 881 (DB).

——S. 439 — The powers of the High Court under S. 439, Criminal P. C. are general and ought, as far as practicable, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case. They cannot be cut down by decisions. AIR (Vol 18) 1931 Mad 242: 1930 MWN 849: 60 MLJ 370: 33 LW 640: 32 Cr LJ 763: 131 Ind Cas 649.

——S. 439 — A court of revision is not precluded from interfering with questions of fact, in criminal cases. (1930) 124 Ind Cas 449: 31 Cr LJ 659 (Nag).

——S. 439 — High Court refused to dismiss important application on a technical ground. AIR (Vol 16) 1929 All 347: 119 Ind Cas 527: 1929 ALJ 520: 10 LRA Cr 84: 12 AI Cr R 1: 30 Cr LJ 1083.

**——S. 439 — Powers of High Court — Charge.**

High Court has extraordinary jurisdiction to set aside a charge framed by the lower Courts. 42 PR 1885 (Cr), Diss. from. AIR (Vol 16) 1929 Lah 67: 29 Cr LJ 1008: 11 AI Cr R 262: 112 Ind Cas 224.

**——S. 439 — Powers of High Court — Conversion of acquittal into conviction.**

Accused charged under S. 302, Penal Code, but convicted under S. 304 — Convicting him under S. 302 in revision is without jurisdiction. AIR (Vol 15) 1928 PC 254: 55 MLJ 786: 50 All 722: 55 IA 390: 26 ALJ 1099: 30 Bom LR 1572: 48 CLJ 397: 10 LRA Cr 129: 12 AI Cr R 241: 33 CWN 1: 29 PLR 575: 5 OWN 911: 28 MLW 396: 1928 MWN 749: 29 Cr LJ 828: 111 Ind Cas 832: 1 M Cr C 244.

**——S. 439 — Limits of.**

And although the High Court has jurisdiction under S. 439 to exercise its powers of revision whatever the source of its knowledge, a High Court would not, as a rule, exercise those powers in a case where the Magistrate making the report has jurisdiction to dispose of the matter himself. AIR (Vol 15) 1928 Sind 69: 22 SLR 201: 9 AI Cr R 154: 105 Ind Cas 802: 28 Cr LJ 978 (DB).

**——S. 439 — Acquittal cannot be converted into conviction.**

High Court has no power in revision to do what is tantamount to converting a finding of acquittal into one of conviction. Where the accused had been acquitted by the Sessions Judge of murder and also under the first part of S. 304 but was convicted under second part, High Court cannot convict him of either of these offences except on an appeal by the Local Government. Section 439 prohibits the converting of a finding of acquittal into one of conviction and says nothing about the acquittal being partial or complete. 37 Mad 119, Diss. AIR (Vol 14) 1927 Mad 582: 52 MLJ 707: 50 Mad 259: 28 Cr LJ 397: 100 Ind Cas 1053: 38 MLT 379: 26 MLW 888 (DB).

——S. 439 — High Court cannot convert a finding of acquittal into one of conviction only when there is complete acquittal — Acquittal under a particular section but conviction under another — High Court can alter acquittal under that section into a conviction. AIR (Vol 11) 1924 Bom 456 and AIR (Vol 9) 1922 All 487, Not Foll.) AIR (Vol 14) 1927 Sind 16: 20 SLR 352: 27 Cr LJ 1121: 97 Ind Cas 641 (DB).

——S. 439 — Technical illegality — Accused not prejudiced — High Court will not interfere. (1926) 93 Ind Cas 1054: 27 Cr LJ 558 (Lah).

——S. 439 — Sub-clause (4) does not prohibit a Court from convicting in revision on a charge upon which the trial Court has in effect acquitted an accused. (AIR 1924 Bom 456, Not Foll.). AIR (Vol 13) 1926 Lah 361: 8 LLJ 188: 27 PLR 244: 27 Cr LJ 566: 94 Ind Cas 134 (DB).

——S. 439 — The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in S. 439; S. 526 is not one of these. AIR (Vol 11) 1924 Rang 100: 77 Ind Cas 885: 1 Rang 632: 2 Bur LJ 236: 25 Cr LJ 485.

——S. 439 — High Court has power to set aside, but will only do so in exceptional cases. AIR (Vol 10) 1923 Lah 278: 71 Ind Cas 246: 5 LLJ 36: 24 Cr LJ 118.

**——S. 439 — Acquittal under S. 182, I. P. C. — Conviction under S. 211 — Whether High Court can alter acquittal into conviction.**

The High Court can convict an accused under S. 182, I. P. C., even though acquitted by the lower appellate Court. Section 439(4) does not come in the way for, the meaning of that clause is that, where an accused person has been acquitted on all charges

he is not to be convicted. If he has been convicted at all, S. 439(4) does not apply to him. AIR (Vol 10) 1923 Oudh 4: 69 Ind Cas 81: 9 OLJ 342: 23 Cr LJ 641: 26 OC 44.

——S. 439 — Passing of order under S. 471 is within revisional powers of High Court.

Section 471, Cr. P. Code, does not compel the court to send the accused to Lunatic Asylum. The Court is only to see that such safeguards have been taken as would prevent the accused from committing mischief. Where the lower Court acquitted the accused on the ground that he was insane when he committed the offence, but omitted to pass orders under S. 471, High Court in revision could pass the order. The passing of an order under S. 471 after an acquittal has been recorded, cannot be said to alter a finding of acquittal into one of conviction within clause 4 of S. 439. AIR (Vol 9) 1922 Mad 54: 42 MLJ 72: 65 Ind Cas 423: 1922 MWN 10: 30 MLT 74: 23 Cr LJ 71.

**(d) Interference with sentence.**

——S. 439 — Conviction — Interference — Grounds — Refusal of application for adjournment under S. 526 (8) — Sufficiency.

The High Court will not in revision interfere with the conviction and sentence passed in a criminal trial merely on the ground that the lower Court refused the application of the accused under S. 526 (8) for an adjournment of the case, when the application has not been a bona fide one but was meant merely to prevent the magistrate from proceeding to judgment and when the accused has had a fair trial. AIR (Vol 37) 1950 Pat 542.

——S. 439 — Charge to the jury defective in certain respects — Whether sufficient ground for interference by the High Court.

The charge to the jury by the Judge being defective in certain respects is not, by itself, sufficient ground for interference against an order of acquittal and a direction of retrial. 1946 OWN 319: 1946 OA (CC) 169: 1946 AWR (CC) 169: 47 Cr LJ 725: 225 Ind Cas 439: AIR (Vol 34) 1947 Oudh 35.

——S. 439 — Revision application admitted only on question of sentence — Whole case, if can be considered.

Even if an application by the accused for revision was admitted by the High Court only on the question of sentence, the High Court can consider the case as a whole and hold that there is an illegality in the trial and the sentence imposed upon the accused. AIR (Vol 32) 1945 All 98: 1945 AWR (HC) 11: 1945 ALJ 45: 1935 OWN (HC) 1: ILR (1945) All 131: 46 Cr LJ 539: 219 Ind Cas 232.

——S. 439 — Order under S. 562 — Interference.

Trial Magistrate considering matter and thinking order under S. 562 inappropriate — High Court refused to interfere with discretion on question of sentence. AIR (Vol 30) 1943 Mad 89: 55 MLW 677: (1942) 2 MLJ 549: 1942 MWN 750: 44 Cr LJ 304: ILR (1943) Mad 456: 204 Ind Cas 555.

——S. 439 — Verdict unanimous — No misdirection.

Where the trial was by jury and the verdict was unanimous and there was no misdirection and on the evidence the jury could reasonably have convicted the accused under S. 411, I. P. C., the High Court refused to interfere with the conviction of the accused under S. 411. AIR (Vol 28) 1941 Mad 708: 42 Cr LJ 824: (1941)-2 MLJ 253: 54 LW 479: 1941 MWN 480: 196 Ind Cas 227.

——S. 439 — Interference, when called for.

Where an alteration of sentence by imposing fine, by Appellate Court has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of a superior Court may be called for. AIR (Vol 24) 1937 Lah 195: 38 PLR 1051: 38 Cr LJ 428: 167 Ind Cas 723.

——S. 439 — Sentence — Lower Court taking everything into consideration.

The adequacy of sentence is always a matter of some trouble to the Revisional Court which is not in a position to judge of the local conditions or of the peculiar circumstances attending a particular case. Where the lower Courts were satisfied that the sentence was not severe and they took into consideration the fact that the Police authorities were, on several previous occasions baulked in their attempt to apprehend the accused's gang, it could not be said that the sentence was so severe that the High Court should interfere in revision on the question of sentence. AIR (Vol 22) 1935 All 516: 36 Cr LJ 558: 1935 AWR 469: 154 Ind Cas 740.

——S. 439 — Sentence — Interference — Practice — (Lahore High Court).

Where the sentence though light, is substantial, it is not the practice of the Lahore High Court to interfere with it. AIR (Vol 21) 1934 Lah 975: 36 PLR 184: 36 Cr LJ 681: 155 Ind Cas 241.

——S. 439 — Unless there is something that is manifestly wrong with the sentence, unless it is clearly out of proportion to the offence, if it is within the jurisdiction of the Magistrate and he has exercised his discretion, no interference in revision should take place.

The authority of a Magistrate should not be constantly disturbed by interference with sentence passed in petty cases. AIR (Vol 21) 1934 Pat 214: 13 Pat 63: 15 PLT 196: 35 Cr LJ 1327: 151 Ind Cas 361.

——S. 439 — The High Court does not ordinarily interfere when a substantial sentence has been passed by the trying Court and is always slow to interfere unless the sentence passed is manifestly inadequate. As a rule, where discretion has been exercised by a Court of competent jurisdiction which is not on the face of it, arbitrary, the practice of the High Court is that as a Revision Court, it would neither inquire into the reasons nor interfere with the exercise of such discretion. AIR (Vol 21) 1934 Sind 157: 36 Cr LJ 218: 152 Ind Cas 872 (DB).

——S. 439 — Grave crime — Interference.

It is highly inexpedient for the High Court in a grave case to weaken the hands of the Sessions Court by interfering without necessity in a sentence which is not excessive. AIR (Vol 21) 1934 Sind 78 (2): 35 Cr LJ 1170: 150 Ind Cas 917 (DB).

——S. 439 — Sentence — Interference.

The question of punishment is peculiarly a matter for the Court. In revision the Crown has no right to seek to influence the Court on this question unless invited by the Court to do so. AIR (Vol 20) 1933 Cal 870: 34 Cr LJ 1100: 58 CWN 25: 61 Cal 155: 145 Ind Cas 937 (DB).

——S. 439 — Where the accused is not prejudiced there will be no interference in revision, though the case ended in conviction, and a 'fortiori' there will be no interference in the case of an acquittal. Where, however, the acquittal is the result of a wholly illegal procedure, the High Court can interfere in revision and direct a retrial of the case. 1930 MWN 770.

**——S. 439 — Sentence — Interference.**

High Court has power to interfere in case of an excessive sentence even the case is before it on reference. AIR (Vol 16) 1929 Lah 187: 30 Cr LJ 918: 118 Ind Cas 438 (DB).

——S. 439 — The power of interference in revision is to be used only for the purpose of correcting injustice and not mere illegality. AIR (Vol 15) 1928 Nag 113: 9 AI Cr R 282: 29 Cr LJ 86: 106 Ind Cas 678.

——S. 439 — The High Court is not precluded by sub-s. (5), S. 439, Cr. P. Code, from interfering with the conviction of an accused who had not preferred an appeal when the case is before the Court otherwise than at his instance. AIR (Vol 15) 1928 Pat 326: 29 Cr LJ 325: 9 AI Cr R 545: 108 Ind Cas 81 (DR).

**——S. 439 — Convicted person not taking any steps — Application by a stranger cannot be entertained.**

A Court should be loath to interfere on behalf of a person convicted in a criminal case, if that person is an adult and of ordinary intelligence, when that person himself in no way contests the propriety of his conviction. AIR (Vol 10) 1923 All 85: 20 ALJ 909: 45 All 128: 24 Cr LJ 115: 71 Ind Cas 243.

——S. 439 — Revision — Court should not go behind findings of lower Court — A just order, though wrong, cannot be interfered with. AIR (Vol 10) 1923 Mad 237: 31 MLT 388: 24 Cr LJ 476: 72 Ind Cas 892.

——S. 439 — Revision on facts — High Court will not interfere except in cases of grave doubt. AIR (Vol 10) 1923 Oudh 8: 9 OLJ 488: 25 Cr LJ 278: 76 Ind Cas 870.

**——S. 439 — Criminal proceedings — Conducted as if in a civil suit.**

Where a criminal case is launched on the basis of a civil dispute between the parties it would be proper for the Magistrate to consider whether or not the case was of a civil nature and if he came to the conclusion that only a civil wrong had been committed, he should have said so and dealt with the case accordingly. If, on the other hand, he was of opinion that a criminal offence had been committed, though he might refer to the evidence in a manner equally appropriate to civil proceedings he should not have lost sight of this fact that he was dealing with a criminal prosecution and ultimately he should have disposed of the case purely from the standpoint of the criminal law. Where the judgment of the magistrate is neither the one nor the other, it is liable to interference in revision. AIR (Vol 10) 1923 Pat 22: 24 Cr LJ 714: 38 CLJ 7: 73 Ind Cas 938 (DB).

**——S. 439 — Conviction under wrong section — Power of High Court to alter finding.**

The High Court in its revisional power can alter the finding under S. 323, I. P. C. to one under S. 325 of the same code. AIR (Vol 7) 1920 Nag 142: 21 Cr LJ 647: 57 Ind Cas 663.

**——S. 439 — Conviction under wrong section — Alteration of section maintaining conviction — Legality of.**

If the Courts below have convicted an accused under a wrong Section in a case in which no charge was framed, it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings. AIR (Vol 5) 1918 Pat 314: 3 Pat LJ 354: 19 Cr LJ 884: 47 Ind Cas 80 (DB).

**——Ss. 439 (4) and 423 — Conviction under wrong section — Scope and applicability.**

Sub-section (4) of S. 439 of the Cr. P. Code refers only to a case of an acquittal but not to a case where there is a conviction but under a wrong section of the law; the sub-section cannot therefore be taken as limiting the powers of the High Court in appeal though it does limit the powers of the High Court only when it sits as a Court of Revision. AIR (Vol 1) 1914 Mad 258: 37 Mad 119: 15 Cr LJ 180: 22 Ind Cas 756 (DB).

**——S. 439 — Sessions Judge passing heavier sentence than the verdict of the Jury.**

The chief Court will not revise a case where the Sessions Judge passes a heavier sentence than he would have passed had he agreed with the Jury. (1910) 3 Bur LT 75: 11 Cr LJ 657: 8 Ind Cas 455.

**——S. 439 — Revision by High Court — Power to interfere on questions of fact — Practice — Penal Code, S. 170 — Personating a public servant — Dishonest intention:**

Per Chandavarkar J:— It is the practice of the High Court not to interfere in revision with a finding of fact unless there are special reasons. Accordingly in cases in which the law allows no appeal, the High Court as a court of revision, does not, except on the ground of an error of law, or where the question is one of evidence otherwise than on exceptional grounds, exercise the power of an appellate court. But where such exceptional grounds exist, the court will exercise its discretion under S. 439, Cr. P. C., and reverse the conviction and sentence.

Per Beaman J.— There is nothing in the statute law which precludes the High Court from interfering in the exercise of its revisional power, with conviction and sentence, whether the grounds of that interference be what is commonly called a question of fact or whether it be a question of law. The 'cursus curiae' drawing a distinction between grounds of the former and grounds of the latter sort rests rather upon a principle of convenience than of law. The true rule is that the High Court will not interfere in the exercise of revisional powers unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice. A dishonest intention is not expressly made an essential ingredient of the offence punishable under S. 170, I. P. C. (1907) 9 Bom LR 706 (708, 709): 6 Cr LJ 70 (DB).

**(e) Record of case.**

**——Ss. 439 and 239 — Power of High Court — Misjoinder of persons — Question of prejudice — If relevant — Order for retrial — If necessary.**

Where the trial is vitiated by non-compliance with the provisions of the Cr. P. Code, as regards the mode of trial (e.g.) joinder of several persons in the same trial in circumstances not covered by S. 239, Cr. P. Code, the High Court must necessarily interfere, even sitting as a revisional Court. Revisional jurisdiction under S. 439, Cr. P. Code, is undoubtedly discretionary in its nature, but that discretion has to be exercised on judicial principles. If there has been no trial in the eye of law, the Court must necessarily step in to right the wrong and quash the conviction

and sentence recorded as a result of such a trial, irrespective of the question of prejudice to the accused. The question of prejudice would be more pertinent to a case of irregularity than to cases of this kind. If the case is of a trivial nature, or the harassment caused to the accused by the illegal trial is deemed sufficient punishment for him in the circumstances of that case, no retrial need be ordered but in other cases, a retrial would be necessary. AIR (Vol 37) 1950 Lah 74: 51 Cr LJ 773: Pak LR (1949) Lah 888.

——S. 439 — Powers of High Court — Order of transfer by District Magistrate under S. 528 — Interference — Power to set aside in revision.

The High Court's powers of revision under S. 439, Cr. P. Code, are very wide and are not limited to those specified in S. 439(1). S. 439 (1) merely describes some of the reliefs which the High Court may grant and is in no way exhaustive. The High Court has power to satisfy itself as to the legality and propriety of any order passed by a subordinate criminal Court including an order of transfer made by an inferior Court under S. 528, Cr. P. Code. Such an order falls within the purview of the words "any other order" in S. 439, and the High Court can in revision set aside an order of transfer and retransfer the case, and it cannot be said that in doing so, the High Court purports to act under S. 526, Cr. P. Code. 1 Rang 632: 37 Cri LJ 220, not foll. AIR (Vol 36) 1949 Cal 257: 50 Cr LJ 521: 53 CWN 291.

——S. 439 — Power of High Court — Further inquiry — Power to direct — Order of discharge or dismissal of complaint.

Whether a dismissal of a complaint is treated as one under S. 203, Cr. P. Code, or one of discharge, the High Court in the exercise of its powers of revision has ample power to see whether further inquiry was justified or not. AIR (Vol 35) 1948 Pat 31: 13 Cut LT 27: 48 Cr LJ 952.

——S. 439 — Case very complicated — Lower appellate Court not noticing number of facts — High Court in revision can go into facts.

Where the case is a very complicated one and the lower appellate Court has not noticed at all or in sufficient details a number of facts and its judgment also contains some mis-statements of fact it is open to the High Court in revision to go into the facts of the case and ascertain the truth. AIR (Vol 33) 1946 All 416.

——S. 439 — Revisional jurisdiction, exercise of — High Court's discretion.

Revisional jurisdiction is exercised at the discretion of the High Court, and only for the purpose of relieving persons who have not had a fair trial, or whose convictions have been arrived at by non-observance of material provisions of the law, or by such misdirections as must have occasioned a failure of justice.

Where, therefore, the High Court is satisfied that the accused, who are convicted for contravening an order of a Sub-Divisional Magistrate, prohibiting the sale of certain commodities above a certain rate, knew what the controlled prices of the commodities were in which they were dealing, there is no justification whatsoever for interfering with the convictions on the ground of absence of proof that the order was published in the manner required by R. 119, Defence of India Rules. AIR (Vol 33) 1946 Pat 122 (DB).

——S. 439 — General power of superintendence over subordinate Court — Power to call for records.

The High Court possesses a general power of superintendence over the actions of Courts subordinate to it. On its administrative side, the power is known as the power of superintendence. On the judicial side, it is known as the duty of revision. The High Court can, at any stage, of its own motion, if it so desires and certainly when illegalities or irregularities resulting in injustice are brought to its notice, call for the records and examine them. The High Court's right to have these matters brought to its notice and to examine the record for itself is as much a part of the administration of justice as its duty to hear appeals and revisions and interlocutory applications. So also its right to exercise its powers of administrative superintendence. AIR (Vol 32) 1945 Nag 33: ILR (1945) Nag 74 : 1945 NLJ 30 (DB).

——S. 439 — Confirmation of death sentence — High Court itself can call for case.

If it is brought to the notice of the High Court that the Sessions Judge has omitted to send the death sentence to the High Court for confirmation in accordance with S. 374, the High Court can in the exercise of its powers of revision, call for the case, and deal with it according to law. AIR (Vol 31) 1944 Sind 83: 45 Cr LJ 598: 212 Ind Cas 352 (FB).

——S. 439 — Appeal wrongly dismissed as barred by limitation — High Court in revision cannot consider appeal on merits.

Where the Sessions Judge has wrongly dismissed the appeal on the ground of limitation, the High Court cannot, in revision, consider the appeal on its merits. It is a matter for the Appellate Court. AIR (Vol 30) 1943 Sind 39: 44 Cr LJ 293: 204 Ind Cas 415 (FB).

——Ss. 439, 89, 87 — Application purporting to be under S. 89 — Magistrate declining to interfere on ground of want of jurisdiction — Decision upheld by Sessions Judge — High Court, if can consider legality of original proceedings.

Where on an application purporting to be under S. 89, Criminal P. C., the Magistrate holds that proclamation under S. 87 issued by another Magistrate in the original proceedings was invalid but declines to interfere on the ground of want of jurisdiction under S. 89 and his decision is upheld by the Sessions Judge, the High Court can, in the exercise of its revisional jurisdiction, consider the legality of the original proceeding and grant relief under S. 89. AIR (Vol 29) 1942 Lah 214: 44 PLR 300: 43 Cr LJ 791: 202 Ind Cas 15.

——S. 439 — Acquittal under S. 417 — No appeal by Local Government — District Magistrate can refer case under S. 438 — Even if reference is incompetent, the matter having come before it, the High Court can interfere under S. 439. Before passing final orders, the High Court must send notice to the accused. AIR (Vol 29) 1942 Oudh 443: 1942 AWR 285: 1942 OWN 432: 43 Cr LJ 763: 201 Ind Cas 506.

——S. 439 — Failure to give reasons for not issuing process under S. 204 — Record showing no sufficient grounds for issue of process.

Where it appears from the records that there are no sufficient grounds for issuing notice to an accused person the High Court will not be justified in interfering in revision merely because the Magistrate who had cognisance of the matter, failed to give reasons

for not issuing the process, but if it is found from the records that the Magistrate had not good grounds for not issuing process, the High Court can interfere in revision. AIR (Vol 25) 1938 Mad 879: (1938) 2 MLJ 372: 1938 MWN 973: 39 Cr LJ 984: 48 LW 801: 177 Ind Cas 957.

**——S. 439 — High Court cannot treat revision as appeal and interfere with finding.**

The revisional jurisdiction of the High Court under S. 439, Criminal P. C., can always be exercised in order to prevent a gross and palpable failure of justice which means an error of fact as is obvious upon the face of the record and is not, in effect, a mistake made by the Magistrate as to the question of which set of facts should be deemed more acceptable but a blunder relating to the question as to whether some fact has been proved or not.

The machinary of the High Court in criminal revision cannot be invoked in a case where there was evidence before the Magistrate which, if he believed it, would enable him to find as he did, and the revision cannot be treated as an appeal. AIR (Vol 25) 1938 Rang 103: 39 Cr LJ 492: 174 Ind Cas 860.

**——Ss. 439 ,438, 423 — High Court, if can interfere with decision of trial Court, records having come before it, under incompetent reference.**

An Assistant Sessions Judge accepting the verdict of the jury convicted the accused but the Additional Sessions Judge finding himself unable to interfere under S. 423(2), Criminal P. C., as there was no misdirection, made a reference to the High Court instead of referring the case to the Local Government for orders:

Held, that the position was that the appeal of the accused had been dismissed. Had not the Additional Sessions Judge referred the case to the High Court, it would have been open to the accused to move the High Court in revision and ask it to interfere on the ground that the Additional Sessions Judge was wrong in holding that there was no misdirection and if the High Court had found that there was misdirection by the Assistant Sessions Judge which had been ignored by the Additional Sessions Judge and which has occasioned failure of justice, it would have interfered. The fact that it has examined the record on an incompetent reference by the Additional Sessions Judge did not alter the position. It could, therefore, interfere if a case for interference was made out. AIR (Vol 24) 1937 Pat 440: 16 Pat 413: 3 BR 734: 38 Cr LJ 919: 18 PLT 607: 170 Ind Cas 464 (DB).

**——S. 439 — Reference for ruling on point of law.**

There is no provision in the Code under which a Magistrate can refer a case to the High Court for a ruling on a point of law, but it is open to the High Court to treat the case as one which has come to its knowledge under S. 439. AIR (Vol 24) 1937 Pesh 73: 38 Cr LJ 838: 169 Ind Cas 681 (DB).

**——S. 439 — Death of applicant after filing revision — High Court, if can take action suo motu.**

Where the applicant has died after making a revision application, the High Court can take action 'suo motu', if the record indicates that there is sufficient reason to do so. AIR (Vol 23) 1936 All 313: 1936 ALJ 253: 1936 AWR 273: 37 Cr LJ 562(1): 162 Ind Cas 338.

**——S. 439 — Accused not appealing.**

Where the record is before the High Court, it can set aside the conviction of a party who had not come to them in appeal if it thinks that he should not have been convicted. AIR (Vol 21) 1934 Sind 72: 28 SLR 140: 35 Cr LJ 1254: 151 Ind Cas 175 (DB).

——S. 439 — Transfer of case — Omission to record reasons for transfer — It is mere irregularity and does not furnish ground for interference in revision. AIR (V 20) 1933 Lah 807: 34 Cr LJ 1174: 146 Ind Cas 166.

**——S. 439 — Refusal of convict to appeal — High Court's power to revise order of conviction.**

There is no warrant for the proposition that the omission of a convict to appeal is by itself sufficient in law, or as a matter of well-established practice to debar the High Court from examining the record suo motu or on a reference by a Sessions Judge, or at the instance of a third party, and from passing such order as it thinks appropriate. The prohibition contained in sub-s. (5), S. 439, Criminal P. C., is limited only to those cases in which the Court is asked to interfere at the instance of the party who could have appealed, but has not done so. It leaves untouched the power of the Court to exercise its revisional powers under sub-s. (1), S. 439, in all other cases.

In applying S. 439, however, it is necessary to bear in mind that the powers of the Court under that section, wide though they are, are purely discretionary and must be exercised, not as a matter of course, but only to further the ends of justice. AIR (V 18) 1931 Lah 145: 82 PLR 71: 32 Cr LJ 700: 131 Ind Cas 353.

——S. 439 — The High Court in revision is not bound by S. 412 but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether their plea of guilty was based on a proper conception of the facts. AIR (V 17) 1930 Rang 349: 128 Ind Cas 845. 32 Cr LJ 206: 1930 Cr C 1177.

**——S. 439 — Power to examine records and pass necessary orders.**

Under S. 439, the Chief Court has power to extmine the records of any case and pass the necessary orders. AIR (V 4) 1917 Lah 277: 23 PR 1916 Cr: 18 Cr LJ 121: 37 Ind Cas 473.

**——S. 439 — Order to pay costs.**

The order of a Criminal court directing an accused to pay cost for adjournment under S. 344 pending his application under S. 526 is obviously improper and is liable to be set aside by the High Court in revision. 8 PWR 1911 Cr: 12 Cr LJ 274: 10 Ind Cas 851.

**——S. 439 — Revision — Criminal cases — Findings of fact — Penal Code, S. 420 — Cheating — Benefit of doubt.**

The chief court in the exercise of revisional powers set aside the order of conviction of the accused under S. 420 of the Penal Code on the ground that on record the accused cannot with any certainty be said to have himself made away with Government money in any of the cases concerned. (1909) PLR No. 106 pp. 404(407): 13 PWR 1909 Cr: 4 Ind Cas 978: 11 Cr LJ 97.

——S. 439 -- Revision — Practice — Plea of guilty.

Held, that the High Court is not inclined to exercise its discretionary powers of revision in cases where the applicant has made undue delay in coming to the court for relief. In a summary trial for an offence under the Cantonment Code the Magistrate recorded in his order: "Finally he (the accussed) admits his error in not having complied with the notice and throws himself on the mercy of this court".

Held, that this was equivalent to plea of guilty, and that the accused coul'd not be heard in revision except as to the extent or legality of the sentence. (1907) AWN 204(204): 29 All 623: 6 Cr LJ 153: 4 ALJ 552.

——S. 439 — Revisional powers of High Court.

The High Court in the exercise of its powers of revision can, on the merits of a case, set aside an order of commitments passed by a District Magistrate or Sessions Judge under S. 436, Cr. P. C., where such order of commitment setting aside a previous order of discharge is made on insufficient or unreliable evidence. (1903) 7 CWN 327 (328) (DB).

**——S. 439 — Revision — Grounds of — High Court — No evidence for jury.**

Where the case is such that the Sessions Judge would, if he possessed the power of withdrawing the case from the jury, exercise that power, the High Court will exercise its powers of revision. (1901) 5 CWN 411 (412,413) (DB).

**(f) Revisional powers.**

**——S. 439 — Forum for revision — Orders under Chap. XII — High Court, if can be moved directly.**

The High Court should not ordinarily entertain petitions of revision against order under Chap. XII. Cr P. Code, unless the lower Court has been moved in the first instance though it should not hesitate to do so if extraordinary and special circumstances are shown to exist which justify departure from the normal course. AIR (Vol 37) 1950 Assam 165.

**——S. 439 — Discretion — Powers of High Court — Transactions legally completed and offenders punished under temporary statute — Re-opening after expiry of statute in revision if open.**

The High Court in revision exercises a discretionary power, and will not re-open in revision transactions which had been already legally completed under a temporary statute, especially where all the necessary proceedings for the punishment of offenders had been taken when the statute was in force. AIR (Vol 35) 1948 Pat 229: 49 Cr LJ 251: 26 Pat 169 (DB).

**——S. 439 — High Court's power of revision in entertaining application against order of acquittal — When can be used — Accused acquitted on unanimous verdict of jury — No appeal by Government — Power of revision, whether can be used.**

Though the High Court has jurisdiction under S. 439, Criminal P. C., to entertain an application in revision of an order of acquittal when the Crown has preferred no appeal, it would not move in such case unless there is some glaring defect either in the procedure or in the view of the evidence taken by the Court below. Where, therefore, in a case all facts were before the jury and they returned a verdict of not guilty and the Government had not appealed, the Court refused to interfere in revision. AIR (Vol 34) 1947 Oudh 35:1946 OWN 319: 1946 OA (CC) 169: 1946 AWR (CC) 169: 47 Cr LJ 725: 225 Ind Cas 439.

**——S. 439 — Powers of High Court — Setting aside conviction of non-appealing accused — Order for his re-trial — Procedure.**

Where one of several accused persons was convicted of the offence of conspiracy to murder, while the others were convicted of murder as well as of conspiracy to murder and the latter alone preferred appeals to the High Court which set aside their convictions on all the charges and ordered their re-trial,

Held, that the High Court should also set aside the conviction of the non-appealing accused in exercise of its revisional powers and that if it was of opinion that he should be retried along with the other appellants it should, having regard to S. 439 (5), Cr. P. Code, direct that a rule should be issued upon him and upon the Crown to show cause why his conviction and sentence should not be set aside and why he should not be re-tried. AIR (Vol 33) 1946 Cal 452: 228 Ind Cas 24 : 48 Cr LJ 46 : 50 CWN 88 (DB).

**——S. 439 — Order passed by Magistrate under S. 522 — High Court, if can reverse.**

High Court has power as a Court of revision under S. 439 read with S. 423 (1) (d), to reverse the order passed by the Magistrate under S. 522. AIR (Vol 32) 1945 All 226: 1945 AWR (HC) 68 (1): 1945 ALJ 233: 1945 OWN (HC) 109: 47 Cr LJ 89: ILR (1945) All 282: 221 Ind Cas 141.

**——S. 439 — Accused not appealing — If can be acquitted.**

Where an accused convicted with the appellants has not appealed, the High Court can, in exercise of its revisional jurisdiction, set aside his conviction and sentence, and acquit him. AIR (Vol 31) 1944 Pat 232: 22 Pat 108: 10 BR 661: 45 Cr LJ 725: 214 Ind Cas 95 (DB).

——S. 439 — If it should happen that interference is attempted by persons in authority in the trial of cases by judicial officers, it is the duty of those judicial officers affected whether they be District Magistrates or Magistrates subordinate to them or any other judicial officer, at once to resist firmly any pressure or influence. Further it is the duty of those officers and Judges affected to inform the High Court at once so that the High Court may deal with the matter and take steps to protect them in the faithful discharge of their duties in the administration of justice. The High Court which has been put in an independent position under the constitution will devote all its power to protect those who are subjected to such wrongful and illegal interference. AIR (Vol 30) 1943 Cal 594: 45 Cr LJ 224: 210 Ind Cas 337 (SB).

**——S. 439 — Nature of revisional jurisdiction.**

It is very important and would save much waste of the time of the Courts if it was thoroughly realised that there is a distinction between a revision and an appeal. In the latter, the appellant is given a statutory right to demand an adjudication from the Court either on a question of fact or on a question of law or upon both. When a matter comes upon revisional jurisdiction, the applicant has no rights whatsoever beyond the right of bringing his case to the notice of the Court. It is for the Court to interfere in exceptional cases where it seems that some real and substantial injustice has been done. That is the main point which the Court has to consider. A revisional application is not to be regarded as, in some sort, a second appeal on a question of law. AIR (Vol 22) 1935 All 814: 36 Cr LJ 907: 1935 AWR 942: 1935 ALJ 969: 156 Ind Cas 101.

**——S. 439 — Appeal by one accused—Co-accused not appealing — Power of High Court to deal with sentence passed on co-accused.**

In exercise of its revisional jurisdiction, the High Court can, on the appeal of one accused, deal with the sentences passed on his co-accused who have not appealed. It has power under S. 439, Criminal P. C., in a proper case, to deal with the cases of accused persons not appealing against their convictions, while considering and trying the appeal preferred by some other persons; and cl. (5) of the section does not, in any way, affect the jurisdiction vested in the High Court to deal with their cases. AIR (Vol 21) 1934 Lah 346: 35 Cr LJ 1046: 36 PLR 121: 150 Ind Cas 21 (DB).

**——Ss. 439, 526 — Order transferring case.**

The High Court has power under S. 439, Criminal P. C. to after or refuse an order transferring a case made under S. 526, Criminal P. C. by the lower Court. AIR (Vol 20) 1933 Rang 89 : 34 Cr LJ 832 : 144 Ind Cas 677.

**——Ss. 439, 497 (5) — Bail — Power to cancel.**

The High Court has jurisdiction to consider whether or not the order of a Subordinate Court passed under S. 497, Criminal P. C. should or should not be maintained and also whether under the provisions of sub-s. (5) of S. 497, an accused person should be allowed to continue at large.

Where a person is accused on a charge of a serious nature such as an attempt to murder, bail should not be allowed for the reason that the injured person was not well enough to attend the identification parade. AIR (Vol 19) 1932 Lah 433: 33 Cr LJ 335: 33 PLR 387: 136 Ind Cas 709.

**——S. 439 — Power of High Court to acquit co-accused who have not preferred appeal.**

Where several persons are convicted and in an appeal preferred by one of them, they are found not guilty, it is open to the High Court under S. 439, to make an order acquitting the other accused also. It is not necessary to issue a rule regarding the other accused. AIR (Vol 18) 1931 Cal 618: 58 Cal 902: 35 CWN 347: 32 Cr LJ 1003: 133 Ind Cas 183 (DB).

**——S. 439 — Discretion.**

The exercise of the revisional powers of the High Court is entirely discretionary and the High Court does not take a technical view and interfere in every case, where an order has been made irregularly or even improperly. AIR (Vol 18) 1931 Cal 607: 54 CLJ 253: 33 Cr LJ 3: 39 CWN 16: 59 Cal 275: 134 Ind Cas 1045 (DB).

**——S. 439 — Defective judgment.**

A judgment in a criminal appeal, which is vitiated by a confusion of ideas, by a wrong view of facts and by a too cursory dismissal of the defence evidence, cannot be upheld in revision. AIR (Vol 17) 1930 Mad 443: 120 Ind Cas 69: 30 Cr LJ 1160: 3 M Cr C 18: 1930 Cr C 495.

**——S. 439 — Powers of High Court — Principles.**

The powers of the High Court in criminal revision are not intended for the gratification of private malice, nor are they to be used to vindicate the position of a private prosecutor where a merely technical offence has been committed, however clearly that technical offence may have been proved. AIR (Vol 17) 1930 Pat 241: 125 Ind Cas 134: 9 Pat 113: 1930 Cr C 509: 31 Cr LJ 789: 11 PLT 772 (DB).

**——S. 439 — Powers of High Court — Extradition — Extradition Act, S. 7 — Order of District or Chief Presidency Magistrate executing warrant under S. 7 can be revised.**

Execution by the District Magistrate (or the Chief Presidency Magistrate) in British India of a warrant under S. 7 of Extradition Act is not an executive act. The Magistrate has judicially to consider the matter and decide whether the warrant can be executed according to law and the order of the Magistrate is subject to the revisional powers of the High Court. The order can also be interfered with under S. 561-A. On proper proceedings being taken High Court can also interfere under S. 491. 42 Cal 793 held too widely stated, AIR (Vol 16) 1929 Bom 81: 117 Ind Cas 321: 31 Bom LR 62: 53 Bom 149: 30 Cr LJ 772 (DB).

——S. 439 — Where accused were bound under Cr. P. Code, S. 562 for an offence under S. 323, and where revision was sought for a retrial.

Held, that the revisional powers were discretionary and not meant to be exercised on trifling occasions. AIR (Vol 16) 1929 Oudh 240: 117 Ind Cas 452: 30 Cr LJ 799.

**——S. 439 — Powers of High Court — Practice — Court ordinarily confines itself to points raised in the revision petition.**

Ordinarily a Judge disposing of revision petition filed by a convicted person or his pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence. A Court exercising its revisional powers upon a revision petition ordinarily deals with the points raised in the petition and has no occasion to travel outside them and consider the whole case upon its merits, as the Court that tries the accused and the Court that hears the appeal, if any, does. It might be otherwise in revision case taken up by the Court suo motu. AIR (Vol 12) 1925 Mad 993: 85 Ind Cas 727: 26 Cr LJ 583 (DB).

**——S. 439 — Powers of revision.**

The High Court should freely exercise the powers of revision vested in it under S. 439 for the very reason that S. 344 is so wide in its scope. AIR (V 5) 1918 Mad 538 : 40 Mad 1130 : 5 LW 763 : 22 MLT 42 : (1917) MWN 566 : 33 MLJ 366 : 18 Cr LJ 612 : 39 Ind Cas 980 (DB).

**——S. 439 — Laches—Ground for revision—Laches of prosecution.**

Powers of revision should not be invoked to supply the laches of the prosecution. Owing to the laches of the prosecution in not placing the fact of the previous convictions of the accused before the trying Magistrate, the accused was lightly punished. The Court did not order the accused to be committed to the sessions and did not enhance the sentence. AIR (V 3) 1916 Sind 3 : 9 SLR 95 : 17 Cr LJ 3 : 32 Ind Cas 131 (DB).

**——Ss. 439 and 562 — Order under S. 562.**

A High Court cannot set aside an order under S. 562 and substitute a sentence of whipping or of imprisonment on its own authority. AIR (V 1) 1914 All 543 : 12 ALJ 1244 : 37 All 31 : 16 Cr LJ 43 : 26 Ind Cas 635.

**——S. 439 — Appealable cases — Application by only one accused.**

The High Court can, on the appeal of one accused, deal, in its Revisional Jurisdiction, with the sentences passed on the other co-accused who have not appealed. (1911) 4 Bur LT 87 : 12 Cr LJ 250 : 10 Ind Cas 792.

**——Ss. 439, 423, 522 — Revision — Reference.**

Under the Code of Criminal Procedure the High Court has in its revisional jurisdiction the power of making any amendment or any consequential or incidental order that may be just or proper. An accused person may upon his acquittal be restored to the possession of a property of which he has been deprived in favour of the complainant. (1905) 2 ALJ 64 : 27 A 415 (416) : 1905 AWN 19: 2 Cr LJ 24 (DB).

——S. 439 — **High Court's revisional powers — Practice.**

Per Chief Justice. — The controlling power of revision of the High Court in criminal cases is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the legislature has committed to them.

This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case.

Per Chandavarkar J. — The law, as laid down in Cr. P. C., gives the High Court the power to go into evidence in revision. But the Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule but will interfere only where there is an error of law.

Per Aston J. — It is a rule of practice according to which the High Court cannot ordinarily reopen questions of fact when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice. When a question before the High Court exercising its powers of revision is one of appreciation of evidence, the rule of practice is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it. To judge of the true meaning of any single phrase it is necessary to see what the accused said in the rest of his deposition. (1904) 6 Bom LR 379 (385, 396, 402): 28 B 533 (FB).

——S. 439 — **Practice — Some accused appeal — Interference with sentence of those who did not appeal — High Court, power of, in revision.**

The High Court has power, in a proper case, to set aside the conviction and sentence of accused who did not appeal while considering the case of those who did appeal. This power of the High Court is not affected by Cl. (5) of S. 439. (1901) 5 CWN 330 (331) (DB).

**24. Private complaint.**

See also Note 2.

——Ss. 439, 435 and 493—**Complainant — Right to apply in revision and be heard.**

On principle there is no reason why a complainant should be held to have no right to apply in revision and also of being heard in support of it. Only the right of the complainant is subordinate to the rights of the Crown. AIR (V 36) 1949 All 213 : 50 Cr LJ 322 : ILR (1949) A 484 : 1948 ALJ 469 : 1948 OWN 383 : 148 ALW 381. (DB).

——S. 439 — **Interference in revision — Delay in filing complaint.**

The fact that the complaint was made 20 days after the occurrence cannot be taken into account in revision of a non-appealable sentence. AIR (V 36) 1949 Oudh 78 : 50 Cr LJ 586 : 1948 O.A. (C. C.) 118 : 1948 OWN 219.

——S. 439 — **Revision by private complainant on ground that evidence has been mis-stated by trial Judge — High Court, when will order re-trial, stated.**

The powers of the High Court in a revision filed by a private complainant from an order of acquittal are exactly the same as the powers in a Court of Appeal conferred by Ss. 423, 426, 427, 428 or S 338. Under cl. (4) of S. 439 the High Court cannot convert a finding of acquittal into one of conviction, but it can under the powers conferred under S. 423, order the accused to be retried by a Court of competent jurisdiction subordinate to such Appellate Court.

In considering the question whether such a retrial should or should not be ordered, the discretion of the Court is legally unlimited. In actual fact, however, the Court seldom exercises this discretion except that an order of acquittal will not as a rule be interfered with merely because the High Court disagrees with the finding of the Magistrate. It is only when the record is incomplete or there is a flaw in jurisdiction or where the finding is manifestly wrong or perverse that the High Court will interfere in such cases.

Where the evidence has been mis-stated by the trial Judge, it is much in the same position as if the Judge, who combines the functions of a Judge and jury had misdirected himself as to what the evidence was in the particular case. It will be open for the High Court, however, to consider whether in spite of the misdirection, any finding other than one of acquittal would have been come to in the circumstances of the particular case and the High Court would not order a retrial unless it comes clearly to the conclusion that but for the misdirection the Court might have or should have come to a different finding to what it actually did. AIR (V 29) 1942 Lah 70: 44 PLR 29: 43 Cr LJ 453: ILR (1942) Lah 125 : 199 Ind Cas 49 (FB).

——S. 439 — **Defamation cases — Government Pleader, if can appear.**

Government cannot avoid the obligation of appealing in a proper case by lending support to a revision application brought by the complainant. AIR (V 28) 1941 Bom 410 : 43 Bom LR 737 : 43 Cr LJ 174 : 197 Ind Cas 502 (DB).

——S. 439—**Remedy is by appeal by Court — Revision to High Court for enhancement of sentence on ground that accused ought to have been convicted under S. 302 — No formal appeal either by Crown or private complainant against acquittal under S. 302 — High Court thinking accused guilty under S. 302 — Procedure.**

It is not open to the High Court in revision to convert a finding of acquittal into one of conviction. In the event of a complete acquittal, the only remedy is an appeal against the acquittal by the Crown.

There was an acquittal under S. 302 but a conviction under S. 325, Penal Code. On the application for enhancement of the sentence to the High Court on the revision side:

Held, that it was not open to the High Court to refer the case to a Division Bench even if it thought that there was substance in the contention that the case against the accused fell within the ambit of S. 302, Penal Code, in the absence of a formal appeal against his acquittal under S. 302, by either the Crown or a private complainant. The only remedy, therefore, was to order a re-trial, if the High Court found that there had been a miscarriage of justice. AIR (V 28) 1941 Lah 425 : 43 Cr LJ 113 : 43 PLR 707 : 197 Ind Cas 116.

——S. 439 — **Revision against acquittal and to enhance sentences in alternative.**

High Court is, as a rule, loath in ordinary circumstances to entertain an application in revision from a private party asking the Court to convict the accused of offences of which they have been acquitted by the Sessions Judge and to enhance a sentence passed upon them. But where there are clear indications that the accused party has been defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past, such application should be

entertained in revision. AIR (V 26) 1939 Pat. 611 : 18 Pat 544: 6 BR 204 : 41 Cr LJ 191: 21 PLT 45: 185 Ind Cas 529 (DB).

**——Ss. 439, 423 (1) (a) — Private complainant.**

Per Stone, C. J., and Niyogi, J., (Bose, J., contra in Order of Reference). — The High Court can entertain an application for revision against an order of acquittal at the instance of a private complainant. The power appears to be expressly given by S. 439 as read with S. 423 (1) (a) of the Criminal P. C., as limited by S. 439 (4). AIR (V 24) 1937 Nag 394 : ILR (1938) Nag 157 : 39 Cr LJ 75 : 172 Ind Cas 177.

**——S. 439 — Private individual.**

The High Court, though it has power under S. 439 of the Criminal P. C., to interfere in revision with an order of acquittal, yet it will not entertain any application for revision against an order of acquittal made by a private individual unless there exist certain circumstances which make it imperative in the interest of public justice for the High Court to set aside an order of acquittal which is manifestly perverse and unjust.

Where the Magistrate has given the accused the benefit of Excep. 9 to S. 499 of the I.P.C., holding that the imputation on the character of the complainant contained in the written statement filed by the accused in the Civil Court was made by the accused in good faith, and for the protection of their interests in the civil suit in which they were defendants and the offending remarks are to be found in the written statement which formed part of the pleadings in that case and that the complainant has failed to prove malice on the part of the accused in respect of the offending remarks made by them against the complainant, these findings being findings of fact based upon direct and circumstantial evidence in the case, the High Court would not for a moment dream of interfering with this well-reasoned and sound judgment. AIR (V 24) 1937 Oudh 77 : 1936 OWN 381 : 37 Cr LJ 490 : 161 Ind Cas 828.

**——S. 439 — Discretion exercised by lower Court should not be lightly interfered with.**

The discretion of Magistrates in dismissing complaints is not lightly to be interfered with. Where he has used his discretion in dismissing a complaint, if there is as much to be said in its favour as against it, the discretion should not be interfered with. Jurisdiction in revision should not be lightly exercised. AIR (V 24) 1937 Sind 81 : ILR (1940) Kar 275 : 38 Cr LJ 742 : 169 Ind Cas 112.

**——S. 439 — Revision.**

The High Court does not regard the question of enhancement only from the point of view of public interest but from the circumstances of the particular case before it. A private complainant can therefore, apply in revision to the High Court for enhancement of a sentence. AIR (V 18) 1931 All 13: 129 Ind Cas 444: 32 Cr LJ 312: 53 All 223: 1930 ALJ 1324 (DB).

——S. 439 — Per Mullick J.— The power of interference in revision should be most sparingly exercised and only in case where it is urgently demanded in the interests of public justice, e.g., cases in which there has been a denial of the right of fair trial and which attract the operation of S. 107 of the Government of India At. In cognizable cases the private prosecutor has no position at all and that if the Crown decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengence. The Crown and not the complainant is always the party.

Per Macpherson, J.— The High Court possesses the power to set aside an acquittal under S. 439 on being moved by a private person, and this power is not restricted to cases where there has been no trial, or where there has been a denial of the right of fair trial. It cannot be laid down that in every case of a prosecution for a cognizable offence the private prosecutor in India has no position at all in the litigation. Neither principle nor authority supports the view that an application under S. 439 against an acquittal is not maintainable in a private prosecution where the offence charged is cognizable. AIR (V 13) 1926 Pat 176 : 92 Ind Cas 219 : 5 Pat 25 : 6 PLT 833 : 27 Cr LJ 235 (DB).

**——S. 439 — Private complainant cannot move High Court to enhance sentence.**

A private party cannot apply to the High Court for enhancing a sentence passed by a Subordinate Court. A District Magistrate, a Sessions Judge, or the Government Pleader, may draw the attention of the High Court to a sentence with a view to its being enhanced; or the High Court can of its own motion send for the record and take action with a like object. If a private complainant considers a sentence unduly lenient, he may draw the attention of Government to the fact. A I R (Vol 11) 1924 Bom 320 : 48 Bom 358 : 26 Bom LR 182 : 25 Cr LJ 966 : 81 Ind Cas 614 (DB).

——S. 439 — No appeal by Local Government from acquittal — Even third party can apply in revision. AIR (Vol 11) 1924 Oudh 171 : 24 Cr LJ 186 : 71 Ind Cas 602.

**——S. 439 — No revision lies at the instance of private person.**

An order of acquittal passed under S. 494, Cr. P. Code, should not be revised by the High Court at the instance of a private party. The private prosecutor has no position at all in criminal litigation. The Crown is the prosecutor and the custodian of the public peace, and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance. A I R (Vol 11) 1924 Pat 283 : 2 Pat 708 : 5 PLT 404 : 25 Cr LJ 446: 2 Pat LR Cr 165: 2 Pat LR Cr 187: 77 Ind Cas 734 (DB).

——S. 439 — After dismissal of a complaint by the Magistrate, if the Sessions Judge wishes to take action he should set it aside himself instead of asking the Magistrate to do so. But where in pursuance of the Sessions Judge's order the Magistrate sets the dismissal aside the High Court will not interfere in revision. AIR (Vol 10) 1923 All 479 : 24 Cr LJ 811 : 74 Ind Cas 715.

——S. 439 — A private complainant under certain circumstances may well be heard by the High Court, when it is called upon to exercise its power of revision. AIR (Vol 10) 1923 Cal 11 : 36 CLJ 287 : 50 Cal 159 : 24 Cr LJ 206 : 71 Ind Cas 670 (DB).

**——S. 439 — Private complaint — Appearance by pleader — Powers of High Court.**

Conviction of certain persons, under S. 147 Penal Code was set aside by the Sessions Judge for which the complainant applied for revision. The High Court can allow the appearance of the complainant by pleader. AIR (Vol 7) 1920 Cal 571 : 21 Cr LJ 682 : 57 Ind Cas 922 (DB).

### 25. Proceedings under Criminal P. C., S. 144.

**——S. 439 — Competency of revision.**

A party aggrieved by an order passed under S. 144, Civil P. C., is entitled to come up in revision to the High Court. AIR (Vol 30) 1943 Cal

35 : ILR (1942) 1 Cal 488 : 46 CWN 136 : 44 Cr LJ 288 : 204 Ind Cas 370 (DB).

——S. 439 — **Opinion of District Magistrate.**

The opinion of the District Magistrate expressed in an order under S. 144, Criminal P. C. although entitled to great weight, is not absolute and cannot interfere with the right of the High Court under the revisional sections of the Criminal P. C. to interfere with the order or set it aside. In proper cases, the High Court has full power to interfere with such orders. The propriety of the order, as well as its illegality can be considered by the High Court in revision. AIR (Vol 29) 1942 Lah 171 : 44 PLR 297 : 43 Cr LJ 747 : ILR (1942) Lah 510 : 201 Ind Cas 572 (FB).

——S. 439 — It is the practice of the Patna High Court to decline to interfere in revision with an order under S. 144, Criminal P. C. when the order would become time-expired in few days. AIR (Vol 29) 1942 Pat 331 : 23 PLT 243 : 8 BR 670 : 43 Cr LJ 637 : 200 Ind Cas 316.

——S. 439—It is not the usual practice of the High Court to interfere with an order which has spent its force, unless there are special reasons for such interference. AIR (Vol 27) 1940 Pat 185 : 6 BR 480 : 41 Cr LJ 463 : 5 Cut LT 54 : 187 Ind Cas 511.

——S. 439 — **Responsibility of Magistrate.**

Magistrate is responsible for the peace of the district and where he says that it is not a proper case under S. 144, and therefore, no action is necessary, it is not competent for the High Court to interfere with such an order. AIR (Vol 26) 1939 Pat 111 : 5 BR 389 : 20 PLT 194 : 40 Cr LJ 355 : 180 Ind Cas 332.

——S. 439 — Section 144, Criminal P. C., is in very wide terms, and under this section, the Legislature has invested in the Magistrates referred to in the section, a very wide discretion. Therefore, although the High Court should not, as a rule, interfere with powers and discretion of the Magistrate, it may, in certain cases, send for a record to satisfy itself that the order of the Magistrate was legal and that the Magistrate had not acted in an arbitrary manner. The order calls for no interference if it is legal and made after due and careful consideration. AIR (Vol 26) 1939 Sind 230 : 40 Cr LJ 823 : ILR (1939) Kar 751 : 183 Ind Cas 641 (DB).

——S. 439 — Where an order under S. 144 (2), Criminal P. C., is passed ex parte, the proper procedure is to apply under S. 144 (4) to the District Magistrate, who has power to set aside the prohibitory order. Where the matter has to be disposed of expeditiously and the Magistrate adjourns the case, the High Court may be approached direct under S. 439, Criminal P. C. AIR (Vol 21) 1934 Cal 139 : 37 CWN 962 : 35 Cr LJ 541 : 147 Ind Cas 1090 (DB).

——S. 439 — Where an application for revision against an order under S. 144, Criminal P. C., is made, and the order has ceased to be in force by efflux of time it should not be interfered with in revision. AIR (Vol 21) 1934 Oudh 87 : 11 OWN 74 : 35 Cr LJ 472 : 147 Ind Cas 672.

——S. 439 — **Interference by High Court.**

The powers of the High Court in revision are general and their generality cannot be cut down by any decision. Where the elements essential to action under S. 144, Cr. P. C., are shown to exist upon materials legally before the court, the High Court will in exercising its powers respect the opinion of the local authorities both as to the gravity of the danger and as to the steps necessary for the maintenance of peace. But if the grounds for action as stated in the order are either unfounded in fact or insufficient in law or if it shows that the order against the public as framed violates the conditions laid down by S. 144, then it is the duty of the High Court to interfere. AIR (Vol 18) 1931 Mad 242 : 1930 MWN 849 : 32 Cr LJ 763.

——S. 439 — **Retrial — Order under S. 144 — Expiration of period — Retrial.**

Where the High Court finds that the trying Magistrate has jurisdiction to pass an order under S. 144, it will not send back the matter to the Magistrate, notwithstanding that the order has expired, so that he may begin the proceedings again, as regards the accused's showing cause against the order. AIR (Vol 17) 1930 Cal 131 : 31 Cr LJ 804 : 1930 Cr C 131 : 125 Ind Cas 273 (DB).

## 26. Proceedings under Criminal P. C., S. 145.

——S. 439 — **Finding of fact — Proceedings under S. 145 — Order dropping proceedings on finding of non-existence of dispute likely to cause breach of the peace — Interference in revision.**

A finding by a Magistrate in proceedings under S. 145, Cr. P. Code, that there is no dispute between the parties likely to cause a breach of the peace is one of fact and cannot be challenged in revision, hence an order dropping or terminating proceedings on the ground of there being no dispute likely to cause a breach of the peace cannot be interfered with in revision under S. 438 or 439. AIR (Vol 38) 1951 Ajmer 86 : 1948 AMLJ 19.

——S. 439 — **Evidence.**

The duty of weighing evidence regarding possession in proceedings under S. 145, Criminal P. C., is reserved purely for the trial Court and finding of trial Court is not open to interference in revision unless it is vitiated by error of law. AIR (Vol 32) 1945 Oudh 12 : 1944 OWN 287 : 1944 AWR 196 : 46 Cr LJ 680.

——S. 439 — **Evidence.**

As a rule of practice, High Court will not go into evidence in revision in matters under S. 145, Criminal P. C., unless it is necessary to do so by reason of special circumstances or by reason of character of error of law. AIR (Vol 29) 1942 Pat 489 : 9 BR 91 : 44 Cr LJ 95 : 203 Ind Cas 521.

——S. 439 — Whether materials on record to justify the initiation of proceedings under S. 145, Criminal P. C., are sufficient or not is entirely for the consideration of Magistrate. High Court cannot go into sufficiency or otherwise of these materials. AIR (Vol 30) 1940 Pat 44 : 44 Cr LJ 25 : 9 BR 73 : 203 Ind Cas 275 (DB).

——S. 439 — **Evidence.**

High Court will not interfere lightly with finding of Magistrate under S. 145, Criminal P. C., where it is based on evidence and the duty of weighing evidence is one purely for trial Court. AIR (Vol 26) 1939 Lah 108 : ILR (1938) Lah 611 : 41 PLR 217 : 40 Cr LJ 519 : 181 Ind Cas 59.

——S. 439 — **Order und r S. 145 — General practice — Exceptional circumstances — Fresh period from date when Sessions Judge refuses to make reference under S. 438 — Petitioner is pardanashin lady — Effect.**

The High Court will not, as a general practice, entertain, in the absence of the most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order made in proceedings under S. 145, Criminal P. C., and sought to be impugned, and a fresh period of 60

days does not accrue from the date when the Sessions Judge or the Deputy Commissioner refuses to make a reference under S. 438, Criminal P. C.

The fact that the Pleaders in the mofussil are not aware of the practice of the High Court and that the petitioners include a pardanashin lady, who is in fact the principal petitioner, cannot be regarded as among the most exceptional circumstances. AIR (Vol 26) 1939 Pat 320 : 5 BR 206 : 40 Cr LJ 196 : 179 Ind Cas 15.

**——S. 439 — Interference on merits.**

The High Court does not interfere in revision with orders under S. 145, Criminal P. C., on the merits, as a rule. AIR (Vol 26) 1939 Pat 187 : 5 BR 246 : 40 Cr LJ 220 : 179 Ind Cas 548.

**——S. 439 — Failure of justice.**

Where, in proceedings under S. 145, Criminal P. C., the only possession claimed by a party is that of his tenant and admits that he is not in actual possession, a refusal by the Magistrate to take further evidence cannot be said to have resulted in failure of justice to the party and the order passed by him will not be open to revision. AIR (Vol 25) 1938 Mad 654 : 1938 MWN 252 : 47 MLW 340 : (1938) 1 MLJ 453 : 39 Cr LJ 922 : 177 Ind Cas 584.

——S. 439 — Proceedings under S. 145, Criminal P. C. — Discretion of Magistrate to issue summonses to witnesses — High Court will not interfere unless any serious and substantial injustice is caused in the exercise of discretion of Court. AIR (Vol 23) 1936 All 322 : 58 All 920 : 1936 ALJ 370 : 37 Cr LJ 694 : 1936 AWR 439 : 162 Ind Cas 736.

——S. 439 — Magistrate arriving at conclusion after due inquiry in proceedings under S. 145, Criminal P. C. — Finding of fact, held cannot be impugned in revision. AIR (Vol 21) 1934 Oudh 158 (1) : 11 OWN 375 : 35 Cr LJ 1056 (1) : 150 Ind Cas 143.

——S. 439 — It is seldom that High Court interferes on facts with an order passed under Ss. 145 and 146, Criminal P. C. AIR (Vol 21) 1934 Pat 33 : 35 Cr LJ 611 : 148 Ind Cas 198.

——S. 439 —In proceedings under S. 145, Criminal P. C., if Magistrate fails to make any order in regard to costs of proceedings, High Court in revision has power to make such order. AIR (Vol 20) 1933 Rang 288 : 11 Rang 361 : 35 Cr LJ 1 : 145 Ind Cas 837 (FB).

——S. 439 — Possession delivered by Civil Court in favour of one party — Magistrate, held had power to draw up proceeding under S. 145 and decide that opposite party was not dispossessed by delivery of possession — Such decision, further held not without jurisdiction though wrong and High Court will interfere with it if it was grossly erroneous. AIR (Vol 19) 1932 Pat 185 : 13 PLT 178 : 34 Cr LJ 259 : 142 Ind Cas 157.

——S. 439 — If a declaratory order is passed under S. 145 (6) the order can be revised, but if the Magistrate on the facts refuses to proceed under S. 145, such order cannot be revised. AIR (Vol 13) 1926 Sind 85 : 89 Ind Cas 309 : 18 SLR 278 : 26 Cr LJ 1333 (DB).

——S. 439 — Refusing to admit written statement filed by claimants in proceedings under S. 145 is revisable as the effect of it will be that the Magistrate's decision under S. 145 will not be binding on the parties whose written statement Magistrate had refused to admit. AIR (Vol 11) 1924 Pat 783 : 81 Ind Cas 442 : 5 PLT 458 : 25 Cr LJ 906.

——S. 439 — Where the Deputy Magistrate attached the property in dispute, owing to his not understanding the meaning of a civil Court's decree relating to the same property, his order is irregular and without jurisdiction. AIR (Vol 11) 1924 Pat 711 : 76 Ind Cas 24 : 25 Cr LJ 88.

——S. 439 — District Magistrate cancelling his predecessor's order under S. 145 (1) and staying proceedings — High Court cannot interfere. AIR (Vol 8) 1921 Lah 92 : 66 Ind Cas 516 : 2 Lah 364 : 105 PLR 1921.

**——S. 439 — Refusal to examine witnesses.**

An arbitrary refusal to examine more than a certain number of witnesses in a proceeding under S. 145 affects the exercise of jurisdiction bringing the case within the revisional powers of the High Court. AIR (Vol 8) 1921 Pat 308 : 61 Ind Cas 718 : 2 PLT 330 : 22 Cr LJ 430.

**——Ss. 439 and 145 — Proceedings under S. 145, Cr. P. Code — Revision.**

It is not competent to the High Court to interfere in revision with proceedings under S. 145, Cr. P. Code. AIR (Vol 6) 1919 All 357: 41 All 302 : 17 ALJ 321 : 20 Cr LJ 449 : 51 Ind Cas 337.

**——S. 439 — Proceedings under S. 145 — Revision.**

A High Court cannot ordinarily interfere in revision under Ss. 435 and 439 of the Cr. P. Code with proceedings under Chap XII of the Code unless the Subordinate Court has passed an order without giving the parties an opportunity of calling evidence, and has thus acted without jurisdiction. AIR (Vol 5) 1918 Nag 136 : 20 Cr LJ 107 : 48 Ind Cas 987.

——S. 439 — The High Court in revision of a proceeding under section 145 cannot go into the question of the sufficiency of evidence in support of a finding arrived at by the Lower Court. AIR (Vol 4) 1917 Cal 100 : 18 Cr LJ 301 : 38 Ind Cas 333 (DB).

**——S. 439 — Proceedings under S. 145 — Order on Police report — Other reasons.**

A Magistrate need not record other reasons, if he takes action on a police report. Proceedings under Chapter XII have been expressly excluded from the scope of S. 439. AIR (Vol 4) 1917 Mad 610 : 18 Cr LJ 23 : 5 LW 165 : 36 Ind Cas 855.

——Ss. 439, 145—Obiter—The High Court has jurisdiction to interfere in cases of illegalities or manifest irregularities in procedure committed by Magistrates in proceedings under S. 145 Cr P.C. AIR (V 4) 1917 Mad 594 : 17 Cr LJ 217 : 34 Ind Cas 329.

——Ss. 439, 145 — In an inquiry under S. 145, it is the duty of the magistrate to determine who was in actual possession at the time of the preliminary order. AIR (V 2) 1915 Mad 748: 1 LW 939: 15 Cr LJ 708: 26 Ind Cas 156 (DB). (Reversing AIR 1915 Mad 27: 15 Cr LJ 669).

**——Ss. 439 and 145 — Proceedings under S. 145 —Revision — Interference by Chief Court with the order of Magistrate.**

The Chief Court will not interfere in revision with the order of the Magistrate under S. 145 of the Cr P. Code where it is inconvenient and unnecessary even if the order is based on irregular procedure, inasmuch as the parties can always resort to a Civil Court for redress. An omission to make a joint owner of property a party in the revision, is immaterial when in the order of the Magistrate no mention is made, of such joint owner

nor is he declared to be in possession. AIR (V 1) 1914 Lah 295 : 15 PWR 1914 Cr : 68 PLR 1914 : 15 Cr LJ 279 : 23 Ind Cas 487.

——S. 439 — An order under S. 145 cannot be set aside in revision merely on the ground that the initiatory order did not set forth explicitly the reasons which satisfied the Magistrate that there was a likelihood of a breach of the peace. In proceedings under Ch XII of C.P.C. where there is any doubt as to the exact local area within which the land in dispute is situate, inquiry can be made by the Magistrate, having jurisdiction in either of the areas in which the land may be situated. A Magistrate's decision as to possession under S. 145 (4) whether right or wrong is one which cannot be questioned in revision. (1909) 12 OC 400 : 11 Cr LJ 69 : 4 Ind Cas 876.

### 27. Proceedings under Criminal P. C., Ss. 195 and 476 to 476-B.

(a) General
(b) Under S. 195

#### (a) General

——Ss. 439 and 435 — Applicability — Appellate order under S. 476-B, Cr P. Code — Procedure — If governed by S. 115, C. P. Code. See C. P. Code, S. 115. AIR (V 35) 1948 Pat 225: 27 Pat 52: 49 Cr LJ 246 (FB).

**——Ss. 439, 476-B — Order of Revenue Court passed under S. 476-B.**

A Revenue Court deciding an appeal under S. 476-B, Criminal P. C., is not an inferior Criminal Court within the meaning of S. 439. Hence an order passed by the Revenue Court in such appeal cannot be revised under S 439 even though the appeal was itself preferred under the provisions of the Criminal Procedure Code. AIR (V 31) 1944 Oudh 23 : 1943 AWR 41 : 1943 OWN 176 : 44 Cr LJ 757 19 Luck 245 : 208 Ind Cas 247 (DB).

**——S. 439 — Order under S. 476 by Revenue Court.**

The High Court has no power either under S. 115, Civil P. C., or under S. 439, Criminal P. C., to revise an order passed by the Revenue Court under S. 476, Criminal P.C., directing the trial of a person for an offence committed in the course of proceedings before it. 1942 Nag L Jour 242 (DB).

**——Ss. 439, 476-B, 195 (3) — No appeal under S. 476B preferred nor revision application made to Sessions Judge — Objection as to jurisdiction raised for first time in revision to High Court — Revision, if maintainable.**

A suit was brought by the applicant before a panchayat under the provisions of the U. P. Village Panchayat Act to recover a sum of money on foot of a chitti. A report from the sarpanch made to the Deputy Commissioner contained an allegation of forgery against the applicant. The Tahsildar was then directed to enquire and report. His report supported the allegation and thereupon the Deputy Commissioner, that is, the District Magistrate, preferred a formal complaint against the applicant under Ss. 467 and 471, Penal Code, and this complaint constituted the basis of the proceedings against him. He was tried and convicted. The question as to jurisdiction of the Court to try the applicant was first raised by him in the revision application to the High Court. No appeal was preferred under S. 476B, Criminal P. C. nor was revision application made first to the Sessions Judge. The suit filed in the Panchayat Court was a civil suit and no appeal lay from its decision under the Panchayat Act which gave only revisional power to the Collector:

Held, that the principal Court having ordinary original civil jurisdiction for the purpose of sub-s. (3) of S. 195, Cri. P. C., was the Court of the Sessions Judge. Consequently, it was either the Panchayat Court itself or the Court of the Sessions Judge which should have preferred the complaint. The District Magistrate had, therefore, no power to prefer a complaint.

Held, however, that although the matter was not of jurisdiction, the procedure which should have been adopted by the applicant was by way of an appeal under S. 476B, Criminal P. C., and having omitted to avail himself of this remedy it was not open to the applicant to raise this objection in revision in view of the provisions of S. 439 (5).

Held, further that the uniform practice of the Chief Court was not to entertain an application in revision when there was no previous revision application to the Sessions Judge and although such a revision application would have been barred by S. 439 (5), the absence of such an application was a further reason why the Chief Court should not interfere. AIR (V 29) 1942 Oudh 439 : 1942 OWN 392 : 43 Cr LJ 668 : 1942 AWR (CC) 252 : 201 Ind Cas 389.

**——S. 439 — Complaint under S. 476 by Civil Court — Civil Procedure Code, S. 115.**

Proceedings under S. 476 when the Court enquiring is a Civil Court, are proceedings subject to the High Court's revisional orders under S. 439. An order made under S. 476 by Civil Court is not a "case decided" within the meaning of S. 115, Civil P. C. Section 476-B not being exhaustive, the revisional powers of the High Court are not limited by the powers of appeal conferred by that section. AIR (V 28) 1941 Sind 217 : ILR (1941) Kar 422 : 43 Cr LJ 259 : 179 Ind Cas 774 (DB).

**——Ss. 439, 476 — Order of Civil Court under S. 476 — S. 115, Civil P. C.**

Section 439, Criminal P.C. only applies to cases which come before the Criminal Courts within the meaning of the Criminal Procedure Code. A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, and if, for the purposes of that application, it remains a Civil Court, it must be governed by the provisions of the Civil Procedure Code, and not by those of the Criminal Procedure Code. Where, therefore, an order has been passed by a Civil Court under S. 476, Criminal P.C., S. 439 has no application. The High Court can only exercise the revisional powers under S. 115, Civil P. C. AIR (V 27) 1940 Mad 465: 21 MLW 542 (2): (1940) 1 MLJ 719 : 1940 MWN 472 (2) : 41 Cr LJ 769: ILR (1940) Mad 762: 189 Ind Cas 630 (FB).

——S. 439 — Mere omission to record finding of expediency under S. 476, Criminal P. C. is no ground for interference in revision. AIR (V 27) 1940 Nag 227 : 1940 NLJ 108 : 41 Cr LJ 466 : 187 Ind Cas 521.

**——S. 439 — Order under S. 476-B, by Civil Court.**

Application in revision from order under S. 476-B by Civil Court should be heard and decided under S. 439. It is not essential to determine whether the Court passing it is Criminal or Civil. It is certainly a Court which is exercising jurisdiction in criminal matter. Provisions of S. 115, Civil P.C., do not apply to such proceedings. AIR (V 25) 1938 Bom 225 : 40 Bom LR 297 : 39 Cr LJ 495 : ILR (1938) Bom 331 : 174 Ind Cas 780 (FB).

——S. 439 — High Court will not interfere with order under S. 476, Criminal P. C., if the lower Appellate Court has power to act under that section even if the High Court takes another view of the matter. High Court will interfere in revision only where the final Court of Appeal acts on fanciful

grounds or bases its order on obviously wrong or worthless grounds or without forming a judicial opinion. But where it comes to the finding that the success of the prosecution for perjury is problematical and this view is based on fact, High Court will not interfere. (1935) 158 Jnd Cas 984 : 18 NLJ 40 : 37 Cr LJ 16.

——S. 439 — Proceedings under S. 476 by Civil or Revenue Court — Revision to High Court from appellate order lies under S. 115, Civil P. C. — Where, however, the proceedings are initiated by Criminal Court, revision lies under S. 439. Criminal P. C. AIR (V 22) 1935 Oudh 59: 11 OWN 1469: 36 Cri LJ 254 : 10 Luck 335 : 153 Ind Cas 104 (DB)

**——Ss. 439 and 476-B — Court refusing to make complaint but Appellate Court accepting the appeal — Revision — Procedure — Power to remand or take additional evidence.**

In the case of a Court refusing to make a complaint and the Appellate Court accepting the appeal, revision lies to the High Court under S. 439, Criminal P.C., in all cases whether the Court be a Civil, Criminal or Revenue Court.

The procedure on appeal under S. 476-B, is the procedure under the Criminal P.C., even though the trial Court be Civil, Criminal or Revenue. The Appellate Court cannot, therefore, make a remand to the trial Court, but it can itself make an inquiry in a case where it comes to the conclusion either that the trial Court has made no preliminary inquiry at all, or has made a defective inquiry and take all evidence necessary for making or completing the preliminary inquiry. However, it cannot take additional evidence under S. 428, as that section is specifically limited to appeals under the chapter in which it occurs. AIR (V 18) 1931 Lah. 761 : 33 Cr LJ 178 : 33 PLR 558 : 13 Lah 342 : 135 Ind Cas 594 (FB).

**——Ss. 439, 476 — Order of Civil Court making complaint — Revision under S. 439 — Civil P. C., S. 115.**

A decree-holder applied for execution. The judgment-debtor pleaded certain payments but the executing Court refused to recognise them as they were time-barred. The judgment-debtor subsequently produced a receipt and moved the Court to institute proceedings under Ss. 209 and 210, Penal Code, against the decree-holder and an order was made for drawing up a complaint. The decree-holder applied in revision under S. 439, Criminal P.C.

Held, (i) that the revision under S. 439, Criminal P.C., was competent even though the complaint was made by a Civil Court.

(ii) that inasmuch as the execution proceedings had terminated and the receipt which formed the basis of the order to prosecute was not before the Court during a proceeding in the Court, no offence was committed in or in relation to a proceeding in that Court and the Court acted ultra vires in inquiring into the matter and the High Court could also interfere under S. 115, Civil P. C. AIR (V 18) 1931 Lah 105: 32 PLR 46: 32 Cr LJ 647: 131 Ind Cas 216.

——S. 439 — An order passed by a Revenue or Civil Court under S. 476, Criminal P.C., cannot be revised under S. 439, Criminal P.C. but under S. 115, Civil P. C., or S. 107, Govt. of India Act. AIR (V 18) 1931 Pat 411 : 12 PLT 671 : 33 Cr. LJ 147 : 135 Ind Cas 513.

**——S. 439 — Revision against order under Ss. 476, 476-A and 476-B, by civil Court does not lie.**

Revision application against order passed under Ss. 476, 476-A and 476-B, Cr.P.C. by Civil Court does not lie under S. 439 of the Code, as it is not a matter connected with any proceedings before any inferior criminal Court within the meaning of S. 435 of the same Code. In such matters the High Court can only interfere under S. 115, C. P. Code, or S. 107, Government of India Act, and the order can therefore only be challenged for wrong, illegal or irregular exercise of jurisdiction. AIR (V 17) 1930 Cal 721 : 34 CWN 914 : 52 CLJ 87 : 1930 Cr C. 1129. (DB).

——S. 439 — Appealable cases — Complaint under S. 476 — Since an appeal to superior Court lies, there is no revision to High Court. AIR (V 16) 1929 Pat 640 : 10 PLT 161 : 117 Ind Cas 309 : 30 Cr LJ 765 : 1929 Cr C 369.

——S. 439 — Appeal under S. 476-B transferred to Subordinate Judge — Proceedings before him can be declared null and void under S. 115, though not under S. 439. AIR (V 15) 1923 Oudh 494 : 114 Ind Cas 812 : 5 OWN 882 : 4 Luck 155 : 30 Cr LJ 382. (DB).

——S. 439 — Order of lower appellate Court, directing complaint under S. 476 on appeal from trial Court's refusal to make a complaint, is not appealable — It may be revised. (AIR 1926 Pat 25 Diss from). AIR (V 14) 1927 Rang 313 : 5 Rang 523 : 28 Cr LJ 937: 105 Ind Cas 457.

**——S. 439 — Jurisdiction — Civil Court order under S. 476 — High Court cannot revise.**

The High Court cannot under S. 439 interfere with an order passed by a Civil Court under S. 476. The amendment of the Code has strengthened the view rather than weakened it. AIR (V 13) 1926 All 229 : 92 Ind Cas 454 : 7 LRA Cr 25 : 24 ALJ 217 : 27 Cr LJ 278.

——S. 439 — Interference in revision with appellate orders refusing to withdraw complaint under S. 476-B is ordinarily not desirable. (1926) 96 Ind Cas 367 : 27 Cr LJ 1011 (Lah).

——S. 439 — Revenue Court's order under S. 476 cannot be interfered with. AIR (V 8) 1921 Pat 94: 61 Ind Cas 643 : 2 PLT 609 : 6 PLJ 178 : 1921 PH CC 240: 22 Cr LJ 403 (DB); AIR (V 13) 1926 All 577: 7 LRA Cr 130: 27 Cr LJ 1021: 96 Ind Cas 877; AIR (Vol 11) 1924 Rang 54: 85 Ind Cas 362: 1 Rang 372: 2 Bur LJ 154: 26 Cr LJ 523.

**——S. 439 — Order under S. 476, Cr. P. Code — Who can apply.**

Only the aggrieved party can apply under S. 439 for the revision of the order passed under S. 476. AIR (V 7) 1920 Nag 264: 21 Cr LJ 846: 58 Ind Cas 926.

**——S. 439 — Order under S. 476 Cr. P. Code — C. P. Code (V of 1908) S. 115.**

The High Court cannot interfere under C. P. Code S. 115 or Cr. P. Code S. 439 with a Revenue Court's direction of a person's trial under S. 476, Cr. P. Code. Where a Revenue Court signs as a Revenue Officer an order in a "miscellaneous Criminal case", it is not presumed to have been passed by a Magistrate. AIR (V 7) 1920 Nag 249: 21 Cr LJ 833: 58 Ind Cas 913.

**——Ss. 439 and 476 — Order under S. 476 — C. P. Code, S. 115.**

An order passed by a Civil Court under S. 476, Cr. P. Code can be revised only under S. 115 C. P. C. and not under S. 439 Cr. P. Code. AIR (V 7) 1920 Nag 146: 16 NLR 23: 21 Cr LJ 270: 55 Ind Cas 286 (DB).

——Ss. 439, 476 — **Order under S. 476 — High Court's power to revise Dt. Judge's order.**

Under S. 439 the High Court exercising Criminal jurisdiction has no power to revise the District Judge's order under S. 476 Cr. P. C. AIR (V 14) 1917 Low Bur 102: 10 Bur LT 13: 18 Cr LJ 121: 37 Ind Cas 473 (DB).

——**S. 439 — Order under S. 476 Cr. P. Code — Revision.**

The High Court has no power under S. 439 to interfere with an order made by a Civil Court under S. 476. In this particular case, it was found that there was no case either, to interfere under S. 115 C. P. C. AIR (V 3) 1916 Mad 209: 17 MLT 268: 16 Cr LJ 232: 27 Ind Cas 904 (DB).

——**S. 439 — Orders under S. 476 — Revision, if lies.**

No revision lies under S. 439 against an order passed by a Civil Court directing prosecution under S. 476 of the Cr. P. Code. Revision, however, lies under C. P. C., S. 115. AIR (V 1) 1914 Oudh 225: 17 OC 25: 15 Cr LJ 217: 22 Ind Cas 1001 (DB).

——**S. 439 — Order under S. 476, Cr. P. Code — Small Cause Court — Small Cause Courts Act, S. 25 — Revision.**

A revision of an order under S. 476 of the Code of the judge of a Small Cause Court lies under S. 25 of the Act IX of 1887 and not under S. 439 of the Code. The power of revision under the Act is much narrower than under the Code. (1913) 6 Bur LT 144: 14 Cr LJ 496: 7 LBR 76: 20 Ind Cas 752.

——**Ss. 439 and 476 — Order under S. 476 — Revision.**

When action is taken under section 476 Cr. P. Code by a criminal court subordinate to the High Court, its proceedings are open to revision under section 439. But not so, if proceedings are taken by a Civil Court. (1913) 40 Cal 477: 17 CLJ 245: 14 Cr LJ 197: 17 CWN 647: 19 Ind Cas 197 (FB).

——**Ss. 439 and 476 — Order under S. 476 of Assistant Collector — Revision.**

The High Court has no power to interfere in its revisional powers on the Criminal side with the order of the Assistant Collector under S. 476 to prosecute certain persons under S. 193 of the Penal Code. (1912) 9 ALJ 231: 34 A 267: 13 Cr LJ 141: 13 Ind Cas 829.

——**S. 439 — Order under S. 476 Cr. P. Code — Revision — High Court's power to make consequential order.**

The High Court has power to revise an order under S. 476(1) of the Code and to direct that the proceedings under S. 476(2) should also cease. S. 423 (1)(d) of the Code gives the power to the High Court to make any consequential order necessary in the circumstances. (1912) 5 Bur LT 107: 6 LBR 49: 13 Cr LJ 492: 15 Ind Cas 492.

——**S. 439 — Order under S. 476, Cr. P. Code — Power of High Court to revise.**

The High Court can revise an order directing prosecution under S. 476, Cr. P. C. (1911) 4 Bur LT 246: 12 Cr LJ 521: 12 Ind Cas 289.

——**S. 439 — Order under S. 476 Cr. P. Code.**

A High Court can deal with orders passed under S. 476 in revision for good cause shown. (1910) 3 Bur LT 101: 12 Cr LJ 85: 8 Ind Cas 1197.

——**S. 439 — Order under S. 476, Cr. P. Code — Revisional power of High Court, on grounds other than the jurisdiction.**

Under S. 439 Cr. P. Code the High Court can interfere on grounds other than the want of jurisdiction where a Cr. Court has taken action under S. 476 of the Code. 26 M. 98 overruled. (1910) 33 Mad 48: 19 MLJ 766: 6 MLT 327: 10 Cr LJ 420: 3 Ind Cas 934 (FB).

——**S. 439 — Order under S. 476—Income-tax Collector's order.**

High Court cannot revise an order passed by an Income-tax Collector, under S. 476, Cr. P. Code nor that of a Revenue Court. (1909) 3 SLR 66: 10 Cr LJ 395: 3 Ind Cas 886 (FB).

——**Ss. 439 and 476 — Revision — Order for prosecution — Power to set aside.**

The High Court in revision can set aside an order for prosecution under S. 476 Cr P. Code, only when it appears that the Lower Court has acted on merely fanciful and empty grounds, or on grounds obviously wrong; and not merely on the ground that it disagrees with the Lower Court's opinion. AIR (Vol 1) 1914 Nag 1: 9 NLR 184: 15 Cr LJ 33 : 22 Ind Cas 177.

——**Ss. 439, 476 — Revision — Order legally passed by a Collector, but erroneously signed as by the District Magistrate.**

A Collector having heard an appeal in a mutation case passed an order against one of the parties to the case, apparently under S. 476 of the Code of Criminal Procedure, but the order was headed and signed as having been passed by the District Magistrate. 'Held, that as the order might legally have been passed by the Collector and could not have legally been made by the District Magistrate, it must be taken to be an order passed by the Collector, and the High Court had therefore no jurisdiction in revision to interfere with it. (1907) AWN 277 (277, 278): 6 Cr LJ 350: 4 ALJ 701.

——**S. 439 — Power of High Court to revise orders under S. 476.**

It is competent to the High Court in the exercise of its revisional jurisdiction to interfere with an order of a subordinate court under S. 476, Cr P.C., directing the prosecution of any person referred to in the section. (1902) 4 Bom LR 618 : 26 B 785 (789)

Also (1905) 7 Bom LR 84 (85) : 2 Cr LJ 54 (DB).

——S. 439 — The Civil Bench should be moved under S. 622, C.P.C., (1904) 8 CWN 73 (74) : 1 Cr LJ 21 (DB).

——**S. 439 — Revision — Conversion of application under S. 439, Cr. P. C., into one under S. 622, C.P.C. —Cr. P. C., S. 476.**

In this case the Court entertained as an application under S. 622 of the C. P.C., an application purporting to be one presented in accordance with the provisions of S. 439 of the Cr. P. C. for revision of an order passed by a Civil Court under S. 476, Cr. P. C. 1904 AWN 170 (171): 1 ALJ 481.

——**Ss. 439, 476 — Order under S. 476 — Revision —Jurisdiction**

An order under S. 476 of the new Code of Criminal Procedure must be treated as a complaint by the court and cannot be revised by the High Court under S. 439 of the Code of Criminal Procedure. 21 M. 124 declared overruled by the new Code. (1903) 26 M 98 (100): 2 Weir 576 (FB).

**(b) Under S. 195**

**——S. 439 — Ss. 439, 195 (1) (a) — Complaint under S. 195 (1) (a) — District Magistrate ordering its withdrawal — Revision, if lies.**

Making of a complaint under S. 195 (1) (a), Criminal P. C. is not a judicial act but is the act of a public servant. Where, therefore, upon such complaint being made, the District Magistrate orders it to be withdrawn under S. 195 (5), such order is not made by him as a Criminal Court and hence, no revision lies under S. 439, Criminal P.C., against his order. AIR (V 25) 1938 Pesh 9 : 39 Cr LJ 445 : 174 Ind Cas 344.

**——S. 439 — Complaint under S. 195.**

Where a Munsiff makes a complaint after deciding the case, revision from an order in such proceedings lies under S. 115, Civil P.C., and not under S. 439. AIR (V 22) 1935 All 696: 58 All 85: 1935 ALJ 943 : 1935 AWR 792 : 161 Ind Cas 322 (DB).

——S. 439—A petition to the District Magistrate for withdrawal of a complaint made under S. 195 (1) (a), Criminal P. C., by a Joint Magistrate, is not by way of appeal but by way of revision, and should not be dismissed without hearing the petitioner personally or by Pleader.

In such a case, no appeal lies to the Sessions Judge, and the proper remedy is to apply to the District Magistrate to exercise his powers of revision. AIR (V 21) 1934 Mad 473 : 1934 MWN 483 (2): 57 Mad 1101: 35 Cr LJ 1134 : 40 MLW 90 : 67 MLJ 195: 150 Ind Cas 773.

——S. 439 — Application for revision lies under S. 439 even when the sanction is granted by a civil Court. AIR (V 16) 1929 Lah 676: 116 Ind Cas 711 : 11 LLJ 103 : 30 PLR 392 : 30 Cr LJ 666 :13 AI Cr R 99.

——S. 439 — In a case under S. 195 granting or revoking sanction, where the matter has already been before two Courts, the High Court can only interfere, if at all, in the exercise of its revisional jurisdiction under S. 439, and it will so interfere only in order to prevent a gross and palpable failure of justice. AIR (V 11) 1924 All 461 : 77 Ind Cas 806 : 4 LR A Cr 213 : 25 Cr LJ 454.

——S. 439 — A revision lies under S. 439 against an order dismissing an appeal from an order granting sanction. AIR (V 10) 1923 Lah 341 : 73 Ind Cas 779 : 4 Lah 130 : 5 LLJ 372 : 24 Cr LJ 683.

——S. 439 — Sanction refused by Magistrate and granted by Sessions Judge — High Court cannot interfere under Section 195 (6) but can, under Section 439. AIR (V 9) 1922 Oudh 225 : 68 Ind Cas 414 : 9 OLJ 282 : 26 OC 104 : 23 Cr LJ 574.

**——S. 439—Order of Appellate Court revoking sanction — High Court has power to revise and set aside.**

An order revoking a sanction might be treated in effect as an order refusing to grant the sanction and whether Section 195, Clause (6) or Section 439 of the Code of Criminal Procedure is applied the propriety of the order revoking the sanction or refusing to grant the sanction can be considered by the High Court in revision. 42 All. 649; 19 ALJ 399, dissented from. The power to grant sanction under Section 195 is included among the powers which can be exercised in revision under Section 439 of the Code; and if this power can be exercised in a proceeding arising out of trial in any of the Courts below it can also be exercised for discharging an order made by a Subordinate Court revoking the sanction granted by the trying Magistrate. AIR (V 9) 1922 Oudh 13 : 71 Ind Cas 681 : 25 OC 153 : 24 Cr LJ 217 : 9 OLJ 662.

——S. 439 — No application in revision lies to the High Court from an order of the Magistrate of 1st class, granting sanction under S. 195. AIR (V 7) 1920 All 177 : 42 All 649 : 21 Cr LJ 746 : 18 ALJ 758: 58 Ind Cas 250.

**——S. 439 — Proceedings under S. 195 — S. 439, applicability of.**

A petition for revising proceedings under S. 195 Cr. P. Code of a Civil Court should be made only under S. 439 of the Cr P. Code, and not under S. 115, C.P.C. AIR (V 4) 1917 Mad 158 : 17 Cr LJ 184 : 33 Ind Cas 824 (DB).

**——S. 439 — Proceedings relating to S. 195 — Civil P. C. 1908, S. 115.**

High Court has no power under S. 439 Cr PC to interfere with the order of Civil Court passed under S. 195 Cr P. C. but it has such power under S. 115, C.P.C. as Civil C urt is not a Criminal Court, when it exercises jurisdiction under S. 195 Cr. P.C. (1910) 14 CWN 806 : 11 Cr LJ 857 : 37 Cal 714: 6 Ind Cas 473.

——S. 439 — Where the conviction of a village Magistrate on a charge of extortion was set aside for want of sanction by the Sessions Judge the High Court could interfere in revision if as a matter of fact no sanction were needed and direct a retrial of the case, in spite of delay, the orders of the lower Courts requiring sanction being the cause for the same. (1909) 6 MLT 128 : 11 Cr LJ 162 : 4 Ind Cas 1056 (DB).

**——S. 439 — Proceedings under S. 195 — Revisional jurisdiction — Sancton by Civil Court.**

A High Court has no revisional power on the criminal side to interfere with a sanction given by a Civil Court under S. 195, Cr P.C. (1909) 31 All 48 : 6 ALJ 1 : 5 MLT 55 : (1908) AWN 290 : 9 Cr LJ 63 : 1 Ind Cas 5 (DB).

**——S. 439 — Stay of criminal proceedings pending civil.**

It would be a dangerous doctrine to lay down any hard and fast rule to the effect that a criminal trial or enquiry should of necessity be stayed simply because a civil suit has been instituted between the parties, in which some or all the matters materially in issue in the criminal case would have to be determined until the civil litigation was finally decided. It is very desirable in the ends of justice that when a competent court has taken upon itself the responsibility of ordering prosecution under S. 476, Cr P. C., that that prosecution should be entertained as speedily as possible while the evidence on both sides is fresh. But a court may well hesitate to give sanction under S. 195, Cr. P. C., to a private individual to prosecute his adversary for an offence alleged to have been committed during the pendency of a civil litigation before it has terminated. Where in his information to the Police the petitioner did not name any one as the actual offender, but what he did was to report that a burglary or theft had taken place in his house and that he suspected that the opposite party had instigated it.

Held, that the order for prosecution of the petitioner under S. 211, I.P.C. was justified as it was found by the Magistrate that, as a matter of fact no burglary or theft had at all taken place as alleged by the petitioner. (1909) 13 CWN 398 (401) : 4 Ind Cas 485: 11 Cr LJ 4 (DB).

**——Ss. 439, 476 — Revision — Power of High Court to revise an order under S. 476 — Circumstances under which such power should or should not be exercised.**

The High Court has power in revision to set aside an order passed by a civil or criminal court, but such power should not be exercised where the court below has arrived at a judicial opinion on evidence that there is ground for inquiring into an offence referred to in S. 195, merely because the High Court disagrees with that opinion. (1901) AWN 59: 23 A 249 (251).

28. Quashing proceedings.

See also Note 22.

——S. 439 — **Complaint in respect of civil dispute — Quashing of proceedings.**

Where it is clear that a complaint under Ss. 417 and 427, Penal Code, is filed against the accused only with a view to put pressure on the accused and with a view to have a cheaper remedy in respect of a matter altogether of a civil nature, the proceedings would be quashed. A I R (Vol 37) 1950 Ajmer 10 : 51 Cr LJ 762.

——S. 439 — **Quashing proceedings — Proceeding under S. 441, I. P. Code — Civil dispute — Abuse of process of Criminal Court.**

The Criminal Court is never intended to be and is not a Court where summary applications can be made for possession. A proceeding under S. 441, I. P. Code, brought in a criminal Court in order to bring pressure upon the accused to give the complainant possession where the accused could not have any of the intents required for criminal trespass, is really an abuse of the process of the criminal Court, and is liable to be quashed in revision. (1949) 53 CWN 822(DB).

——S. 439 — **Proceedings, when can be quashed.**

Proceedings before a Criminal Court are only quashed when no offence whatever is disclosed or when the prosecution is bound, on the face of it, to fail, or for some other cause equally powerful. They cannot be quashed before a complainant who has disclosed a prima facie case in his complaint has had an opportunity of placing the material on which he bases his complaint before the Court.' AIR (Vol 30) 1943 Nag 327 : 1943 NLJ 456 : 45 Cr LJ 175 : ILR (1944) Nag 238 : 210 Ind Cas 136.

——S. 439 — **Criminal Courts not to be used to collect civil debts.**

Criminal Courts should not be used to collect a civil debt. A complaint filed in Criminal Court in order to collect a civil debt should be quashed. AIR (Vol 29) 1942 Lah 122 : 44 PLR 104 : 43 Cr LJ 632 : 200 Ind Cas 446.

——S. 439 — **Two similar complaints dismissed — Third complaint on same facts.**

The fact that the petitioner had been harassed already by two similar complaints, both of which had been dismissed or he himself discharged, is ample ground for quashing a third complaint made on the same facts. AIR (Vol 29) 1942 Lah 122 : 44 PLR 104 : 43 Cr LJ 632 : 200 Ind Cas 446.

——S. 439 — **Commitment order under S. 437.**

Dacoity case — Magistrate discharging accused under S. 209 after preliminary enquiry and after considering all evidence — Sessions Judge not specifically finding prima facie case but taking different view and ordering commitment — Sessions Judge's order is improper and the commitment should be quashed. AIR (Vol 26) 1939 Mad 253 : 1938 MWN 1311 : 40 Cr LJ 392 : 180 Ind Cas 576.

——S. 439 — **Quashing charge.**

It is not the practice nor would it be proper for the High Court ordinarily to alter or quash a charge unless it is clear that the complaint does not disclose the offence in the charge. (1937) 39 PLR 957.

——S. 439 — **Complaint under S. 307, U. P. Municipalities Act — Accused acquitted for want of prosecution — Subsequent complaint regarding the same matter after nine years — Accused again acquitted for want of prosecution — Fresh complaint after two years — Held, this amounted to harassment and proceedings should be quashed.**

The accused had a house adjoining an open piece of land belonging to Government under the control of the Municipal Board and he opened a window in his own wall facing the Government land. The Municipal Board served a notice upon the accused to close the door. On his failure to do so, he was prosecuted but the complaint filed by the Municipal Board was dismissed for want of prosecution. The Municipal Board remained quiet for about nine years and it again served a fresh notice on the accused in respect of the same window calling upon him to close it. As he failed to close it, another complaint was filed against him under S. 307, Municipalities Act. This also was again dismissed for want of prosecution, the Municipal Board then waited for nearly two years and served a fresh notice on the accused again calling upon him to close the said window. As he did not do so, a complaint was filed under S. 307, against him on the ground that he had failed to comply with the notice of the Municipal Board :

Held, that this was a case which should not be allowed to proceed any further because it amounts to a harassment of the accused and raking up a rather stale matter. The Municipal Board clearly had a remedy by way of civil suit and it should not be allowed to find a short-cut by getting the accused convicted by a Criminal Court. AIR (V 23) 1936 All 149 : 1936 AWR 36 : 1936 ALJ 205 : 37 Cr LJ 426 (2) : 161 Ind Cas 316 (DB).

——S. 439 — **Prosecution disclosing no offence — Quashing of charges.**

Where a charge is framed but the allegations of the prosecution disclose no offence, the High Court in revision can set aside the proceedings as an abuse of the process of the Criminal Court and quash the charges against the accused. AIR (Vol 21) 1934 Lah 434 : 35 PLR 361 : 36 CLJ 20 : 152 Ind Cas 224.

——S. 439 — **Accused unnecessarily harassed — Quashing of pending proceedings — Extraordinary powers of High Court.**

It is a gross abuse of the process of the criminal law to re-start the prosecution on the same facts, merely by describing the offence to be one under a different section than previously. Further enquiry can be ordered only if the order of discharge is foolish or perverse or was based on a record which was manifestly incomplete.

Where the accused have been unnecessarily harassed by proceedings which have been re-started by order of Court, it is proper for the High Court to exercise its extraordinary powers under S. 439, Criminal P. C. and set aside pending proceedings. (1934) 34 PLR 833 : 35 Cr LJ 449 : 147 Ind Cas 447.

——S. 439 — **Quashing of proceedings in limine — Practice — Pending cases.**

It is invariably the practice of the High Courts to be very reluctant to quash proceedings in limine. It is undesirable that the discretionary powers of Courts should become crystallised and it would seriously impede the administration of justice if parties were encouraged to come to the High Court from time to time before the completion of a trial. Only in exceptional circumstances will the High Court interfere in revision in pending cases. To justify such interference would require that on the face of the proceedings, there should appear some clear injustice requiring immediate redress. AIR (Vol 21) 1934 Sind 183 (1) : 36 Cr LJ 331 (1) : 153 Ind Cas 320 (DB).

——S. 439 — **Sub-Divisional Officer finding prima facie case against accused — Accused's explana-**

**tion found reasonable by Sessions Judge — Quashing of proceedings in revision — Legality of.**

A complaint being instituted against a company, the Sub-Divisional Officer came to the conclusion that a prima facie case had been made out with reference to the balance-sheets. When the case went up to the Sessions Judge, he found that the charge was entirely misconceived and that the explanation given by the accused was satisfactory :

Held, that whatever may be the ultimate view that might be taken if this question were agitated in a civil action, the accused had succeeded in giving a sufficient explanation which would entitle them to induce a Court of Revision in saying that the prosecution against them should also be brought to a termination and the proceedings taken against the accused should be quashed. AIR (Vol 20) 1933 Cal 647 (2) : 35 Cr LJ 29 : 146 Ind Cas 366 (DB).

——S. 439 — Courts can quash the proceedings in second case when there was a complete trial in the first case even though the plea of autrefois acquit would not be available. 1933 MWN 246.

**——S. 439 — Weak case against accused — Quashing of charge.**

The fact that the case against the accused is a weank one is no ground for quashing the charge in revision. AIR (Vol 19) 1932 Lah 349 (1) : 33 PLR 231 : 34 Cr LJ 82 : 140 Ind Cas 807.

——S. 439 — The High Court has power at an interlocutory stage to quash the proceedings if a clear case is made out. Ordinarily, the High Court would not interfere at an interlocutory stage and interfere with the proceedings pending before a Magistrate, but when it appears that the accused is not guilty on the face of the proceedings, the High Court will interfere even at an interlocutory stage in order to prevent further harassment of the accused. AIR (Vol 15) 1928 Bom 184 : 52 Bom 151 : 30 Bom LR 70 : 29 Cr LJ 317 : 9 AI Cr R 563 : 108 Ind Cas 27 (DB).

**——S. 439 — Power under, to be sparingly used.**

The power of the Court to take action under S. 439 by quashing proceedings is undoubted though such power will be exercised in exceptional cases only. AIR (Vol 15) 1928 Lah 945 : 10 LLJ 485 : 12 AI Cr R 85 : 30 Cr LJ 162 : 113 Ind Cas 536.

——S. 439 — Prosecution under S. 415, Penal Code — Sessions Court recommending to the High Court that proceedings be quashed — Judge of the Chief Court ordering the proceedings to continue — Subsequently accused praying, under S. 561-A the Chief Court to quash proceedings — Previous decision of the Judge of the Chief Court does not constitute estoppel against powers of the Chief Court under S. 561 and S. 439. AIR (Vol 15) 1928 Oudh 292 : 5 OWN 357 : 10 AI Cr R 445 : 29 Cr LJ 657 : 110 Ind Cas 209 (DB).

**——S. 439 — "Quash" meaning of.**

The word "quash" is not a banned word. "Quashing of proceedings" is a term of compendious connotation and the practical result is setting aside or reversal of the order initiating the proceedings. AIR (Vol 15) 1928 Oudh 104 : 9 AI Cr R 356 : 3 Luck 287 : 29 Cr LJ 102 : 1 LC 653 : 106 Ind Cas 694.

**——S. 439 — Delay in disposal if a ground.**

Where the delay in disposal of a criminal case is not due to the complainant proceedings should not be quashed on that ground as to quash the proceedings would be to deny the complainant justice which would be as much a scandal as to allow their continuance. AIR (Vol 14) 1927 Lah 66 : 8 LLJ 518 : 27 PLR 705 : 28 Cr LJ 164 : 99 Ind Cas 596.

**——S. 439 — High Court — Powers of.**

Section 439 does not say that the High Court shall exercise only those powers that are conferred on a Court of Appeal; but on the other hand it enacts that among the powers possessed by the High Court are the powers conferred on an Appellate Court. The High Court has power at any stage to quash or set aside proceedings. AIR (Vol 12) 1925 Mad 39 : 47 Mad 722 : 2 MLW 234 : 35 MLT 77 : 1924 MWN 556 : 25 Cr LJ 1009 : 47 MLJ 373 : 81 Ind Cas 785.

——S. 439 — Accused summoned — Final order not passed — High Court can quash proceedings to prevent injustice. AIR (Vol 9) 1922 Lah 452 : 23 Cr LJ 429 : 67 Ind Cas 589.

——S. 439 — Report to High Court by Sessions Judge — Proceedings not asked to be quashed — High Court can quash proceedings. A I R (Vol 8) 1921 Sind 137 : 16 SLR 1 : 66 Ind Cos 657 (DB).

**29. Question of law.**

**——S. 439 — Discretion of Court — Interference suo motu.**

Two accused persons went up in revision to the Sessions Judge who rejected the application of one of them and referred the application of the other to the High Court. It was urged by the counsel on behalf of the former accused that although his revision application was dismissed by the Sessions Judge and no separate application was filed by him in the High Court, the High Court should take notice of his case suo motu and pass a suitable order since the whole matter was before it.

Held, that ordinarily the High Court would not entertain this request in the absence of an application for revision by the accused, but as the counsel raised an important question of law it should decide it. AIR (V 36) 1949 All 32 : ILR (1949) A 195 : 1948 AWR (HC) 222 : 50 Cr L J 101.

**——S. 439 — Jurisdiction of High Court — Illegality in institution of proceedings — Power to quash proceedings.**

When a manifest irregularity or illegality has been committed in the institution of proceedings, there is no point in permitting the proceedings to continue. Once the illegality is brought to light, the High Court will exercise its revisional jurisdiction to remedy the illegality and quash the proceedings. AIR (V 34) 1947 Sind 68 : ILR (1946) Kar 285 : 230 Ind Cas 166 : 48 Cr L J 564 (DB).

**——Ss. 439, 215, 443 — Order accepting claim under S. 443, though not appealable, is revisable.**

Although the trial Court's order accepting the claim made by an accused person under S. 443, Criminal P. C., and committing the accused for trial by the Sessions Court is not appealable and cannot be set aside by the Sessions Judge himself, there is nothing to prevent him from reporting the case for revision to the High Court for the commitment being quashed, if he considers it to be illegal. AIR (V 30) 1943 Lah 8 : 43 Cr L J 901 : 46 PLR 127 : 202 Ind Cas 759.

——S. 439 — A pure question of law, though not taken before a Magistrate, can be raised in revision. (1943) 24 PLT 326.

——S. 439 — The High Court can interfere in revision with a pending proceeding where a criminal charge is unsustainable on the evidence of the prosecution witnesses. It is the duty of the High Court to interfere when the facts proved do not constitute an offence and the continuance of the trial would be an abuse of the process of the Court. AIR (V 27) 1940 Nag 360 : 1940 NLJ 183 : 41 Cr L J 753 : 189 Ind Cas 579.

**——S. 439 — Prosecution under S. 193, Penal Code — Lower Courts concurring — Revision.**

Revision can only be granted, if there is some error of law, some irregularity, or some abuse of or failure to exercise jurisdiction. It is inadvisable for the High Court to interfere in revision when two Courts have concurred in holding that a

prosecution is in the interests of public policy. In case of a prosecution under S. 193, Penal Code, such a course is not even in the interests of the accused person as it deprives him of the only means of clearing his character, which would otherwise remain affected by the fact of the complaint having been made and endorsed by the Court of appeal. AIR (V 26) 1939 Lah 529 : 41 PLR 652 : 41 Cr LJ 204 : 185 Ind Cas 588.

——S. 439 — **High Court can direct rehearing of appeal.**

Though the High Court should not, in revision, direct a re-hearing of an appeal on the ground that the Appellate Court had taken a mistaken view of the facts, (for that would be tantamount to a direction to take the view that commended itself to the High Court, and in effect to direct that an acquittal be turned into a conviction), yet the High Court can and should, in proper cases, where the Appellate Court has misdirected itself on a point of law, point out the error and direct the re-hearing of the appeal. AIR (V 25) 1938 Rang 193 : 1938 Rang L R 121 : 39 Cr L J 623 : 175 Ind Cas 547.

——S. 439 — The power to quash criminal proceedings at the outset is vested in the High Court, and will, in proper cases, be exercised. But it is a power, of which the High Court makes a circumspect or sparing use. The rule by which it is accustomed to guide itself is that on the face of the proceedings, there must appear some infraction or evasion of law, calling for prompt redress. AIR (V 22) 1935 Sind 81 : 36 Cr L J 881 : 156 Ind Cas 219 (DB).

——S. 439 — **Quashing commitment.**

Under S. 439, High Court can quash commitment on a question of law. When the matter is brought before it and it appears that the order of commitment was illegal, the High Court will quash commitment and may either drop the proceedings altogether or act under S. 439 read with S. 423 and order a fresh inquiry. AIR (V 21) 1934 All 963 : 36 Cr L J 137 : 1934 ALJ 965 : 4 AWR 524 : 57 All 412 : 152 Ind Cas 667 (FB).

——S. 439 — **Question that there was no legally admissible evidence against accused.**

Ordinarily, the High Court will be reluctant to interfere in revision on a question of fact. But the question whether there was legally admissible evidence against the accused is rather a question of law than one of fact, and interference is justifiable on such a point. AIR (V 21) 1934 Rang 60 : 35 Cr L J 808 : 142 Ind Cas 876.

——S. 439 — **Scope — Sufficiency of identification and propriety of conviction — Interference in revision.**

It is true that the High Court usually does not interfere in revision as regards findings of fact. But the question whether an accused has been sufficiently identified and whether his conviction on the evidence of one witness only should stand is a point more of law than of fact and the High Court will interfere in revision. AIR (V 18) 1931 Sind 13 : 130 Ind Cas 378 : 32 Cr L J 543 : 1931 Cr C 61 (DB).

——S. 439 — Where both the parties have tendered evidence the question of weight is not a question of law. AIR (V 17) 1930 All 23 : 120 Ind Cas 193: 31 Cr L J 1 : 1930 Cr C 39 : 1930 ALJ 254.

——S. 439 — It is open to the High Court to revise a finding based on a misapprehension of the law. AIR (V 16) 1929 Pat 429 : 115 Ind Cas 895 : 30 Cr L J 546 : 10 PLT 483 : 12 AI Cr R 360.

——S. 439 — **Offence under Copyright Act (1914), S. 7 — Accused acquitted by trial Court under wrong view of law — Retrial was ordered.**

Where the offence alleged to have been committed by the accused was one under S. 7, Copyright Act (1914), and the trial Court took a wrong view of the law and acquitted accused,

Held, that in a case where the Court has proceeded on a wrong view of the law, and where the matter is of great importance to the complainant in his position as author of this book, which will be pirated by another who will secure for himself the gains that ought legitimately to go to the petitioner, a retrial should be ordered. AIR (V 14) 1927 Mad 981 : 53 MLJ 529 : 105 Ind Cas 669 : 26 MLW 489: 1927 MWN 772 : 39 MLT 328 : 28 Cr LJ 957.

——S. 439 — **Order on wrong application of law can be set aside.**

Where the appellate Court has wrongly considered that the whole of the proceedings in the trial Court were without jurisdiction on a wrong application of the provisions of law, its order can be set aside in revision. AIR (V 13) 1926 All 368 : 92 Ind Cas 870 : 27 Cr L J 358 : 7 LRA Cr 75.

——S. 439 — Lower Court's order erroneous in law but otherwise proper ought not to be set aside. AIR (V 12) 1925 Oudh 739 : 90 Ind Cas 915 : 2 OWN 823 : 26 Cr LJ 1619.

——S. 439 — Point of law not raised in lower Court or in grounds of revision can be pressed at hearing of application for revision. AIR (V 8) 1921 Pat 415 : 61 Ind Cas 794 : 2 PLT 455 : 22 Cr L J 442.

——S. 439 — **Questions of law — Difficult question of law — Revision.**

The High Court refused to interfere in the exercise of its revisional jurisdiction, where question of law which arose was not in all respects free from difficulty. AIR (V 6) 1919 Cal 430 : 46 Cal 986 : 29 CLJ 522 : 20 Cr LJ 574 : 52 Ind Cas 62 (DB).

——S. 439 — **Question of law — Interference — Wrong interpretation of law — Penal Code S. 354.**

Where a Court interprets the law to the effect that a lover is entitled to pull a woman by the hair and hand in public, it is an erroneous interpretation of law which will justify the interference by the High Court with an order of acquittal. (1911) 4 Bur L T 268 : 13 Cr L J 53 : 13 Ind Cas 389.

——S. 439 — **Question of law — Appeal — Conversion of, into revision.**

The High Court can convert an appeal which could not be maintained, into a revision and interfere on a question of law. (1909) 10 Cr LJ 255 : 3 Ind Cas 285 (Bom) (DB).

——Ss. 439, 215 — **Powers of High Court — Revision of commitment order.**

Section 215, Cr. P. C., bars the revision by the High Court of an order of commitment made under Ss. 213, 214, 477 and 478 Cr. P. C., except on a point of law. But where a commitment order has been made under S. 436, Cr. P. C., the High Court has full jurisdiction to enter into the facts and to consider the propriety of the order of commitment. (1907) 6 CLJ 760 (762) : 12 CWN 117 : 6 Cr L J 406 (DB).

**30. Records of case.**

See Note 23.

**31. Reduction of sentence.**

——S. 439 — **Ends of justice.**

An accused was convicted under S. 307, I. P. C. for committing a murderous assault upon his own brother and sentenced to four years' rigorous imprisonment. The quarrel between the brothers was subsequently made up and they began to live in amity. The injured brother desired a reduction in the sentence and made a prayer to that effect to the High Court. In revision by the accused:

Held, that in the circumstances, it would be consistent with the ends of justice to reduce the sentence to rigorous imprisonment for the period of one year, since to keep the accused in jail for a long period would in the circumstances only be likely to end in a renewal of the feud after his emergence from

prison. AIR (V 31) 1944 Pat 37 : 44 Cr L J 336: 9 BR 208 : 25 PLT 43 : 205 Ind Cas 195 (DB).

**——S. 439 — Murder — Youth of accused.**

To commute a sentence of death in the absence of any mitigating circumstances purely on the ground of the age of the accused is, in effect, to lay it down that persons of a certain age should never be sentenced to death even though it is not the law. AIR (V 30) 1943 Mad 69 : 55 LW 552 : (1942) 2 M LJ 312 : 1942 MWN 584 : 44 Cr LJ 299 : ILR (1943) Mad 148 : 204 Ind Cas 545 (DB).

**——S. 439 — Discretion.**

Sentences are a matter of discretion and where they are not disproportionate with the seriousness of the offence, the Appellate Court will not interfere with them. AIR (V 28) 1941 All 309 : 1941 ALJ 342 : 1941 OWN 839 : 1941 AWR 215 : 42 Cr L J 779 : ILR (1941) All 465 : 195 Ind Cas 720 (DB).

**——S. 439 — Practice.**

As a rule, the High Court is reluctant in interfering with the sentence passed by the trial Court. AIR (V 26) 1939 Pesh 47 : 41 Cr LJ 132 : 185 Ind Cas 208 (DB).

**——S. 439 — Procedure.**

Appeal against conviction — High Court finding conviction right but sentence too high — Appeal should not be summarily dismissed — Notice should be sent under revisional power to Government to show cause why sentence should not be reduced and record should be sent for at the same time — If after hearing Government Pleader, the Court comes to conclusion that sentence should be reduced, it can be reduced under S. 439 — Having thus reduced the sentence, the Court can say that it sees no reason for interfering with sentence or conviction and then dismiss the appeal summarily under S. 421. AIR (V 24) 1937 Bom 148 : 39 Bom LR 74 : 38 Cr L J 572 (2) : ILR (1937) Bom 365 : 168 Ind Cas 504.

**——S. 439 — Case ordinarily triable by 3rd class Magistrate but tried by 1st class Magistrate.**

Where an offence triable by a third class Magistrate is tried by a first class Magistrate along with an offence not triable by a third class Magistrate and the conviction in respect of latter offence is set aside on appeal, the High Court will in revision, reduce the sentence in respect of the other offence to one that ordinarily would be awarded by the third class Magistrate. 1937 MWN 743.

**——S. 439 — Interference at instance of third party.**

Though the sentences under S. 151, read with S. 145, I. P. C. were heavy, the High Court did not entertain a revision application for reduction of the sentence at the instance of the third party (Bar Association), the convicted persons not having seen fit to appeal. AIR (Vol 20) 1933 Cal 361 : 34 Cr LJ 814 : 144 Ind Cas 691 (2) (DB).

——S. 439 — A High Court should be satisfied that the sentence awarded is so unreasonable and so excessive as to require a reduction before it can interfere in revision on the question of sentence. AIR (Vol 17) 1930 Sind 58 : 31 Cr LJ 763 : 1930 Cr C 122 : 125 Ind Cas 46 (DB).

——S. 439 — The High Court which has power to confirm the order under S. 137 has also power to modify that order to such extent as may seem fit. AIR (Vol 16) 1929 All 220 : 1929 ALJ 385 : 10 LRA Cr 49 : 11 AI Cr R 350 : 30 Cr LJ 670 : 116 Ind Cas 786.

——S. 439 — Where the Courts below have given non-judicial reasons for passing a severe sentence, the High Court would reduce the sentence in revision. AIR (Vol 14) 1927 Oudh 296 : 2 Luck 503 : 1 LC 159 : 8 AI Cr R 321 : 28 Cr LJ 673 : 103 Ind Cas 401.

**——S. 439 — Conviction — Reduction of sentence.**

Sentences of the accused for a serious riot cannot be reduced in revision on the ground that the men on his side sustained some injuries. AIR (Vol 3) 1916 All 297: 17 Cr LJ 300: 35 Ind Cas 172.

**——Ss. 439 and 423 (1) (b) — Conviction — Variation of sentence by District Magistrate — Revision.**

Where the District Magistrate reduced the term of imprisonment awarded by the Sub-Magistrate but increased the amount of fine payable in default, Held, no revision lay. AIR (Vol 1) 1914 All 530 : 36 All 485 : 12 ALJ 827 : 15 Cr LJ 519 : 24 Ind Cas 607.

**——Ss. 439 and 435 (1) — Reduction of sentence.**

The Appellate Court need not reduce the sentence in a case where the appellant was convicted by the Lower Court under two sections, and the conviction under one section is quashed, when the true interference to be drawn from the sentence is that the Lower Court did not mean to pass a separate sentence for the offence of which the petitioner was acquitted. (1910) 7 MLT 81 : 11 Cr LJ 213 : 5 Ind Cas 754.

——S. 439 — Revision — Sentence reduced by Sessions Judge — Applications by District Magistrate asking for enhancement. 1905 AWN 198 : 2 ALJ 589 : 28 All 91 (92) : 2 Cr LJ 515.

**32. Remand.**

**——S. 439 — Defective judgment of lower Appellate Court — Case, if should be remanded.**

If an Appellate Court does not write a judgment in accordance with S. 367, the High Court is not bound to send the case back to the Appellate Court for a rehearing. It can itself hear the appeal and dispose of it upon an application for revision under S. 439. AIR (V 23) 1936 Nag 160 : ILR (1937) Nag 38 : 39 Cr LJ 349 : 173 Ind Cas 639.

**——S. 439 — Circumstances justifying irregular — Remand will be ordered only when trial has been incurably irregular.**

High Court will not go into evidence as a rule in revision; it will ordinarily confine its interference to cases of exceptional circumstances, or where there is error of law, nor will it interfere with the acquittal unless the trial has been illegal or so radically and incurably irregular as in fact to have occasioned a failure of justice. A retrial should only be ordered in cases of acquittal in which the Court has been radically and incurably defective. AIR (V 14) 1927 Nag 170 : 23 NLR 40 : 102 Ind Cas 219 : 28 Cr LJ 523.

**——S. 439 — Power of High Court — Rehearing of appeal after admitting additional evidence — Govt. of India Act, S. 107.**

Both under S. 439 Cr. P. Code and under S. 107 of the Government of India Act, the High Court has powers to direct a Sessions Judge to re-hear an appeal after obtaining an additional evidence. When petitions are made to a Court, it is improper merely to direct them to be filed with the record. AIR (V 5) 1918 Pat 272 : 3 PLJ 632 : 19 Cr LJ 902 : 47 Ind Cas 274 (DB).

**——S. 439 — Findings of fact — Re-trial — Re-trial Court if can question the finding.**

In a case directed to be retried, the trial Court cannot go behind the finding of fact which was the basis for the retrial order. AIR (V 2) 1915 Mad 334 : 15 Cr LJ 619 : 25 Ind Cas 627.

**33. Retrial.**

**——Ss. 439, 237 and 238 — Power of Court of revision — Conviction under S. 161, I. P. Code — Alteration into one of abetment.**

Where a person has been convicted of the principal offence under S. 161, I. P. Code, it is not open to the Court of revision to alter the conviction into one for abetment of the offence. The Court can only order a re-trial. AIR (V 37) 1950 All 412: 1950 ALJ 750: 51 Cr LJ 1073.

——S. 439 — **Duty of Court — Interference by Minister in trial of case proved — Case should be retried even though it is not proved that such interference was cause of verdict.**

It is not merely of some importance but is of fundamental importance that justice should not only be done but should be manifestly and undoubtedly seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. It is a very serious matter at all times for the course of justice to be interfered with or for even an attempt to be made to interfere with the course of justice. Consequently, where interference by a Minister in the trial of a case is proved, and powerful pressure was exerted by him upon Magistrates trying the case, the case should be ordered to be re-tried even though it is not proved that such interference was the cause of the verdict. AIR (V 30) 1943 Cal 594 : 45 Cr LJ 224 : 210 Ind Cas 337 (SB).

——S. 439 — Mere defect in framing charge will not be sufficient to order re-trial. But where more serious irregularity is involved in framing charge (e.g. not setting out with precision the misrepresentation and the manner of cheating in a charge under S. 420, I. P. C.), the retrial should be ordered from the point before the framing of the charge. AIR (V 29) 1942 Sind 102 : ILR (1942) Kar 112 : 43 Cr LJ 799 : 202 Ind Cas 206.

——S. 439 — **Re-trial — Power of High Court.**

The High Court has no power to convert a sentence of acquittal into one of conviction. It can, of course, order a re-trial, but it would do so only if there was some defect in the proceedings which would lead it to the conclusion that the persons acquitted had never been properly tried at all. It will not order a re-trial merely because it did not agree with the decision of the Court below. AIR (Vol 28) 1941 All 309: 1941 ALJ 342: 1941 OWN 839: 1941 AWR (HC) 215: ILR (1941) All 465: 42 Cr LJ 779: 195 Ind Cas 720 (DB).

**——S. 439 — No appeal by Government — Power of High Court.**

Even if there is no appeal against acquittal by Government, the High Court, as a Court of revision, has every power to set aside acquittal and order re-trial. AIR (Vol 28) 1941 Lah 214: 43 PLR 159: ILR (1941) Lah 423: 42 Cr LJ 660: 195 Ind Cas 58 (DB).

**——S. 439 — Re- trial, when ordered by High Court, stated.**

In the exercise of its revisional powers, a retrial is ordered by the High Court only in cases where non-compliance with the provisions of the Criminal P. C., has prejudiced the accused. The High Court is not bound to set aside a trial on a technical point on the revision side if no injustice has resulted. AIR (Vol 25) 1938 Lah 832: 40 PLR 589: 40 Cr LJ 186: 179 Ind Cas 249.

——S. 439 (1) — **Fact of previous convictions of accused not known to Magistrate and case not referred to superior Magistrate — High Court, if can order re-trial by competent Court.**

The accused had no less than six previous convictions under Ss. 379, 380 and 381, Penal Code. This fact was, however, not put before the Second Class Magistrate who was trying the case under S. 380, Penal Code and in consequence, the accused was not charged under S. 75, Penal Code and the case was disposed of by the Magistrate himself instead of being sent up to a Magistrate with higher powers under S. 349, Criminal P. C.:

Held, that under the provisions of S. 439, Criminal P. C., cl. 1, the High Court had the power to reverse the finding and sentence and order, that the accused be re-tried by a Court of competent jurisdiction subordinate to the High Court or committed for trial. AIR (Vol 25) 1938 Oudh 261: 1938 AWR 92 (1): 40 Cr LJ 25: 1938 OWN 1062: 178 Ind Cas 248 .

**——S. 439 — Appeal not preferred against acquittal.**

Section 439 does not prohibit the High Court from ordering a re-trial, even where there has been an acquittal and there has been no appeal preferred by Government against such an acquittal. The power to order a re-trial is unrestricted and such an order does not amount to a conversion of a finding of acquittal into one of conviction, which obviously means convicting an accused straight off who has already been acquitted by a Subordinate Court. AIR (Vol 24) 1937 All 240: 1937 ALJ 143: 1937 AWR 66: 38 Cr LJ 521: 168 Ind Cas 17 (DB).

——S. 439 — If an order of acquittal is on mistaken impression of want of jurisdiction, there is no bar to the fresh trial of the case but if the interest of the public does not suffer and the case is not of a serious nature, the case need not be enquired into. 1935 MWN 817.

**——S. 439 — Power to order retrial from any stage.**

It is open to the High Court to order re-trial from any stage of a criminal proceeding it thinks fit. AIR (Vol 19) 1932 Sind 64: 33 Cr LJ 650: 26 SLR 191: 138 Ind Cas 618 (DB).

——S. 439 — Where there is evidence, independently of the inadmissible evidence to justify the conviction cannot be reversed and a re-trial ordered merely because some evidence was improperly admitted. 1931 MWN 1067.

——S. 439 — Where acquittal is wrong, High Court can order retrial. AIR (Vol 16) 1929 Nag 87: 115 Ind Cas 169: 11 NLJ 242: 30 Cr LJ 405: 12 AI Cr R 297.

——S. 439 — Accused acquitted — No erroneous recording or omission of evidence — High Court cannot direct re-trial by holding that on evidence as it is accused ought not to have been acquitted. AIR 1929 Pat 139, not Foll. AIR (Vol 16) 1929 Rang 321: 120 Ind Cas 912: 7 Rang 538: 1929 Cr C 497: 31 Cr LJ 186.

——S. 439 — An order for retrial in a case of discharge under Ss. 342, 355 and 506, Penal Code, after a lapse of about two years, amounts to travesty of justice. AIR (Vol 15) 1928 Lah 178: 111 Ind Cas 575: 9 AI Cr R 428: 29 Cr LJ 895.

——S. 439, Cr. P. Code, confers on High Court power to direct accused to be committed for retrial. AIR (Vol 15) 1928 Mad 1267: 55 MLJ 674 : 52 Mad 156: 28 MLW 651: 30 Cr LJ 184: 11 AI Cr R 550: 1928 MWN 312: 1 M Cr C 231: 113 Ind Cas 546 (FB).

——S. 439 — Case heard by a Bench, but not finally disposed of — Chief Justice can direct another Bench to hear it. AIR (Vol 14) 1927 Mad 961: 53 MLJ 633: 105 Ind Cas 686: 39 MLT 548: 1927 MWN 835: 28 Cr LJ 974: 27 MLW 239: 9 AI Cr R 127 (SB).

**——S. 439 — Retrial ordered by High Court — No Court mentioned — Question left to discretion of Court having power to direct the trial.**

If an order for re-trial is made by the High Court and it is not stated in the order whether the retrial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of the High Court to direct that the re-trial should be held by the same Magistrate. Under these circumstances the matter is left entirely in the discretion of the Magistrate who has got to appoint the Court by which the case is to be tried. AIR (Vol 13) 1926 Cal 1173: 97 Ind Cas 948: 30 CWN 1002: 27 Cr LJ 1188 (DB).

**——S. 439 — Prosecution should not be helped with retrial.**

It will not be right to allow the prosecution to shape its case afresh after the whole matter has been thrashed out and the defects brought to light, in the course of prolonged proceedings. No retrial should be ordered in such a case. AIR (Vol 12) 1925 Cal 603: 86 Ind Cas 705: 26 Cr LJ 849: 29 CWN 408: 41 CLJ 172 (DB).

**——S. 439 — Acquittal set aside — If High Court could direct.**

When the order of acquittal by the lower Court is set aside for non-compliance with the mandatory provisions of S. 342 it is not within the province of the High Court to determine whether the accused should be retried. AIR (Vol 11) 1924 Cal 975: 83 Ind Cas 495: 51 Cal 924: 39 CLJ 411: 26 Cr LJ 15 (DB).

**——S. 439 — Grave irregularities of procedure — Trial conducted in an atmosphere of prejudice — Retrial ordered.**

Where the trial was characterised by grave irregularities in procedure, a map prepared by the investigation officer had been rejected as not drawn to scale, no examination of the accused was taken under S. 342, defence witnesses had been examined as Court witnesses and there was no proper charge to the jury, and the accused, a European British subject, was acquitted and the Government refused to appeal.

Held, in revision, that the acquittal must be set aside and retrial ordered. AIR (Vol 8) 1921 Cal 269: 64 Ind Cas 665: 33 CLJ 503: 25 CWN 609: 23 Cr LJ 41 (DB).

——S. 439 — Where the only complaint of the District Magistrate in a reference was there was acquittal in spite of evidence which in his opinion would have justified a conviction,

Held, that would not be good ground for directing a re-trial and that High Courts do not as a rule interfere with orders for acquittal which can be appealed against by the Local Government. AIR (Vol 8) 1921 Oudh 99: 95 Ind Cas 599: 24 O C 4: 27 Cr LJ 823.

**——Ss. 439 and 424 — Defective judgment.**

The High Court set aside an appellate judgment and directed rehearing on the ground that sufficient materials should be given in the judgment to enable the High Court to come to a conclusion as to the correctness of the sentence passed against different accused charged with different offences. AIR (Vol 4) 1917 Cal 285: 20 CWN 1296: 18 Cr LJ 294: 38 Ind Cas 326.

**——S. 439 (4) — Conviction under wrong section — Charge under Arms Act — Explosive Substances Act — Retrial necessary.**

When a case might properly have been tried under the Arms Act or the Explosive Substances Act and the Public Prosecutor failed to ask for an order for retrial. Held, that the High Court could not convict under either of the enactments without a fresh trial. (1910) 8 MLT 296: 11 Cr LJ 645: 8 Ind Cas 397 (DB).

**——S. 439 — Prior trial void — Difference between judge and assessors — Real question, not validity, tried.**

Where a trial has been invalidated on legal grounds and the real question in the case has not been legally tried, a retrial ought to be held, unless it appears from the record that there is no evidence against the prisoner or that there is very little chance of a conviction. Mere disagreement between judge and assessors is no sufficient reason for refusing a trial. The fact that the law gives operation to the finding of the judge and not to that of the assessors does not detract from the value of the opinion expressed by them. Where, therefore, the judge and assessors have disagreed as to the facts, which were peculiar and as to which different conclusions have been arrived at by different minds, there ought to be no trial ordered. (1908) 8 CLJ 59 (62, 64): 8 Cr LJ 121 (FB).

——S. 439 — Misdirection to Jury — Quashing of conviction — Where a conviction is quashed on account of a material misdirection to the jury, a re-trial should not be ordered if the Court considers that the accused could not be convicted on any proper view of the evidence. (1902) 29 C. 782 (791): 6 Cal WN 553 (DB).

### 34. Scope.

(a) General.
(b) Administrative and Executive Orders.

#### (a) General

**——S. 439 (3) — Scope — Power of High Court — If limited by nature of offence — Offence triable by Magistrate but tried by Sessions Court — If bar to High Court enhancing fine beyond pecuniary limit of Magistrate — Principles.**

What is relevant under S. 439 (3), Cr P. Code, in considering whether a sentence can be enhanced, is the tribunal trying the case and not the nature of the offence, i.e., whether it is triable by a Magistrate or some other Court, such as the Sessions Court. In the case of a charge triable by a Magistrate, but tried by the Court of Session, the fact that the Magistrate could not have imposed a heavier fine than Rs. 1,000, does not prevent the High Court on a notice of enhancement, from enhancing the sentence of fine to a higher amount than Rs. 1,000. When the tribunal which tried the particular case, namely, the Sessions Judge, could impose an unlimited fine on the accused, the High Court has undoubted jurisdiction to enhance the sentence of fine in the case up to any extent. AIR (V 38) 1951 Bom 233 : 52 Bom LR 648 (DB).

**——Ss. 439 and 435 — Revision — Dismissal for default of appearance — If can be restored to file.**

There is no provision in the Cr P. Code analogous to O. 9, R. 9 of the C. P. Code or its equivalent in O. 41, R. 19, C. P. Code, and hence a criminal revision petition dismissed for default of appearance cannot be restored to file. AIR (V 36) 1949 Mad 154 : 61 LW 405 (1) : 1948 MWN 672 (2) : (1948) 1 MLJ 406: 50 Cr LJ 201.

**——Ss. 439 (3) and 545 — Power of High Court as Court of revision — Offence under S. 498, I. P. Code — Sentence of imprisonment converted into fine by Court hearing appeal — Competency of Magistrate sitting in appeal to inflict fine higher than that leviable by the trial Court — Order for compensation by appellate Court levying fine for the first time — Legality.**

The petitioner was convicted under S. 498, I.P. Code and sentenced to imprisonment for four months. The Joint Magistrate in appeal while confirming the conviction converted the sentence

of imprisonment to a sentence of fine of Rs. 1,000 and further directed that out of the fine, Rs. 500 should be paid to P. W. 1 as compensation. On the questions whether an appellate Court imposing a sentence of fine for the first time could impose a punishment higher than what the Court of first instance can impose and whether a Court of appeal levying a sentence of fine for the first time could make an order under S. 545, Cr P. Code,

Held, (1) the lower appellate Court had no jurisdiction to levy a sentence of fine higher than what the Court of first instance could levy which was only to the extent of Rs. 200 being the maximum leviable in the case. But under S. 439, sub-S. (3) of the Cr P. Code, the High Court as a Court of revision can inflict the same punishment which might have been inflicted by the First Class Magistrate.

(2) That S. 545 of the Cr. P. Code empowers any Criminal Court which imposes any fine or any Criminal Court confirming in appeal that sentence of fine to make an order for compensation as contemplated in that section. AIR (V 34) 1947 Mad 368: (1947) 1 MLJ 238: 1947 MWN 342 (2).

——S. 439 — The expression "any proceeding" occurring in sub-s. (1) of S. 439 must be confined to proceedings before any inferior Criminal Court. The High Court has no power either under S. 439 Criminal P.C. or under S. 115, Civil P.C., to revise an order of the Revenue Court in proceedings for contempt. The words "take cognizance" in S. 480 (1) merely indicate that a Civil or Revenue Court has been given additional ad hoc powers and not that it loses its identity as a Civil or Revenue Court. AIR (V 34) 1947 Nag 35 : ILR (1946) Nag 780 : 226 Ind Cas 87 : 47 Cr LJ 829 : 1946 Nag L Jour 443.

**——S. 439 (2) — Applicability — Sub-section applies to case of enhancement of sentence of accused—Reference under S.438 by person who is not accused — Order without hearing — Order is valid and binds petitioner.**

The provision of sub-s. (2) of S. 439 that no order shall be made to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader applies to a case of enhancement of sentence of the accused and not to a case where the petitioner is not an accused person and the order of the lower Court is only confirmed. Consequently, in the case of such a petitioner, the fact that the order in a reference under S. 438 was made without hearing the petitioner does not affect its validity or its binding nature on the petitioner. AIR (V 33) 1946 Bom 276 : 48 Bom LR 41 (FB).

**——S. 439 — Applicability — Order of Revenue Court under S. 480 (1) — Revision — Power of High Court.**

The expression "any proceeding" in S. 439 (1), Cr. P. Code, must be confined to proceeding before any inferior Criminal Court. The High Court has therefore no power under this section to revise an order of the Revenue Court under S. 480 (1), Cr. P. Code. The words "take cognizance" in sub-S. (1) of S. 480 merely indicate that a Civil or Revenue Court has been given additional ad hoc powers and not that it loses its identity as a Civil or Revenue Court. AIR (V 34) 1947 Nag 35 : 226 Ind Cas 87 : 47 Cr LJ 829 : 1946 NLJ 443: ILR (1946) Nag 780.

**——Ss. 439, 491 and 561A — Persons arrested under extradition warrant challenging validity of such warrant enlarged on bail — High Court can act under S. 439 or S. 561A if not under S. 491.**

If the High Court cannot, strictly speaking, act under S. 491, where a person arrested under an extradition warrant challenging the validity of such warrant is not in custody, being enlarged on bail, it can act under S. 439 or S. 561A. AIR (V 33) 1946 Pat 196 : 24 Pat 699 : 12 Cut LT 1 : 228 Ind Cas 59 : 48 Cr LJ 40 (DB).

**——S. 439 — For interference under S. 439, District Magistrate, if must have acted as Court.**

Where the District Magistrate acts as a District Magistrate, he is a Criminal Court. There is no distinction between an order passed by him after evidence has been taken and an order passed suo motu after considering the material which is within his knowledge.

Per Bhide J. — It is not necessary for the purposes of S. 439, Criminal P. C., that the District Magistrate should be acting as a "Court." The wording of that section is very wide and covers 'any proceedings' the record of which had been called for by the High Court or which has been reported for orders, or which otherwise comes to its knowledge. AIR (V 29) 1942 Lah 171 : 44 PLR 297 : 43 Cr LJ 747 : ILR (1942) Lah 510 : 201 Ind Cas 572 (FB).

——S. 439 — Where the requirements of S. 370 (i), Criminal P. C., are not complied with, and the High Court in revision calls for the record of the case, the Magistrate can submit a report under S. 441, Criminal P.C., and remedy the defect in the original order by giving a brief statement of the reasons for conviction. In such a case, the High Court will not interfere in revision. AIR (V 29) 1942 Mad 603: (1942) 2 MLJ 146 : 55 LW 467: 1942 MWN 441: 43 Cr LJ 859: 202 Ind Cas 503.

——S. 439 — Only proceedings in inferior Criminal Courts are covered by the words "any proceeding" in S. 439. 1942 NLJ 242.

——S. 439 — Order under S. 27, Bombay City Police Act, as amended in 1938, by Commissioner is not an order which can be revised under S. 439, Criminal P.C. AIR (V 28) 1941 Bom 334 : 43 Bom LR 702 : 43 Cr LJ 25 : 196 Ind Cas 537 (DB).

**——S. 439 — Orders under the Punjab Village Panchayat Act.**

Section 224 (2), Government of India Act, 1935, bars High Court from questioning a judgment, provided it is by inferior Court and provided it is "not otherwise subject to appeal or revision." When criminal judicial powers are conferred upon a Panchayat by S. 22, Punjab Panchayat Act, 1922, the Panchayat becomes a Court when acting in the exercise of these powers. In such cases, the High Court has no power to interfere. There is, however, no finality in the case of orders which are not passed under Chap. IV of the Panchayat Act and the Criminal P. C., would apply in such a case and the High Court can interfere with such orders under Ss. 439 and 561-A of the Code. AIR (V 28) 1941 Lah 5 : 42 PLR 623 : 42 Cr LJ 248 : ILR (1941) Lah 121 : 192 Ind Cas 128 (DB).

**——S. 439 — "Court."**

Order of Magistrate under S. 198, Bihar and Orissa Municipal Act — Held, the terms 'Courts' and 'Magistrates' in Criminal P. C., are generally used as convertible terms and hence the order under S. 198 is open to revision under S. 439. AIR (Vol 28) 1941 Pat 548 : 22 PLT 510 : 8 BR 145 : 43 Cr LJ 110 : 197 Ind Cas 74.

**——S. 439 — Order under S. 4, U. P. Naik Girls' Protection Act.**

District Magistrate passing an order in exercise of the special powers conferred upon him by S. 4 of the U. P. Naik Girls' Protection Act without

following the procedure laid down in Criminal P. C., does not function as an inferior Criminal Court so that the revisional powers of the High Court under S. 439 cannot be invoked for setting aside such an order. AIR (Vol 26) 1939 All 124 : 1938 ALJ 1147 : 1939 AWR 64 : ILR (1939) All 178 : 40 Cr LJ 305 : 180 Ind Cas 37.

**——Ss. 439, 423 — Order making or refusing to make complaint — Second appeal — Power of High Court under S. 423 to order complaint to be restored to file.**

There is no second appeal against an order making or refusing to make a complaint. Section 195 no longer occurs in S. 439, Criminal P. C. and S. 476-B, Criminal P. C. has not been put in the place but under S. 423(1) (c), Criminal P. C. the High Court has power to reverse the order of the Judge, and under S. 423 (1) (d) the High Court has power to order the Magistrate's complaint, which the Judge has ordered to be withdrawn, to be restored to the file and to be disposed of according to law. AIR (Vol 24) 1937 Sind 116 : 31 SLR 77 : 38 Cr LJ 873 : 170 Ind Cas 360 (DB).

**——S. 439 — Bengal Village Self-Government Act (Ben. Act V of 1919), Ss. 71, 93 — Conviction by Union Court — Revision — Government of India Act (5 and 6 Geo. V, C. 61), S. 107.**

Having regard to the provisions of the Bengal Village Self-Government Act, the High Court cannot interfere under S. 439, Criminal P. C., with the conviction and sentence passed by a Union Bench or Union Court constituted under the Bengal Village Self-Government Act. But the powers of superintendence given to the High Court under S. 107, Government of India Act, might justify, in a proper case, interference with an order of conviction made by the Union Bench. AIR (Vol 19) 1932 Cal 867 (1) : 59 Cal 1080 : 34 Cr LJ 111 : 140 Ind Cas 873.

**——S. 439 — Miscellaneous — Argument ad miseri cordium.**

An argument ad miseri cordium is out of place in a court of revision which is concerned with law and procedure. AIR (Vol 18) 1931 Oudh 80 : 7 OWN 751.

**——S. 439 — The words "unless he has already done so" are to be implied at the end of sub-section.**

The words "unless he has already done so" though not occurring at the end of the sub-section, are to be presumed to be implied from the ordinary presumption as to the finality of orders in criminal revision proceedings. AIR (Vol 16) 1929 Lah 797 : 117 Ind Cas 699 : 30 PLR 409 : 1929 Cr C 429 : 10 Lah 241 : 30 Cr LJ 815.

**——S. 439 — Orders under S. 421 and under S. 424 cannot be discriminated for S. 439, Cl. (6).**

De Souza, A. J. C. — The order summarily dismissing the appeal virtually amounts to an order affirming the findings both of fact and of law recorded by the lower Court and there is no reason to discriminate between an order summarily dismissing the appeal under S. 421 and an order dismissing the appeal after hearing under S. 424 so far as its liability to attack in revision for purposes of S. 439, cl. (6), is concerned. AIR (Vol 16) 1929 Sind 26: 111 Ind Cas 856: 22 SLR 453 : 29 Cr LJ 936 (DB).

**——S. 439 — Object of.**

Sub-section (6) is primarily intended to operate as an exception to what is otherwise laid down or implied in S. 439 itself. It is presumably to overrule 32 Bom. 162 that the provisions of sub-S. (6) were inserted in 1923. AIR (Vol 13) 1926 Bom 555 : 97 Ind Cas 805 : 50 Bom 783 : 28 Bom LR 1051 : 27 Cr LJ 1173 (DB).

**——S. 439 — Revision against appellate judgment.**

Although a motion for revision does lie against the Sessions Judge's order, it is not the intention of the law that the motion shall be heard by High Court as an appeal, for if that were the case, then there would be no object in giving a right of appeal to the Sessions Judge at all. All that the petitioners can claim in an application for revision is a right to show that the Sessions Judge has decided wrongly. AIR (Vol 10) 1923 Pat 238 : 72 Ind Cas 959 : 4 PLT 265 : 1923 PHCC 109 : 1 Pat LR Cr 25 : 24 Cr LJ 495 (DB).

**——S. 439 — Powers of High Court.**

The High Court has ample power under S. 439 to deal with a case which has been reported for orders or which otherwise comes to its knowledge and the powers given to the court in revision are those conferred on a court of appeal amongst others by S. 426 of the Code. It does not matter even if the case came on an application made by the complainant. AIR (Vol 6) 1919 Pat 556 : (1919) Pat HCC 265 : 4 Pat LJ 435 : 20 Cr LJ 545 : 51 Ind Cas 833 (DB).

**——S. 439 — Powers of court under.**

Under S. 439 Cr. P. Code, a High Court had no power to call for finding, but only to call for additional evidence from the Magistrate and should come to an independent conclusion upon the evidence taken, S. 439 Cr. P. Code gives the High Court power to exercise all the powers of a Court of appeal under S. 428. AIR (Vol 3) 1916 Mad 775 : 16 Cr LJ 767 : 31 Ind Cas 367 (DB).

**(b) Administrative and Executive orders**

**——S. 439 — Order under S. 36, Legal Practitioners' Act — Civil P. C., S. 115.**

District Judge declaring person to be tout under S. 36, Legal Practitioners' Act — Revision lies under S. 115, Civil P. C., Section 439, Criminal P. C., does not apply to such a case. AIR (Vol 25) 1938 Mad 634 : ILR (1938) Mad 988 : 47 LW 578 : 1938 MWN 456 : (1938) 2 MLJ 100 : 177 Ind Cas 456.

**——S. 439 — Executive order — Administrative Act — Press and Regn., of Books Act S. 6 — No revision.**

A District Magistrate in acting under S. 6 of Act 25 of 1867, is not exercising jurisdiction as a Court Civil or Criminal and his proceedings are administrative and therefore not open to revision by the High Court. AIR (Vol 5) 1918 Lah 302 : 19 Cr LJ 621 :27 PWR 1918 Cr : 21 PR 1918 Cr : 137 PLR 1918 : 46 Ind Cas 525 (DB).

**——S. 439 — Executive order — District Magistrate — Order under S. 43 of the Bom. Dt. Police Act.**

An order of a Dt. Magistrate under S. 43 of the Bom. Dt. Police Act is an executive order and cannot be interfered with in revision. AIR (Vol 5) 1918 Sind 49: 11 SLR 113: 19 Cr LJ 588: 45 Ind Cas 396 (DB).

**——S. 439 — Land acquisition proceedings.**

The High Court has no power to revise the order of a land acquisition officer, as proceedings before him are only administrative. AIR (Vol 4) 1917 Mad 824 : 20 MLT 388 : (1916) 2 MWN 348 : 4 LW 535 : 36 Ind Cas 621 (DB).

**——S. 439 — Revision — Practice — Executive order — Order passed by District Magistrate disallowing the claims of certain persons to act**

as petition-writers within the precincts of the District Court.

In this case the High Court declined to interfere with an order passed by a District Magistrate, whereby he revised the list of petition-writers who had been allowed to carry on their business within the precincts of the District Court. 1902 AWN 175 (175).

### 35. Sentence interference with.

See Note 23.

### 36. Stay of proceedings.

**——S. 439 — Power of District Magistrate to stay proceedings in Criminal Court subordinate to him.**

There is no provision of the Code, althorising the District Magistrate to stay proceedings in a Criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by S. 439 of the Code and S. 85 (1), Government of Burma Act. When a case is once made over for disposal to a subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him, under Chap. XXXII, Criminal P. C., i.e., Ss. 435, 436 and 437. AIR (Vol 28) 1941 Rang 114 : 1941 Rang LR 82 : 42 Cr LJ 573 : 194 Ind Cas 370.

——S. 439 — Proceedings in a trial should not be stopped merely because the accused cited as one of his witnesses a person on whom process could not be served and who could not be examined on commission. AIR (Vol 23) 1936 Pesh 101 : 37 Cr LJ 618 : 162 Ind Cas 270.

**——S. 439 — Stay of criminal trial pending civil suit — Matter of discretion — Interference by High Court.**

There is no invariable rule as regards the staying of criminal proceedings (under S. 82, Registration Act) pending the issue in a civil suit. This is a matter for the discretion of the trial Court and in criminal revision High Court cannot interfere with the order unless the Court has in exercise of its jurisdiction acted in a manner which is unjudicial. AIR (Vol 16) 1929 Pat 500 : 119 Ind Cas 888 : 10 PLT 889 : 30 Cr LJ 1101 : 1929 Cr C 252.

——S. 439 — High Court staying proceedings — Lower Court informed by party but disposing of case — Lower Court's order is ultra vires. AIR (Vol 12) 1925 Pat 553 : 87 Ind Cas 421 : 6 PLT 215 : 3 Pat LR Cr 127 : 26 Cr LJ 965.

——S. 439 — Application for stay of criminal proceedings pending civil suit cannot be made to the High Court unless Magistrate has refused it. AIR (Vol 11) 1924 Mad 235 : 73 Ind Cas 528 : 18 MLW 236 : 24 Cr LJ 640.

——S. 439 — Order directing enquiry under S. 202 — High Court will not interfere by staying the order. AIR (Vol 10) 1923 Lah 663 : 83 Ind Cas 727 : 26 Cr LJ 167.

——S. 439 — A proceeding which is void for want of jurisdiction cannot be literally quashed but the High Court can direct further proceedings to be stayed. AIR (Vol 10) 1923 Mad 326 : 72 Ind Cas 351 : 24 Cr LJ 351 : 17 MLW 69 (DB).

**——S. 439 — Stay of criminal proceedings — Pending of civil suits.**

Case in which the High Court directed the stay of prosecution on the charge of forgery, during the pendency of a civil suit in which the genuineness of the document would be a material case. (1910) 12 CLJ 270 : 38 Cal 106 : 7 Ind Cas 317 (318).

**——S. 439 — Stay of criminal proceedings pending civil suit.**

The defendant in a civil suit ought not to be allowed to prejudice the trial of a civil suit by launching proceedings with a criminal prosecution on the same facts against the plaintiffs and their witnesses pending the trial of such suit; and the High Court, consequently, stayed the criminal proceedings pending the trial of the civil sut. (1907) 30 M 226 (227) : 6 Cr LJ 131 (DB).

**——S. 439 — Pending civil suit.**

The High Court will not stay criminal proceedings pending before a Magistrate till the disposal of a civil suit in regard to the same matter except upon good cause shown. Their Lordships declined to stay proceedings in the case. (1904) 31 C 858 (862) : 1 Cr LJ 852 (DB).

### 37. Wrong Procedure

**——S. 439 — Proceedings under S. 476 — Revision.**

Proceedings under S. 476 — Finding that inquiry into offence is expedient in interest of justice is necessary — Mere omission to record such a finding does not, however, mean that the point has not been considered — High Court should not necessarily interfere in revision merely because the words of S. 476 have not been copied out. AIR (V 27) 1940 Nag 227 : 1940 NLJ 108 : 41 Cr LJ 466 : 187 Ind Cas 521.

**——S. 439 — Court not following procedure and filing complaint under S. 476.**

Court ordering attachment of crop — Filing of complaint under S. 476, Criminal P.C., against person harvesting same — Requirements of O. 21, R. 45, Civil P.C., not followed — High Court will interfere in view of errors committed by the Court, though ordinarily it would not so interfere. AIR (V 25) 1938 Mad 976: 1938 MWN 1009: 48 LW 441 (1) (1938) 2 MLJ 843 : 40 Cr LJ 312 : 179 Ind Cas 980.

**——S. 439 — Revisional powers of High Court cannot be used to prevent criminal trials taking place.**

It is desirable that a case should be fairly heard by a Criminal Court. The revisional powers of the High Court should not be used to prevent criminal trials taking place. The prosecution as much as defence is entitled to a fair hearing and it is in the interests of justice that a fair trial should take place. AIR (V 22) 1935 All 439: 36 Cr LJ 526: 1935 AWR 209 : 154 Ind Cas 513.

**——S. 439 — No prejudice.**

The High Court should not interfere in revision where the parties have suffered no real prejudice as a result of the procedure adopted. 1935 MWN 1227 (2).

——S. 439 — Magistrate acting in contravention of law and admitting inadmissible and irrelevant evidence — Guilt established by legal evidence on record — New trial need not be ordered. AIR (V 17) 1930 Lah 318 : 122 Ind Cas 93 : 10 Lah 794: 31 Cr LJ 343 : 1930 Cr. C. 350 : 31 PLR 742.

——S. 439 — Reference by District Magistrate to High Court for enhancement of sentence — Procedure is irregular — Proper procedure is to instruct law officer of the Crown to file application for revision. AIR (V 15) 1928 Lah 660 : 107 Ind Cas 285 : 29 Cr LJ 235.

**——S. 439 — Illegal attachment.**

Where land has been attached under S. 88 without a warrant, the High Court would interfere under inherent powers to set right the irregularity though not according to S. 89 AIR (V 13) 1926 Lah 662 : 96 Ind Cas 977 : 27 Cr LJ 1025 : 8 ILJ 608 : 27 PLR 825.

**——S. 439 — Non-compliance with the provisions of S. 494 — Not a ground for revision.**

Where the Magistrate should have given his reasons for allowing withdrawal and did not act properly in passing the very brief order, viz., "the case is withdrawn, the accused is nereby discharged," without reference to S. 494, which could have shown him that his consent was necessary and that (under certain authorities) he had to state his reasons for giving that consent,

Held, the absence of any statement of reasons in the particular case did not vitiate that order to such an extent as to make this case a fit case for exceptional treatment and to justify the setting aside of an acquittal on revision in the absence of appeal by local Government under S. 417 AIR (V 10) 1923 Lah 163 : 72 Ind 593 : 24 Cr LJ 433.

**——S. 439 — Series of errors committed by lower Courts — Orders were set aside.**

Where, in orders, there has been irregularity of form but no harm would be done to the parties and, although by a wrong method, a right result may perhaps have been reached, it is undesirable that the High Court should exercise its discretionary jurisdiction in revision, but the case is otherwise when there is a series of errors committed, ignoring the formalities prescribed by the Code.

Where Sub-divisional Officer without concluding his investigation under the provisions of S. 144 and at any rate making some order which would indicate what had happened to those proceedings, initiated proceedings under S. 107, Cr. P. Code, and the District Magistrate quashed the proceedings which had been initiated by the Sub-divisional Officer under the provisions of S. 107 and ordered the Sub-divisional Officer to initiate proceedings under S. 145, and the Sub-divisional Officer started proceedings under the provisions of S. 145 simply on the ground tnat he was told so to do by the District Magistrate,

Held, that if such a series of errors were passed over without comment and the orders which have been wrongly made were allowed to stand simply because it may possibly be that no harm will eventuate to either of the parties as a result of such orders those who have to administer the criminal law in subordinate capacities, might perhaps feel that any close adherence to the formalities prescribed by the Cr. P. Code is unnecessary. AIR (V 10) 1923 Pat 438 : 75 Ind Cas 65 : 1 Pat LR Cr 93 : 73 Ind Cas 161 : 24 Cr LJ 545.

——S. 439 — If the Magistrate in the exercise of discretion elects to proceed under S. 107 instead of S. 145, the High Court cannot interfere in revision. AIR (V 7) 1920 Cal 841 : 60 Ind Cas 336 : 24 CWN 1075 : 22 Cr LJ 224 (DB).

**——S. 439 — Wrong procedure — Interference by High Court — Point not raised.**

Where a point is not urged in the Court of first instance or on appeal, the High Court will not interfere in revision unless there has been a miscarriage of justice. AIR (V 7) 1920 Pat 518 : 54 Ind Cas 496 (DB).

**——S. 439 — Wrong procedure — Complaint — Dismissal of — Interference.**

Though a complaint of an offence has been dismissed by two Courts, the High Court can interfere in a proper case and direct the complaint to be enquired into. AIR (V 7) 1920 Pat 112 : 1 Pat LT 127 : 21 Cr LJ 338 : 55 Ind Cas 674.

**——S. 439 — Wrong procedure — Powers in revision — Investigation of facts.**



If the Appellate Court does not thoroughly investigate the facts as dealt with by the trial court the High Court will do so in revision. AIR (V 6) 1919 All 167 : 20 Cr LJ 370 : 50 Ind Cas 978.

**——S. 439 — Wrong procedure — Material irregularity — Summary trial of offence under S. 448, I. P.C.**

The summary trial and conviction of the accused at the place of occurrence without allowing them an opportunity of being represented by legal practitioners cr calling defence witness is an irregular exercise of jurisdiction and open to revision. AIR (V 5) 1918 Pat 197 : (1917) Pat HCC 363 : 3 PLJ 147: 19 Cr LJ 249: 4 Pat LW 359: 44 Ind Cas 41 (DB).

**——S. 439 — Wrong procedure — Revisional powers of Superior Court.**

High Court is to prevent the abuse of law and if in a case under S. 107, Cr P.C. it is found that the information did not justify the Magistrate in issuing warrant for the arrest of the applicants for holding a public meeting, the High Court will quash the order under S. 107. AIR (V 5) 1918 UB 53: 2 UBR (1916) 157 : 11 Bur LT 59 : 18 Cr LJ 512 : 39 Ind Cas 480.

**——S. 439 — Wrong procedure — Irregularity — No prejudice.**

Where an applicant has not in any way been prejudiced by an irregularity, the High Court will not interfere in revision on the ground of that irregularity. AIR (V 4) 1917 All 91 : 15 ALJ 642 : 18 Cr LJ 765 : 41 Ind Cas 141.

**——S. 439 — Wrong procedure — Irregularity — Remedy of an accused when irregularities are discovered.**

When irregularities are discovered at the end of a trial leading to a miscarriage of justice the proper course for the aggrieved party is to carry the matter to the Crown for remedy. AIR (V 4) 1917 Cal 149 : 44 Cal 723 : 21 CWN 167 : 18 Cr LJ 311: 38 Ind Cas 423 (FB).

**——S. 439 — Wrong procedure — Omission to frame charge.**

Omission to frame a charge while changing finding in appeal is no ground for revision unless there is miscarriage of justice. AIR (V 4) 1917 Mad 687 : (116) 2 MWN 267 : 4 LW 373 : 17 Cr LJ 384: 35 Ind Cas 816.

**——S. 439 — Wrong procedure — Irregularity — Evidence of counsel for client first recorded, then ruled out as irrelevant.**

Where the evidence of counsel for client was first recorded but then ruled out as irrelevant held it was a fit case for revision. AIR (V 1) 1914 All 364 : 12 ALJ 285 : 15 Cr LJ 429 : 24 Ind Cas 165.

**——S. 439 — Wrong procedure — Revision — No error in law — Whether High Court can interfere.**

It is a sound rule of practice not to interfere in revision when there is no error in law on the face of the record. AIR (V 1) 1914 Mad 628 : 38 Mad 1028 : 26 MLJ 160 : (1914) MWN 273 : 15 Cr LJ 236 : 22 Ind Cas 188 (DB).

**——S. 439 — Wrong prosecution.**

If the Court orders a prosecution for perjury without prima facie case appearing on the record the Court commits a material irregularity and its orders can be set aside in revision. AIR (V 1) 1914 Sind 129 : 7 SLR 187 : 15 Cr LJ 541 : 24 Ind Cas 949 (DB).

**——S. 439 — Wrong procedure — Technical mistake — Interference in — Revision.**

A technical mistake in adjective law cannot be presumed to cause injustice, and a Court should not move in such a case in the exercise of its dis-

cretionary powers of revision. AIR (V 1) 1914 Sind 69 : 8 SLR 25 : 15 Cr LJ 666 : 25 Ind Cas 994 (DB)

——S. 439 — **Wrong procedure — Interference — Lower Court's irregularity.**

Where the lower court has awarded separate punishments for offences under S. 71, I.P.C. but the aggregate does not exceed the one provided for the major offence it is a mere irregularity and the High Court will not interfere unless there is failure of justice. (1909) 3 SLR 224 : 11 Cr LJ 415 6 Ind Cas 880 (DB).

——S. 440.

——S. 400 — **Reduction of sentence — Power of High Court — Notice to Crown — If necessary.**

The High Court has power in revision to reduce a sentence passed upon an accused person without issuing any notice to the Crown, as under S. 440, Cr. P. Code, the Crown has no right to be heard in a Criminal Revision. But such power must be exercised sparingly and only in clear cases (e.g.) if the sentence is manifestly excessive and cannot be supported. AIR (Vol 34) 1497 Lah 47: 49 PLR 258: ILR (1946) Lah 295: 228 Ind Cas 258: 48 Cr LJ 175 (FB).

——S. 440 — An order in revision that Counsel should be heard only on a question of sentence and not on the question of the finding is perfectly legal. AIR (Vol 27) 1940 All 426: 1940 ALJ 462: 41 Cr LJ 876: ILR (1940) All 539: 1940 AWR 379: 190 Ind Cas 225.

——S. 440 — **Hearing complainant.**

S. 440 applies to an accused and therefore still more strongly does it apply to a complainant. The High Court has power to hear the complainant to see what his case is about. If the case on investigation should tend to show that there has been any denial of natural justice, or that some gross and palpable error has been committed in the Court below, then the High Court should direct a rule to issue in order to hear what is to be said on the other side. AIR (Vol 16) 1929 Bom 443: 31 Bom LR 1144: 1929 Cr C 555 (DB).

——S. 440 — **Discretion.**

There is no established practice in the Allahabad High Court to hear counsel in all reference cases. Each case must depend on its merits. AIR (Vol 14) 1927 All 724: 25 ALJ 1010: 8 AI Cr R 337: 8 LRA Cr 135.

——S. 440 — **Right to be heard.**

No party has a right to be heard. AIR (Vol 12) 1925 Oudh 558 : 85 Ind Cas 367 : 26 Cr LJ 527.

——S. 440 — **Appearance by pleader — Lower court refusing to appoint one for the Crown —**

If the Dt. Magistrate has refused to appoint a legal practitioner to represent the crown, in revision the chief court must decline to hear the counsel. 5 PWR 1910 Cr: 11 Cr LJ 211: 5 Ind Cas 720.

——S. 440 — **Reopening a criminal case disposed of in default of appearance — Inherent power of court to re-hear — Judgment signed and sealed — Criminal Procedure Code, S. 440.**

The court has power to re-open and dispose of a criminal case which has been previously disposed of in default of appearance. The court may, under S. 440 of the Criminal Procedure Code, determine the questions raised without hearing counsel or pleader on either side, but where it has not done so, but merely disposed of the case in default of appearance, the court has power to restore the case and hear and determine it. (1909) 10 CLJ 80 (83): 3 Ind Cas 393 (DB).

——S. 441.

——S. 441 — Requirements of S. 370 (i) not complied with — High Court, in revision, calling for records — Magistrate submitting report under S. 441 can remedy the defect in the original order by giving a brief statement of reasons for conviction. In such case the High Court will not interfere in revision AIR (Vol 29) 1942 Mad 603 : (1942) 2 MLJ 146 : 55 LW 467: 1942 MWN 441: 43 Cr LJ 859: 202 Ind Cas 603.

——S. 441 — **Scope of.**

Section 441 is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given ; but to enable them to supply reasons where in exercise of their privilege under S. 370, they have given no reasons at all. AIR (Vol 17) 1930 Mad 225: 1930 Cr C. 120: 1929 MWN 893: 3 M. Cr C. 55: 31 Cr LJ 460: 122 Ind Cas 800.

——S. 441 — Clause (1) of S. 444 lays down as a general proposition as to who is a complainant and the proviso is intended to exclude generally from the application of the definition public prosecutors, public servants, etc., who make complaints or lodge information before the police in their official capacity as such public prosecutors or public servants, etc., irrespective of whether or not they have personal knowledge of the facts or a personal interest in the case. AIR (Vol 13) 1926 Sind 230: 20 SLR 178: 27 Cr LJ 770: 95 Ind Cas 306.

——S. 441 — **Statement under — Satisfactory — Effect.**

If a statement under S. 441 by the Magistrate is satisfactory the omission to record reasons before taking action under Ss. 202, 203 Cr. P. C. is cured and may be deemed to be supplied. (1909) 5 MLT 79 : 10 Cr LJ 117 : 2 Ind Cas 618. (DB).

——S. 442.

——S. 442 — **Scope**

S. 442 is very generally expressed and deals with every "case" which is "revised under this chapter by the High Court"; in other words it applies to all revisions by a High Court whether under S. 435 or S. 439, the powers of revision possessed by a High Court under chap. 32 and however, exercisable only in respect of findings, sentences or orders of "inferior" Court. (1909) 9 Cr LJ 378 (381) : 1909 Pun Re No. 4 Cr, (DB).

——Chapter 33.

(This chapter comprising Ss. 443 to 449 has been repealed by S. 3 of the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), as these provisions entitling Europeans and Americans to preferential treatment in matters of trial and punishment have been regarded as an anarchronism. The cases given under these provisions are before that repeal — Ed.)

——Chap. 33 — **Applicability.**

The provisions of Chap. 33 apply only when the complainant and the accused are respectively European and Indian British subjects, or Indian and European British subjects. Where, therefore, the accused and the complainant are both European British subjects, provisions of Chap. 33 do not apply. AIR (V 33) 1946 Nag 225.

——Chap. 33 — **Findings of jury.**

Obiter — Per Niyogi and Bose JJ. in order of reference — In a case arising under Chap. XXXIII, Criminal P. C., the finding of a jury on a question of fact cannot be treated as final. AIR (V 27) 1940 Nag 17 : 41 Cr LJ 289 : ILR (1940) Nag 394 : 186 Ind Cas 402 (FB).

——Chap. 33 — **Right to be dealt with as European British subject, if can be waived.**

It is possible for a European British subject to waive his right to be dealt with as such. AIR (V 26) 1939 Cal 545 : ILR (1939) 1 Cal 162 : 43 CWN 120 : 41 Cr LJ 72 : 184 Ind Cas 757.

**——Chap. 33 — Object and applicability of.**

Chapter 33, Criminal P. C., was only designed to apply to cases of racial distinction where there is a real clash between a European as defined in the Code on the one side and an Indian on the other, or vice versa. AIR (V 26) 1939 Cal 545 :ILR (1939) 1 Cal 162 : 43 CWN 120 : 41 Cr LJ 72 : 184 Ind Cas 757.

**——Chap. 33 — Condition precedent for trial of case outside presidency town under Chap. 33.**

There are two fundamental conditions precedent for the trial of a case outside a presidency town under the provisions of Chap. XXXIII. namely that the accused person shall claim that the case ought to be tried under the provisions of Chap. XXXIII, and that the Magistrate shall make an enquiry and record a finding that the case is a case which ought to be tried under the provisions of the Chapter. AIR (V 26) 1939 Cal 545 : 41 Cr LJ 72 : ILR (1939) 1 Cal 162 : 43 CWN 120 : 184 Ind Cas 757.

**——Chap 33 — Durwan going to Police Station and giving information that certain man was lying on floor with blood marks, whether complainant.**

Even the Police Inspector cannot rightly be deemed to be a complainant for the purposes of the provisions of Chap. XXXIII and so if a Police Inspector who, in an official document, was described as "the complainant" is not a 'complainant' for the purposes of the Chapter, a fortiori the Durwan or any other adult or child who gives information that certain man was lying on floor with blood marks, ought not to be considered as a 'complainant' for the purposes of Chap. 33. AIR (Vol 26) 1939 Cal 545 : ILR (1939) 1 Cal 162 : 43 CWN 120 : 31 Cr LJ 72 : 184 Ind Cas 757.

**——Chap 33 — Proceedings under — Charge, if can be cancelled — Accused whether can waive privilege of Chap. 33.**

Once a Magistrate has taken proceedings under Chap. XXXIII, Criminal P. C., his powers are curtailed. He cannot, for instance, under S. 213 (2), Criminal P. C., cancel the charge, and if he does not discharge the accused under S. 209 or S. 253, Criminal P. C., he must, as S. 446 of the Code directs, commit the accused for trial.

Chapter XXXIII, is a special procedure of which certain individuals at their own request are permitted to avail themselves. Therefore, the accused can waive a right which he need never have claimed, provided his request can be granted without prejudice to the trial of his co-accused or the business of the Courts. AIR (V 25) 1938 Sind 150 : 39 Cr LJ 789 : ILR (1939) Kar 38 : 176 Ind Cas 705.

**——Ch. 33 (Ss. 443 to 449) — Claim for special procedure — Right to be tried under the provisions of Chap. 33 can be raised at the time of application for leave to appeal.**

There is no provision in the Code of enabling a person to put forward a claim to be tried under Ch. 33 either before a Magistrate holding an enquiry or trial in a Presidency town or before the High Court during the trial of the case. It is unreasonable to suppose that the legislature ever intended that when there was no knowing whether there would be a conviction or an acquittal (and both are open to appeal under S. 449, Cr P. Code) an enquiry might be asked for and the Court required to decide on the question as to whether if tried outside a Presidency town the case would have been triable under the provisions of Chapter 33, the only object of such an enquiry being that the result of it may be availed of for the purposes of an appeal by the accused in the case of a conviction and by the Crown in the case of an acquittal. The proper time to raise the question is when leave to appeal is applied for. AIR (V 12) 1925 Cal 14 : 84 Ind Cas 1041 : 40 CLJ 256 : 52 Cal 347 : 29 CWN 447 : 26 Cr LJ 401 (DB).

**——S. 443.**

**—— Ss. 443 (1) and 439 — Order accepting claim under S. 443 (1) can be set aside in revision.**

An order by a Magistrate accepting a claim under S. 443 (1), Criminal P. C., can be set aside in revision. AIR (V 33) 1946 Nag 225.

**——Ss. 443 and 446 — No specific finding under S. 443 (1) — It cannot be implied from an order under S. 446 (1).**

Where a claim is made by an accused person that the case ought to be tried under the provisions of Chap. 33 it is the duty of the Magistrate to record a finding either that the case is a case which ought to be tried under the provisions of Chap. 33 or that it is not such a case. Where there is no such specific finding as required by S. 443 (1), it cannot be said that there was a finding by implication under the section merely because the Magistrate committed the accused for trial at sessions under S. 446 (1). AIR (V 33) 1946 Nag 225.

**——S. 443 — G, Indian British subject, appointed sole executor of will of D, European British subject and guardian of D's minor son — In proceedings on application by R, European British subject for removal of G from guardianship and rendition of accounts, High Court directing G's prosecution under Ss. 193 and 406, Penal Code — Case, if comes within S. 443 (1) (b) or S. 443 (1) (a).**

G, an Indian British subject was appointed sole executor of his will by one D, a European British subject and was also appointed guardian of his minor son. Later on, some trouble arose on account of the minor son of the testator not getting sufficient allowance for his fees and clothes. The matter was reported to R, a European British subject by a relation of the minor. R filed in the High Court an application under Ss. 301 and 302 of the Indian Succession Act, praying for the removal of G from the executorship and also for rendition of accounts of the estate. In the course of proceedings taken on the application, the High Court directed the prosecution of G under Ss. 193 and 406, I. P. C. :

Held, that as the prosecution of G under Ss. 193 and 406, was directed by the High Court, the case did not come within S. 443 (1) (a), Criminal P. C. Although the complaints under Ss. 193 and 406, were made at the instance of the High Court they were undoubtedly the result of an application made by R, a British subject. There could be no doubt that European British subject and an Indian British subject were connected with this case and there was conflict of interests between them. Hence the case fell within S. 443 (1) (b), the wording of which was very wide and the trial Court had the discretion to decide in the circumstances whether it was expedient for the ends of justice that the case should be tried under the provisions of Chap. XXXIII. AIR (Vol 30) 1943 Lah 8: 43 Cr LJ 901: 46 PLR 127: 202 Ind Cas 759.

**——S. 443 — Order accepting claim by accused under S. 443, though not appealable is revisable by High Court on report by the Sessions Judge.**

AIR (Vol 30) 1943 Lah 8: 43 Cr LJ 901: 46 PLR 127: 202 Ind Cas 759.

——Ss. 443, 561-A — **Advantage taken under Chap. XXXIII — Accused, if can always waive same.**

It is not open to an accused person under all circumstances to demand that when an advantage thought likely to accrue to him by reason of the delay in the procedure under Chap. XXXIII does not eventualize, he should then be permitted to have the forum of his trial changed back to the Court of a Magistrate. (Where, however, the fault for the apparently quite unjustified demand for the procedure of Chap. XXXIII, emanated not so much from the minds of the accused as from the mind of their Advocate, the application was granted and the proceedings so far held before the Magistrate were deemed to be proceedings not under Chap. XXXIII but under Chap. XXI, Criminal P. C.) AIR (Vol 30) 1943 Sind 123: ILR (1943) Kar 1: 44 Cr LJ 586: 207 Ind Cas 235 (DB).

——Ss. 443, 446 (1) — **Application under S. 443 — District Magistrate omitting to record finding on such application but committal order implying that he had come to finding.**

The omission of the District Magistrate to record his separate finding on the application under S. 443, Criminal P. C., does not invalidate his proceeding if his committal order implies that he had come to a finding. It is sufficient that he decides under S. 443 that the case ought to be tried under the provisions of Chap. XXXIII and, consequently, commits the case for trial to the Court of Session under S. 446 (1). AIR (Vol 25) 1938 Rang 105: 39 Cr LJ 470: 174 Ind Cas 824.

——S. 443 — **Power of High Court.**

'The decision of the Sessions Judge shall be final' means that it is not open to the High Court to say that this is a case in which special procedure of Chap. XXXIII, ought to apply when the Sessions Judge has come to the conclusion that it is not. But it cannot be said that even though the provisions have been entirely ignored, the High Court will have no power to put the matter right. ILR (1937) 2 Cal 741: 41 CWN 996 (DB).

——S. 443 — **Appeal or revision.**

Although no appeal lies from an order accepting a claim under S. 443, revision is competent. AIR (Vol 20) 1933 Lah 1019: 35 Cr LJ 505: 35 PLR 268: 147 Ind Cas 997 (2).

——Ss. 443, 107 — **Applicability of S. 443 to proceedings under S. 107.**

The provisions of S. 443 are not applicable to proceedings under S. 107. The wording of S. 443 refers to an accused person charged with an offence punishable with imprisonment and the time during which he can make a claim before his commission for trial under S. 213, or showing cause under S. 242 or entering on his defence under S. 256. In other words, it contemplates a case of an offence triable by a Sessions Court as a warrant case and an offence triable by a Sessions Court, as a summons case. AIR (Vol 20) 1933 Lah 1019: 35 Cr LJ 505: 35 PLR 268: 147 Ind Cas 997 (2).

——S. 443 — **Trial for murder.**

The plain and intended meaning of the word "punishable with imprisonment" in S. 443, Criminal P. C., is that in the case of all serious offences for which a sentence of imprisonment might be passed, as distinguished from petty offences punishable, with a fine only, the procedure prescribed by Chap. XXXIII could be resorted to and the procedure prescribed by Chap. XXXIII, Criminal P. C., can be availed of even in the course of a trial of the offence of murder. AIR (Vol 19) 1932 Lah 490 (2): 33 Cr LJ 529: 33 PLR 578: 13 Lah 755: 137 Ind Cas 763 (DB).

——S. 443 — **Both parties Europeans.**

No special procedure when accused and complainant are both European British Subjects — Magistrate need not be a Justice of the Peace. AIR (Vol 16) 1929 Lah 187: 118 Ind Cas 438: 30 Cr LJ 918 (DB).

——S. 443 — **Claim to special procedure.**

The mere fact that an accused person is a European British subject does not ipso facto entitle him to a right of any special procedure and does not specially restrict a Magistrate or a Court of Session in his or its power of punishment. AIR (V 16) 1929 Lah 187: 118 Ind Cas 438: 30 Cr LJ 918 (DB).

——S. 443 — **Failure to claim benefit under Chap. XLIV — Effect of.**

Per Walmsley, J. — The omission of the accused person to avail himself of the right to claim the benefit of S. 528-A, does not conclude the matter and he is not debarred from urging that the conditions mentioned in cls. (a) or (b) of S. 443, exist.

Per Mukerji, J. — A claim to be tried under the provisions of Chapter XXXIII of the Code is wholly different from a claim to be tried as a European British subject or an Indian British subject or a European not being a European British subject or an American. It is the latter claim only which is dealt with in Chapter XLIV of the Code in which sections 528-A and 528-B occur and so far as the former claim is concerned the question of status of the claimant does not always arise as is evident from the provisions of sec. 443 (1) (b) of the Code. Consequently Ss. 528-A & 528-B, can have no application to S. 449 under which the right of appeal is claimed in Ch. 33. AIR (Vol 12) 1925 Cal 14:84 Ind Cas 1041: 40 CLJ 256: 52 Cal 347: 29 CWN 447: 26 Cr LJ 401 (DB).

——S. 443 — **Failure to claim — Accused not claiming before committing Magistrate — Question cannot be raised after committal to Sessions.**

A claim by the accused and a finding by the Magistrate are necessary ingredients for the application of the provisions of Ch. 33. If any such claim is made prior to commitment and there is no finding by the Magistrate the question cannot be raised in the Court of Sessions. If such a claim is made and a finding favourable to the accused is recorded by the Magistrate, the Sessions Judge would be bound to act under the provisions of Ch. 33, and could not refuse to do so on the ground that those provisions did not apply. In the case of acceptance of the claim of the accused person the finding of the Magistrate would be final. When the finding of the Magistrate is adverse to the claim it is final unless the claimant appeals and in the case of an appeal the decision of the Sessions Judge shall be final. Where the accused merely stated that they were European British Subjects and claimed to be tried as such according to the provisions of the Code,

Held that there was no claim to be tried under Ch. XXXIII. AIR (Vol 12) 1925 Oudh 469: 88 Ind Cas 833: 2 OWN 469: 28 OC 230: 26 Cr LJ 1217.

——**S. 443 — Prosecution by a European employee.**

In a criminal prosecution launched against a British Indian subject by a European employee on behalf of a Railway Administration the accused cannot claim to be tried under Chap. 33, Cr. P. Code. AIR (Vol 11) 1924 Rang 373: 83 Ind Cas 894: 3 Bur LJ 147: 26 Cr LJ 190.

——**S. 443 — Charge — Meaning — Proceeding under S. 107 — Forum of trial.**

A European British Subject against whom proceedings under S. 107 of the Code are taken is entitled to claim to be tried by a justice of the peace or District or Presidency Magistrate provided the justice of the peace is a first class Magistrate or a European Br. Subject. The word 'charge' in S. 443, includes proceedings under S. 407 Cr. P. Code. (1909) 36 Cal 163: 13 CWN 151: 9 Cr LJ 359: 1 Ind Cas 737 (DB).

——**Ss. 443, 463 — Claim of status as European British subject, without claiming to be tried by a jury — District Magistrate — Jurisdiction.**

The accused claimed to be a European British subject, but did not claim to be tried by a jury. The Magistrate found him not to be a European British subject, but passed on him a sentence that could have been passed on a European British subject. The accused appealed on the ground, inter alia, that he was a European British subject. The Sessions Judge found that he was a European British subject and directed a new trial by the Magistrate.

Held, that the procedure was erroneous, inasmuch as the accused had not claimed to be tried by a jury and the sentence passed was one that could have been passed on a European British subject and the Sessions Judge should have proceeded to try the case on the merits. 1905 AWN 5 (6): 2 ALJ 20: 27 A 697 (DB).

——**S. 444.**

——S. 444 — Applicability—Ch. 33 does not apply to complaint by public servant on orders of Government. AIR (V 13) 1926 Pat 566 : 7 PLT 367 : 27 Cri LJ 1041 : 7 AI Cr R 97 : 97 Ind Cas 17 (DB)

——**S. 444 — Powers of High Court.**

Section 444 does not enact that the powers of the High Court in the matter of a reference are coextensive with those in an appeal under S. 449. AIR (V 13) 1926 Pat 566: 7 PLT 367 : 27 Cr LJ 1041 : 97 Ind Cas 17 : 7 A Cr R 97 (DB).

——**S. 446.**

——**Ss. 446, 215 — Commitment under S. 446 — S. 215, whether applies — Advisability of interfering with commitments in revision considered—Whether evidence is weak — Criterion.**

The limitation imposed by S. 215 does not, in terms, apply to commitments made under S. 446. The High Court should not, however, in the course of revision, go beyond the rule contained in S. 215 when dealing with commitments under any other provisions of the Code. There would be obvious difficulties in interfering with any commitment on grounds of pure fact since a discussion of the evidence, if a conviction is not finally quashed, might have a prejudicial effect on the course of the subsequent trial. The absence of evidence sufficient to justify an order of commitment may be regarded as a legal ground, though it may sometimes be difficult to draw a line between a ground of this kind and a mere weakness of the evidence. The criterion may be, that a number of ingredients are generally required to make up an offence and if it appears from the evidence that one of these ingredients is entirely lacking from the prosecution case, this would be a good legal ground for quashing the commitment. In any case since it is for the Judge to decide whether there is or is not a case to lay before a jury, this, in its usually accepted sense, would seem to be a question of law rather than of fact since it is a question for the Judge to decide. AIR (V 32) 1945 Lah 1: 46 Cr LJ 648: 219 Ind Cas 464 (DB).

——**S. 446 — Scope.**

Section 446 is a provision of the first nature, i. e., a provision which directs a Magistrate to commit accused to Sessions in certain circumstances. It is to be differentiated from the sections which lay down the procedure to be adopted when a Court is to commit. Section 213 lays down the procedure for committal by a Magistrate. (1944) 46 PLR 178.

——**S. 446 — Issuing warrant.**

In suitable cases, it is the duty of a Magistrate to issue warrant of arrest. The position of an accused person should not influence the Court but before exercising the power vested in the Magistrate he should take some trouble to satisfy himself that the statement of the complainant was based on reasonable grounds. AIR (V 26) 1939 All 602 : 139 ALJ 574 : 1939 AWR 570: 40 Cr LJ 917 : ILR (1939) All 851 : 184 Ind Cas 313.

——**Ss. 446, 29-A — "Magistrate," meaning of — Offence under Ss. 403, 417, 427, Penal Code — Second Class Magistrate, if can enquire into.**

The 'Magistrate' in S. 446 (1), Criminal P. C., means a Magistrate having jurisdiction to inquire into the case. Section 446 must be read with S. 29A of the Code. Before an accused is committed to the Court of Session there must be some evidence on the record to prove a prima facie case against him. The Second Class Magistrate cannot hold an inquiry, in view of S. 29A Criminal P. C., into a case under Ss. 403, 417 and 427, Penal Code, being punishable otherwise than with fine not exceeding Rs. 50. In such a case it is incumbent upon him to direct the complainant to make a complaint to a Magistrate who is empowered to hold a preliminary inuiry before committing the accused to the Sessions. AIR (V 26) 1939 All 602 : 1939 ALJ 574 : 40 CrLJ 917 : 1939 AWR 570 : ILR (1939) All 851 : 184 Ind Cas 313.

——**Ss. 446 (1), 209, 253 — Recording of prosecution evidence.**

Before a Magistrate makes a commitment under S. 446 (1), Criminal P. C., he must consider whether there are grounds for discharging the accused under S. 209 or S. 253, Criminal P.C., and he cannot do this without taking the evidence for the prosecution. AIR (V 20) 1933 Pat 677 (1) : 12 Pat 707: 35 Cr LJ 174 (1): 14 PLT 726: 146 Ind Cas 879 (1) (DB).

——S. 446 — Section 446 (2), Criminal P. C., renders final a decision by a Magistrate that the case is one to which Chap. XXXIII, applies. AIR (V 19) 1932 Lah 490 (2) : 33 Cr LJ 529: 33 PLR 578: 13 Lah 755 :137 Ind Cas 763 (DB).

——**Ss. 446, 443 — Power of Magistrate to cancel charge.**

Section 446, Criminal P.C., debars a Magistrate from cancelling a charge which has once been framed against a person who has claimed to be tried under the provisions of Chap. XXXIII a European British subject, and whose claim to be so tried has been upheld by a competent Court

under S. 443 of the Code. AIR (V 18) 1931 All 366: 32 Cr LJ 866 : 53 All 690 : 1931 ALJ 526 : 132 Ind Cas 332.

---S. 446 — Some accused Indians.

Case against Indian accused together with one European — Magistrate cannot assume jurisdiction over Indians by discharging the European— He must commit them to Sessions. AIR (V 16) 1929 All 84 : 113 Ind Cas 764 : 51 All 483 : 1929 ALJ 188: 10 LRA Cr 41: 11 AI Cr R 290: 30 Cr LJ 218.

---S. 446 — Trial by Jury.

In the case of a person committed to a Sessions Court under S. 446 (1) of the Cr. P. C. the trial must be with the aid of jury, the proviso to subclause (2) of S. 446 merely giving the accused person the right to claim to be tried by assessors. AIR (V 12) 1925 Lah 236 : 5 Lah 515 : 26 Cr LJ 540 : 85 Ind Cas 540 (FB).

--S. 447.

---S. 447 — Appeal against acquittal —General rule — Reversal — When justified.

It is the practice of the Sind Judicial Commissioner's Court in all appeals, especially criminal appeals, to pay great deference to the opinion of the Judge presiding over the trial Court, but it will not hesitate to convict in an acquittal appeal more than it should hesitate to acquit in an appeal from a conviction, provided that there are valid grounds for reversing the decision of the learned Judge of the Lower Court. AIR (V 14) 1927 Sind 92 : 21 SLR 141 : 27 Cr LJ 1347 : 98 Ind Cas 467. (DB).

---S. 447 — Prosecution solely relying on admissions — Acquittal by lower Court — No case for remand.

In a case where the prosecution produces no evidence and relies entirely on admissions by the accused and where the trial Court acquits the accused the Appellate Court should not remand the case for proper trial, such admissions not being sufficient to enable the Crown to procure a legal decision and there being no material for the High Court to supplement the deficiencies of the prosecution by remanding the case for proper trial. AIR (V 12) 1925 Lah 85 : 5 Lah 404 : 26 Cr LJ 320: 84 Ind Cas 464 (DB).

---S. 447 — Omission to inform.

The omission of the Magistrate to inform the accused of their rights under Ch. 33, as required by S. 447, is absolutely cured by the provisions of S. 534. AIR (V 12) 1925 Rang 239 : 89 Ind Cas 459 : 4 Bur LJ 44 : 26 Cr LJ 1371 : 3 Rang 220 (DB).

---Ss. 447, 449 — Resident at Aden — Sessions Court — Transfer of case — High Court — Aden Courts Act (Bom. Act II of 1864), S. 20.

The Resident at Aden, who has a case committed to his court under S. 447 is not competent to transfer the case to the High Court of Bombay under S. 449 of the Code when he feels that the accused being a European British subject cannot be adequately punished by him. The powers of the Court of Session conferred upon the Resident by the Aden Courts Act, 1864, are not merely such as are defined in the Code, but such as are provided expressly in the Act itself, and S. 449 cannot affect those provisions.

Semble: It may be that Sub-s. I of S. 449, Cr P.C. enters into and forms part of the definition of the powers of a Court of Session within the meaning of S. 20 of Bombay Act II of 1864, in which case the Resident, though competent to try a case in which European British subjects are charged with culpable homicide or grievous hurt, would not be competent to pass sentences in excess of one year's punishment. (1905) 7 Bom LR 104 : 29 B 575 (577, 578).

---S. 449.

---S. 449 — Trial by jury — Appeal — Powers of High Court.

In case of a trial by jury, S. 449, Criminal P.C., expressly gives a right of appeal, both on matters of law and fact and that right can be exercised by either the convict or the Crown. As an appeal under S. 449 may be on a matter of fact, the High Court is fully entitled to go into the facts and to reverse an order passed in accordance with the verdict of the jury. The section does not place any limit on the powers of the High Court. There is nothing to suggest that the High Court can only interfere in the case of a perverse verdict or an unreasonable one. Section 449 gives the Court the same power from appeals in jury trials as it has in appeals from convictions by a Sessions Judge sitting alone or with assessors. AIR (V 32) 1945 Lah 105 : 47 Cr LJ 4 : ILR (1945) Lah 290 : 220 Ind Cas 467 (FB).

---S. 449 — Murder reference and appeal — Part of evidence inadmissible — Powers of High Court.

In an appeal under S. 449, the High Court can, even where there has been a serious misdirection or non-direction consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused.

When, in a murder reference and appeal, it is found that inadmissible evidence has been admitted in a jury trial, the High Court can exclude such evidence and maintain a conviction if the remaining evidence is sufficient to warrant it. AIR (V 32) 1945 Lah 105 : 47 Cr LJ 4 : ILR (1945) Lah 290: 220 Ind Cas 467 (FB).

---S. 449 — Sentence of death passed on June 16 —Application for leave to appeal under S. 449 made on July 25, whether lies in view of Art. 155 read with Art. 150 of Limitation Act.

Quaere.—Whether in view of Art. 155 read with Art. 150 of the Limitation Act, an application for leave to appeal under S. 449, Criminal P.C., made on July 25 lies, when conviction and sentence of death is passed on June 16. AIR (V 26) 1939 Cal 545: ILR (1939) 1 Cal 162: 41 Cr LJ 72: 43 CWN 120: 184 Ind Cas 757 (DB).

---S. 449 — Appeal against judgment of Judge sitting with jury — Duty of Appellate Court — Full weight to unanimous opinions to be given.

While on an appeal against the finding of a Judge sitting alone, the appellant has to satisfy the Appellate Court that the Judge was wrong, on an appeal against a jury's verdict following on a properly directed charge, the appellant has the burden of showing that the verdict is unreasonable. Upon an appeal from a conviction founded on a jury's verdict, the proper way of approaching it is to assume that the findings of fact are correct and reasonable and lay the burden on the appellant of showing them to be otherwise. In other words, the Appellate Court, in reaching its conclusions, must give full weight and consideration to the unanimous opinions of the Judge and the jury. AIR (V 23) 1936 Nag 103: 37 Cr LJ 607: 31 NLR 215 Sup. : 162 Ind Cas 430 (DB).

---S. 449 (1) (a) — Trial by jury under Chap. XXXIII — Accused must claim such trial before Magistrate.

Before it can be held that there has been a trial by a jury in the High Court under the provisions of Chap. XXXIII within the meaning of S. 449 (1) (a), Criminal P. C., it is incumbent upon

the accused to satisfy the Court that he had duly preferred a claim before the Magistrate that the case ought to be tried under the provisions of Chap. XXXIII before he was committed for trial, and that upon such claim having been made the Magistrate, after making such inquiry as he deemed necessary and being satisfied that the status of the complainant and the accused respectively were such as to entitle the accused to a trial under Chap. XXXIII, had recorded a finding that the case was one which ought to be tried under the provisions of that Chapter or that the Magistrate, on the claim having only been made to him in that behalf, had rejected the claim, but that on appeal to the Sessions Judge, the claim of the accused to be tried under Chap. XXXIII had been granted. AIR (V 22) 1935 Rang 67: 36 Cr LJ 595: 13 Rang 104 : 154 Ind Cas 837 (FB).

**——S. 449 (1) (a) — Appeal — When lies.**

The right of appeal under S. 449 (1) (a), Criminal P.C., depends not upon whether in certain circumstances the accused might have been tried under the provisions of Chap. XXXIII, but whether he was in fact so tried; and as regards any question as to whether the trial was rendered invalid by reason of the alleged failure of the committing Magistrate to comply with the provisions of S. 477, Criminal P.C., the matter is concluded against the accused by S. 534 of the Code. AIR (V 22) 1935 Rang 67: 13 Rang 104: 36 Cr LJ 595: 154 Ind Cas 837 (FB).

**——Ss. 449, 417 — Appeal against acquittal — Limitation Act, Sch. I, Art. 157.**

It is impossible to hold that the right of appeal in a case tried by jury under the provisions of Chap. XXXIII, Criminal P.C., is created by S. 449 of that Code. The right of appeal against an order of acquittal is created by S. 417 of the Code and S. 449, in its application to appeals against acquittals merely has the effect of enlarging the scope of such appeals in certain classes of cases. The effect of Art. 157, Lim. Act, in respect of an appeal against an order of acquittal is to fix the period of limitation in respect of such appeals at six months in all classes of cases, whatever may have been the form of trial and whatever may be the scope of the appeal and by reason of the provisions of S. 449, Criminal P.C. its scope extends to questions of fact as well as to questions of law. AIR (V 21) 1934 Cal 610 : 38 CWN 654 : 59 CLJ 482 : 35 Cr LJ 1367 : 61 Cal 991 : 151 Ind Cas 662 (DB).

**——S. 449 — Original side appeal — Vakil — If can act for a party.**

The question whether a vakil can act for a party in a criminal appeal from the Original side of a High Court depends upon the rules of that Court and is not concluded by anything in the Cr. P. Code. AIR (V 15) 1928 Cal 675 : 55 Cal 858 : 32 CWN 319 : 29 Cr LJ 1022 : 112 Ind Cas 350 (DB).

**——S. 449 — Limitation.**

An application for leave to appeal under Cr. P. Code, S. 449 (1) (c) is within Art. 155 of the Limitation Act. AIR (V 14) 1927 Cal 307: 54 Cal 52: 101 Ind Cas 657: 28 Cr LJ 48 (DB).

——S. 449 — An appeal to the High Court in the words of S. 449 read with S. 443 is governed by Art. 155 which is not limited only to appeals to the High Court from the Sessions Courts in the mofussil, or from other Courts to which appeal to the High Court lie direct. An application presented after 60 days from date of conviction for the determination of the status of the prisoner under S. 449, read with S. 443 is out of time. AIR (V 13) 1926 Cal 1203. 98 Ind Cas 248 : 53 Cal 746 : 27 Cr LJ 1304 (DB).

**——S. 449 — Leave to appeal.**

Affidavits of the applicants as to their nationality on the applications for leave to appeal under S. 449 (1) (c) are admissible. AIR (V 14) : 1927 Cal 307 : 54 Cal 52 : 28 Cr LJ 481 : 101 Ind Cas 657 (DB)

**——S. 449 — Division Bench should hear.**

It is desirabe that the application for leave to appeal should be heard by a Divisional Bench rather than by a single Judge. AIR (Vol 12) 1925 Cal 673: 86 Ind Cas 659 : 41 CLJ 325 : 29 CWN 458 : 26 Cr LJ 835 : 52 Cal 636 (DB).

**——S. 449 — Question to be decided.**

If the applicant for leave is able to show, that if the case had been tried outside a Presidency Town, it would have been triable under the prosions of Chapter 33 of the Code, he has an absolute right of appeal. AIR (V 12) 1925 Cal 673 : 86 Ind Cas 659 : 41 CLJ 325 : 29 CWN 458 : 26 Cr LJ 835: 52 Cal 636 (DB).

**——S. 449 — Claim wrongly allowed — Error of the order cannot be challenged in appeal from conviction.**

There is a clear distinction between a claim to be tried as a European subject and a claim to be dealt with under the provisions of Ch. 33. But if that distinction is not properly appreciated by the enquiring Magistrate and an order is passed purporting to be under S. 443, it cannot be disputed by the Crown in oppossing an appeal from the conviction which follows. In such case therefore, the appeal must be dealt with, on matters of facts and matters of law, as contemplated by S. 449 (1) Cr P. Code. AIR (V 12) 1925 Cal 501 : 86 Ind Cas 38: 41 CLJ 87: 29 CWN 260 : 26 Cr LJ 662 (DB).

**——S. 449 — Trial by jury—High Court—Interference — Powers of.**

Under S. 449, in cases tried by jury, an appeal lies to the High Court on a matter of fact as well as on a matter of law. Therefore in a case tried under Chapter 33 the finding of a jury on a question of fact is no longer final, according to the present Cr. P. Code and therefore to justify an interference by High Court under S. 307, the finding of jury need not be manifestly wrong or perverse. AIR (V 12) 1925 Lah 401 : 88 Ind Cas 857 : 6 Lah 98: 26 PLR 263 : 26 Cr LJ 1241 (DB).

**——S. 449 — Notice to Crown.**

Application for leave to appeal should be made with notice to the Crown but once the leave is granted without such notice it cannot be revoked on the ground of the want of such notice.

Per Mukerji. J.—If it subsequently appears that the ground on which leave was asked for and granted is non-existent the appeal may be dismissed. AIR (12) 1925 Cal 14 : 84 Ind Cas 1041 : 40 CLJ 256 : 52 Cal 347 : 29 CWN 447 : 26 Cr LJ 401 (DB).

**——S. 449 — Jurisdiction to entertain application.**

The question as to application for leave being made to the Judge who tried the case is a mere matter of convenience though it is desirable that such applications should be made to him. The right of appeal, if there is one, depends upon extraneous circumstances which have nothing to do with the guilt of the accused and the trying Judge is better qualified than any one else to decide whether those circumstances exist or not. AIR (V 12) 1925 Cal 14: 94 Ind Cas 1041: 40 CLJ 256: 52 Cal 347 : 29 CWN 447: 26 Cr LJ 401 (DB).

**——S. 450.**

——(Ss 450 to 463. Repealed by S. 27 of the Criminal Law Amendment Act (XII of 1923). Of these Ss. 453, 454, 455 & 459 were re-enacted as Ss. 528 A, 528 B, 528 C and 528 D respectively; Ss. 456, 457,

and 458 were incorporated in Ss. 491 and 491A; S. 460 was included in S. 284A, Sub-s. (2), S. 462 was merged in S. 326 and Ss. 450, 451, 452, 461 and 463 were omitted. Cases under Ss. 450 to 463 given below are before repeal —Ed.)

**——S. 451.**

**——S. 451 — Making of claim.**

Right to trial by Jury can be claimed by accused before he enters defence, though he had withdrawn it at a prior stage. AIR (V 10) 1923 Cal 657 : 74 Ind Cas 1041: 50 Cal 689 : 27 CWN 649 :24 Cr LJ 849 (DB).

**——S. 451 (1) — European British subject— Not claiming trial by jury in a warrant case—Estoppel.**

The fact that the accused, before the trial has begun in a warrant case, stated that he did not wish for a jury, does not prevent him from altering his mind afterwards and claiming a jury within the time allowed by S. 451, Sub-s. (1). (1902) AWN 142 : 24 A 511 (513).

**——S. 454.**

**——S. 454 — Effect of waiver.**

When an accused waived his right to be tried as a European British subject, the special privileges given to him as such, one of which is his right to come up to the High Court in revision by virtue of the definition of "High Court" in S. 4, Cl. (j) of the Cr. P. Code is lost and he should be tried like any other ordinary individual not only in the matter of the trial itself but in the matter of appeal and revisions as well. The words "in any subsequent stage of the same case," include an application to get his conviction set aside in revision. The word "case" is wide enough to include the whole of the proceedings connected with the prosecution; the trial, the appeal and the revision are all stages in a case. AIR (V 11) 1924 Mad 373 : 45 MLJ 800 : 76 Ind Cas 695: 18 MLW 895 : 33 MLT 194 : 1924 MWN 60 : 25 Cr LJ 231

**——S. 454 — Subsequent stage — Revision.**

An application for revision being an independent matter with a right to apply to superior Court, is not a subsequent stage of the original proceedings under S. 44 of the Cr. P. Code. AIR (V 7) 1920 All 351 : 17 ALJ 896 : 58 Ind Cas 351.

**——Ss. 454, 537 and 534 — Omission to ask accused if he is a European British Subject — Revision.**

An omission to ask an accused person whether he is a European British Subject is merely an irregularity and is not a sufficient ground for interference in revision. AIR (V 3) 1916 Mad 1155: 16 Cr LJ 616 : 30 Ind Cas 440. (DB).

**——S. 454 — European British subject should be informed of his right to be tried under a special procedure.**

A European British subject should be informed of his right under the law to be tried according to special procedure. Otherwise the trial is bad. AIR (V 1) 1914 Cal 451 : 18 CWN 385 : 15 Cr LJ 297: 23 Ind Cas 505 (DB).

**——S. 454 — Claim to be tried as European Br. subject — Waiver.**

A claim to be tried as a European Br. subject can be waived. When an accused is found to be a European Br. subject, his rights as such subject, should be carefully explained to him so as to enable him to exercise his choice and judgment, as to whether he would claim those rights or waive them. (1911) 7 NLR 93 : 12 Cr LJ 436: 11 Ind Cas 620.

**——S. 454 — Trial by Jury — Right could be taken away by Cr. P. Code — Indian Councils Act (1861) — (24 and 25 Vict. Ch. 67) S. 22, proviso — waiver.**

The right to trial by Jury could be taken away by the Cr. P. Code in spite of the proviso to S. 22 Indian Councils Act.

A European British subject may relinquish his right to be dealt with as such. (1910) 37 Cal 467: 14 CWN 1114 : 11 Cr LJ 453 : 7 Ind Cas 359 (DB).

**——S. 460.**

**——S. 460 — Relinquishment of claim.**

To avail oneself of S. 460 an accused must make his claim under the section, failure to do which amounts to relinquishment. 6 PR Cr 1912 : 24 PWR Cr 1912 : 14 Ind Cas 197 (DB).

**——S. 464.**

**——S. 464 — Examination of Civil Surgeon for deciding whether accused is of sound or unsound mind — Whether Magistrate's duty — Accused producing evidence in rebuttal — Prosecution, if also entitled to rebut evidence produced by accused.**

An inquiry which is contemplated by cl. (1) of S. 464, Criminal P. C., is not confined to the examination of the Civil Surgeon alone.

The evidence of a Civil Surgeon under S. 464, taken in order to decide whether the accused is or is not of unsound mind is not evidence produced by the prosecution. The examination of the Civil Surgeon is a duty which is placed by statute upon the Magistrate himself and it is obvious that if one party can produce other evidence, both parties must be allowed to do so. It is further obvious that the burden of proving that the accused is of unsound mind and incapable of making his defence lies upon the accused and it is for him to lead evidence on the point in the first place and such evidence as is led on his behalf can be rebutted by the prosecution. AIR (V 25) 1938 Pesh 24 : 39 Cr LJ 737 : 176 Ind Cas 447.

**——S. 464 (1) — Examination by Civil Surgeon, if sufficient — Opportunity to rebut Civil Surgeon's evidence, if to be given.**

Section 464 (1), Criminal P.C. does, indeed, prescribe that where there is reason to believe that an accused is of unsound mind and consequently incapable of making his defence, a Magistrate shall cause such person to be examined by the Civil Surgeon of the District, or such other Medical Officer as the Local Govt. directs, but the section cannot be regarded as directing that the enquiry shall be limited to an examination by a Civil Surgeon, or other Medical Officer of the person concerned. An opportunity should be given to rebut the evidence given by the Civil Surgeon. AIR (V 20) 1933 Oudh 362 : 10 OWN 719 : 34 Cr LJ 914 : 144 Ind Cas 1031.

**——S. 464 — Examination of Civil Surgeon examining accused — Necessity of.**

The provisions of S. 464, Criminal P.C., are mandatory. They require the Magistrate not only to have the accused examined by the Civil Surgeon of the District or such other Medical Officer as the Local Govt. directs but to examine such officer as a witness. AIR (V 20) 1933 Sind 267: 35 Cr LJ 200: 146 Ind Cas 850 (DB).

**——S. 464 — Medical enquiry — Magistrate is not under duty to order a medical inquiry upon a defence of insanity.**

There is no provision of the law in India making it incumbent upon a Magistrate to order a medical enquiry upon mere defence of insanity. It is only in cases where the accused appears to be incapable, by reason of mental infirmity, of taking his trial that this issue of insanity must be tried before the trial for the offence is proceeded with. AIR (V 15) 1928 Lah 796: 9 Lah 371: 29 Cr LJ 204: 106 Ind Ind Cas 796 (DB).

**——Ss. 464 to 475 (Ch-34)—Appointment of guardian — Proceedings under S. 488 — No guardian can be appointed — Case must be postponed if party insane — Cr. P. Code, alone governs the case.**

A Magistrate has no power under the Code to appoint a guardian ad item for a lunatic in a proceeding under S. 488. Such proceedings may be quasi civil but they are also criminal and are wholly governed by the provisions of the Cr.P. Code alone. Where in such a case, the counter-petitioner pleads insanity, it is the Magistrate's duty to hold a judicial enquiry and put him if necessary under medical observation. If as a result of the enquiry, Court is satisfied that he is sane and capable of understanding the proceedings, then the matter is simple. But if he concludes that he is insane and not capable of understanding the proceedings and incapable of understanding questions put to him and giving rational answers he must postpone further proceedings until he reverts to sanity. AIR (V 12) 1925 Mad 440 : 48 MLJ 187: 86 Ind Cas 77: 26 Cr LJ 701: 48 Mad 388: 21 MLW 180: 1925 MWN 65.

**——Ss. 464 and 465 — Procedure obligatory — Subsequent enquiry — Cure of defect.**

When a question is raised as to soundness of mind of an accused person the Court is bound to enquire, before it begins to record evidence whether the accused is or is not incapacitated by unsoundness of mind from making his defence. If it fails to do so, the subsequent enquiry about soundness or unsoundness of mind does not cure the defect. The question whether an accused person is entitled to an acquittal, under the general exception of insanity under S. 84 I. P. C. can only arise when the procedure laid down by Ss. 464, 465 Cr. P. Code, is duly followed. AIR (Vol 7) 1920 All 354 : 42 All 137 : 21 Cr LJ 83 : 1 UPLR (HC) 174 : 18 ALJ 53 : 54 Ind Cas 483 (DB).

**——S. 464 — Accused of poor wits — Inquiry under the chapter if necessary.**

Where the Magistrate finds the accused to be of poor wits and wanting comprehension of the serious consequences of his act, he must hold an inquiry as to whether the accused is a lunatic at time of the trial or at the time of the commission of the offence. (1912) 11 MLT 24 : 13 Cr LJ 24 : 13 Ind Cas 216 (DB).

**——S. 465.**

**——S. 465 — Scope and applicability — Verbal application for adjournment by accused's Counsel on ground of unsoundness of accused's mind — Court recording that there was no reason to think that accused was of unsound mind — Held, S. 465 was not applicable.**

The first stage in the procedure laid down by S. 465, Criminal P. C., is that it must appear to the Court that the accused placed on his trial was of unsound mind and incapable of making his defence. The next stage that is to follow when it appears to the Judge that the accused is of unsound mind and consequently incapable of making his defence, is that fact of such unsoundness of mind and incapacity should be inquired into on the materials placed before the Court.

Where, in a case, there was merely a verbal application made by the Pleader for the accused for an adjournment in order that the accused may be kept under mental observation, and the Judge on that recorded his opinion that there was no reason for thinking that the accused was of unsound mind or incapable of making his defence and also it was further noted by the Judge that no suggestion had been made, before the trial commenced, that the accused was in any way mentally unsound and incapable of taking his trial :

Held, that the provisions of S. 465 had no application to the case and it was neither necessary nor incumbent upon the Judge to hold enquiry and adjourn the case. AIR (Vol 25) 1938 Cal 6 : 41 CWN 1322 : 39 Cr LJ 308 : 173 Ind Cas 475 (DB).

**——S. 465 — Insanity of accused at the time of trial and at the time of commission of offence — Procedure.**

The procedure in the case of lunacy at the time of the trial and lunacy at the time of the commission of the offence are entirely separate matters leading to different consequences. The first point that a Court has to decide when an accused person is brought before it who is suspected or alleged to be a lunatic, before the Court can even proceed with the trial for the offence alleged to have been committed, is whether the accused person appears to the Court to be of unsound mind and consequently incapable of making his defence. AIR (Vol 19) 1932 Oudh 190 : 9 OWN 355 : 33 Cr LJ 542 : 137 Ind Cas 800 (2).

**——S. 465 — Demeanour of accused.**

Demeanour of accused raising suspicion as to sanity and capability to make defence — Court must come to definite finding on point — Absence vitiates conviction and sentence. AIR (Vol 17) 1930 All 450 : 1930 Cr C 670 : 125 Ind Cas 767 : 31 Cr LJ 899 (DB).

**——S. 465 — Preliminary issue — Question of insanity must be put to the jury as a preliminary issue.**

The moment the question of insanity of the accused is raised, the Judge must put to the jury as a preliminary issue to be tried by them as to whether or not the jury are satisfied that the accused is a person of unsound mind and incapable of standing his trial and in a position to understand the proceedings which are going on in Court. Evidence must be led on that point and the Judge must come to a finding on the basis of such evidence. AIR (Vol 14) 1927 Cal 289 : 44 CLJ 285 : 27 Cr LJ 896 : 96 Ind Cas 160 (DB).

**——S. 465 — Procedure — Non-compliance with S. 465 vitiates trial.**

It is incumbent on the Sessions Judge himself to hold an enquiry on the question whether the accused was capable of making his defence when the latter came before him on commitment, to take the opinion of the assessors on that question, and to come to a decision before proceeding further with the trial. If he has any reason for supposing that the accused when brought up for trial was of unsound mind, the question whether he was of unsound mind at the time of the alleged offence is an entirely separate one to be enquired into in entirely separate manner. Neglect to follow the mandatory provisions of S. 465 must vitiate the trial AIR (Vol 13) 1926 Lah 498 : 7 Lah 315 : 27 Cr LJ 552 : 27 PLR 454 : 93 Ind Cas 1048 (DB).

**——S. 465 — Right to begin — Prosecution and not defence has to begin.**

If enquiry is to be commenced under S. 465 of the Cr. P. Code, it should be regarded not so much, as the issue joined between the parties, but as a preliminary enquiry which is conducted for the satisfaction of the Court, and in that view the prosecution ought to commence and give

their evidence. AIR (Vol 12) 1925 Cal 479 : 84 Ind Cas 340 : 51 Cal 827 : 26 Cr LJ 276.

——S. 465 — **Burden of proof.**

The onus in an inquiry under S. 465 (i) is on the prosecution to show that the accused is at the time of proceedings against him of sound mind and capable of making his defence. AIR (Vol 11) 1924 Cal 713 : 81 Ind Cas 827 : 51 Cal 584 : 25 Cr LJ 1051 (DB).

——S. 465 — **Preliminary enquiry — Scope of — Not a trial.**

The preliminary enquiry held under S. 465 of the Cr. P. Code is not a trial in the sense of ascertaining whether the accused is guilty or not of offences charged. AIR (Vol 5) 1918 Pat 179 : 3 PLJ 291 : (1918) Pat HCC 57 : 19 Cr LJ 135 : 4 PLW 14 : 43 Ind Cas 423 (FB).

——S. 465 — **Insanity of accused — Procedure — Duty of Court.**

If the Court doubts the existence of an unsoundness of a mind of the accused it should act under S. 465 Cr. P. Code and try the fact whether on the date on which the accused was called on to plead, he was or was not of unsound mind and capable or incapable of making his evidence. The question is quite separate from the question whether at the time when the accused is alleged to have committed the offence, he was of sound mind. AIR (Vol 4) 1917 All 328 : 15 ALJ 239 : 18 Cr LJ 470 : 39 Ind Cas 310.

——S. 465 — **Lunatic — Trial on the fact of insanity.**

The trial on the question of insanity should be in the first instance and should not be continued throughout the trial of the offence. 1905 AWN 2 (3) (DB).

——S. 466.

——S. 466 — In a case where the accused is found to be of unsound mind incapable of understanding the proceeding, the Court should not proceed with the trial and convictions under these circumstances are liable to be quashed. 1935 MWN 814 (815).

——S. 466 (1) — **Condition not mentioned in S. 466 (1) — Whether can be added by Magistrate.**

The only power vested in the Magistrate under S. 466 (1) is to order the release of the accused "on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf". There is nothing in this section to empower the Magistrate to add any other condition. Where the Magistrate has ordered that the accused be released provided "a responsible gentleman comes forward to take care of her outside Karachi" the order of conditional release cannot be sustained. AIR (Vol 20) 1933 Sind 267 : 35 Cr LJ 200 : 146 Ind Cas 850 (DB).

——S. 468.

——S. 468 (2) — **Accused incapable of making defence — Court, if should take evidence of capacity of accused — Certificate of Inspector-General of Jails declaring capacity of accused — Committal to Sessions.**

Under S. 468 (1), Criminal P. C., there is no injunction upon the Magistrate or Court to take evidence as to the capacity of the accused to make his defence. The view of the Magistrate or Court is made the criterion of whether action is required under sub-s. (2).

Where the trial of an accused person was postponed as he was incapable of making any defence on account of insanity and on receiving a certificate from the Inspector-General of Jails that he was capable of making a defence, the accused was again placed on his trial and the Magistrate committed him to Sessions:

Held, that with the certificate of the Inspector-General of Jails before him and the appearance of the accused in dock, the Magistrate certainly had a basis for a decision as to whether sub-s. (1) or sub-s. (2) of S. 468 applied and it could not be said that his decision was not arrived at under a due sense of responsibility. Being of the view that the accused was capable of making his defence, he was bound to proceed with the inquiry. AIR (Vol 22) 1935 Pat 501 : 16 PLT 828 : 2 BR 129 : 159 Ind Cas 963.

——S. 470.

——Ss. 470, 471 — **Acquittal on ground of insanity — Release of accused — Powers of Court.**

Where an accused is acquitted on the ground of insanity, the Court is bound to order him to be detained in safe custody and to report the action to the Provincial Government and cannot release him on the ground that he appeared to be insane at the time of the trial.

The Court may report that it is safe to release the accused subject to certain safeguards, but the decision whether or not he is to be released rests with the Provincial Government. AIR (Vol 32) 1945 Nag 77 : 1944 NLJ 527.

——S. 471.

——S. 471 — **Nature of order to be passed under — Order for detention of accused in the custody of a relative — Propriety.**

As S. 471, Cr. P. Code, now stands, it is essential that the accused should be "detained" in a "place". The words "detained" denotes the curtailment of liberty. It is obligatory upon the Court to order the detention in a place and not with a person.

Where a Court in issuing an order under S. 471 (1) of the Code ordered the accused to be detained in the custody of his father-in-law and brother.

Held, that the order could not be sustained and has to be set aside. AIR (Vol 35) 1948 Mad 291 : ILR (1948) Mad 827 : 49 Cr LJ 313 : 61 LW 12 : 1948 MWN 8 : (1948) 1 MLJ 23.

——S. 471 — Acquittal of accused on the ground of insanity — No power to release him — Proper procedure. See AIR (Vol 32) 1945 Nag 77 : 46 Cr LJ 745.

——Ss. 471, 469, 470, — **Accused acquitted being insane at the time of offence — Medical evidence as to his insanity, if necessary for keeping him in safe custody.**

Where the accused is acquitted on the ground that he was insane at the time of the commission of the offence, medical evidence as to his insanity is not necessary under S. 471, Criminal P. C., for his being ordered to be kept in safe custody.

Medical evidence is necessary only in such proceedings as those under S. 464 (1). AIR (V 28) 1941 Rang 352 : 1941 Rang LR 544 : 43 Cr LJ 228 : 197 Ind Cas 654.

——S. 471 — The Appellate Court can pass order under S. 471, such order being consequential within the meaning of S. 423 (d). AIR (V 28) 1941 Rang 352 : 1941 Rang LR 544 : 43 Cr LJ 228 : 197 Ind Cas 654.

——S. 471 — **Accused guilty under S. 326, Penal Code, but found insane at the time of committing**

**offence — Whether can be acquitted under S. 84, Penal Code, and kept under care of relatives on their giving security for his good behaviour — Proper course.**

Where a Magistrate finds the accused guilty under S. 326, Penal Code, but acquits him under S. 84, Penal Code, as he is found incapable of understanding the nature of his act due to insanity, and orders him to be handed over to the care of his relatives on their furnishing a security for his good behaviour, the order contravenes S. 471, Criminal P. C. In such a case, the accused should be detained in safe custody in a lunatic asylum. AIR (V 25) 1938 Rang 96 : 39 Cr LJ 544 : 175 Ind Cas 48.

——S.471—Where the accused is proved to be a criminal lunatic and in the opinion of the medical expert, there was no likelihood of his ever regaining his mental capacity, he might be directed under S. 471 to be detained in safe custody in a mental hospital. AIR (V 22) 1935 Oudh 143 : 36 Cr LJ 392 (2): 1935 OWN 53 : 153 Ind Cas 780.

——S. 471 — Deaf and dumb person in possession of stolen property:

Held, that proof as to knowledge of accused as to property being stolen is not possible to get and the conviction under S. 411, I.P.C., is not legal. Nor does the case come under S. 471, Criminal P.C. AIR (V 22) 1935 Pat 451: 16 PLT 568: 2 BR 96: 37 Cr LJ 107: 159 Ind Cas 577 (2) (DB).

**——S. 471 — Interpretation — "Detained in custody"**

"Detained in safe custody" in S. 471 does not mean having regard to the language used in S. 475, "detained in the custody of friends or relatives." What the Magistrate or Court can do under S. 471, is to detain the accused in safe custody and report the matter to the Local Government. Under S. 475 it is the Local Government and not the Magistrate who can deliver the accused to any relative or friend of his for safe custody. AIR (V 15) 1928 Cal 653: 48 CLJ 148: 29 Cr LJ 847: 11 AI Cr R 162: 56 Cal 208 : 111 Ind Cas 162: 111 Ind Cas 399 (DB).

**——S. 471 — Report to Government — Not necessary after the amendment of the section.**

In view of the amendment of S. 471, Cr P. C., there is now no longer any necessity from a Court which a quits a person on the ground of insanity to report the case for the orders of the Local Government. Clauses (2) and (3) of that section were repealed by Act IV of 1912, mainly with the object of relieving the Local Government from the necessity of dealing with the cases of such persons. AIR (V 10) 1923 Bom 261: 84 Ind Cas 652: 25 Bom LR 286: 26 Cr LJ 348 (DB).

**——S. 471 — Sending to Asylum — If compulsory.**

Section 471, Cr. P.C., does not compel the Court to send the accused to Lunatic Asylum. The Court is only to see that such safeguards have been taken as would prevent the accused from committing mischief. AIR (V 9) 1922 Mad 54 : 42 MLJ 72: 65 Ind Cas 423: 1922 MWN 10: 30 MLT 74: 23 Cr LJ 71.

**——S. 471 — Criminal lunatic — Power of court to order detention — Lunatic Assylum Act (of 1914).**

Section 471 of the Cr. P.C., as amended by Act X of 1914 no longer requires that the court should report the case of lunatic accused for the orders of the Local Government. The court can itself issue a direction for the detention in a lunatic assylum or if there is no accommodation in it, in jail or some other place of custody in Br. India. AIR (V 6) 1919 Oudh 49: 22 OC 269: 21 Cr LJ 46: 54 Ind Cas 254.

**——Ss. 471, 474 and 475 — Criminal Lunatic — Order as to detention — Procedure.**

Under S. 471 (1) a Court can order a Criminal lunatic to be kept in safe custody in such place and manner as it thinks fit. But the Court cannot exercise the powers conferred on the Local Government under Ss. 474 and 475 AIR (V 5) 1918 Bom 110: 43 B 134: 20 Bom LR 629: 19 Cr LJ 771: 46 Ind Cas 691 (DB).

**——S. 471 — Forgery — Dishonestly using as genuine a forged document.**

A party merely produced a document in court and included it in the list of documents filed with the statement. He did not tender it in evidence. Held, that no offence was committed within the scope of S. 471, I.P.C. (1908) 35 C 820 (822) (DB).

**——S. 473.**

——S. 473 — Certificate of visitors of lunatic asylum upon the prescribed Government form signed by superintendent of asylum is a public document and its genuineness is presumed. (1936) 63 Cal 425 (DB).

**——Ss. 473, 468 — Penal Code, S. 84 — Murder — Defence of insanity—Assessors finding accused to be insane — Accused sent to Mental Hospital — Superintendent of Mental Hospital writing to Sessions Judge that accused was feigning insanity — Letter not proved — Superintendent not examined —Fresh trial.**

Where the accused pleaded insanity on being charged with murder and the assessors concluded that he was insane and he was sent to the Mental Hospital but on the Superintendent writing to the Sessions Judge that the insanity was feigned, the Judge proceeded to hold a fresh trial acting on this letter and the letter was not proved nor was the Superintendent examined:

Held, that while S. 473, Criminal P. C., compelled a Court to proceed in accordance with the provisions of S. 468, the Court was not precluded from proceeding under S. 463, at any time when an accused was brought before it; that the trial was not contrary to law though the Sessions Judge would have acted wisely if before considering it, he had placed it on the record that he considered the accused to be capable of making his defence and stated the grounds on which he came to this conclusion.

Held, also, that under the circumstances of the case, the accused was insane at the time of committing the murder and that his case fell within S. 84, Penal Code. AIR (V 21) 1934 Lah 123: 35 Cr LJ 869: 148 Ind Cas 987 (DB).

**——S. 476.**

See also Cr. P. C., Ss. 190, 195, 476-A & 476-B.

1. **Abetment.**
2. **Appeal.**
   See also Cr. P. C. S. 476-B
3. **Applicability and scope.**
   See also Cr. P. C., S. 195
4. **Civil or Revenue Court.**
   See also N. 2 and 32.
5. **'Court', meaning of.**
6. **Delay.**
7. **Detention in custody.**
8. **Discretion.**
9. **Findings as to offence.**
10. **Expert evidence.**
11. **Finding of expediency.**
12. **Grounds for interference.**

13. Initiation of proceedings.
14. 'In relation to' meaning of.
See also N. 13.
15. Judicial proceedings.
16. Jurisdiction.
17. Legality of order.
18. Nature of order and proceedings.
19. Notice or opportunity.
See also N. 28.
20. Other offences.
See also N. 24.
21. Orders against strangers.
22. Pending proceedings.
23. Perjury.
24. Powers of Court.
25. Powers of Superior Court.
See also Cr. P. C. Ss. 476 A and 476-B.
26. Preliminary enquiry.
27. Probability of conviction.
28. Procedure.
29. Prosecution upon complaint under.
30. Revision.
See also N 8 & 12 and
Cr. P. C., Ss. 195 & 439.
31. Right of accused.
32. Sanction.
33. Stay of proceedings.

### 1. Abetment.

——S. 476 — **Abetment of offence under S. 205, Penal Code.**

A complaint of abetment of forgery is a complaint of an offence punishable under one of the sections of the Penal Code named in S. 195 (1) (b), namely S. 205, Penal Code. Moreover, the phrase in S. 476, Criminal P. C., "any offence referred to in S. 195, sub-s. (1), cl. (b)" must mean any offence to which S. 195, sub-s. (1), cl. (b) has reference. The Court, therefore, has jurisdiction to make a complaint of abetment of an offence under S. 205, Penal Code. AIR (V 27) 1940 Rang 104 : 1940 Rang LR 12 : 41 Cr LJ 515 : 187 Ind Cas 754 (DB).

——Ss. 476, 195 — **Private complaint against abettor.**

A private complaint can be made against a person who abets an offence for which the Court's sanction should in the first place be obtained under S. 195, Criminal P. C. AIR (Vol 21) 1934 Sind 78 (1): 35 Cr LJ 1251: 151 Ind Cas 60 (1) (DB).

——S. 476 — The Court has no power under S. 476, Criminal P. C., to complain against witnesses for abetting forgery. AIR (Vol 19) 1932 Mad 129: 34 LW 841: 61 MLJ 684: 1931 MWN 1047: 33 Cr LJ 218 (1):136 Ind Cas 48.

——S. 476 — No complaint by Court is necessary in respect of abettors of the offence. 12 Bom LR 383, Diss. AIR (Vol 15) 1928 Lah 787: 10 Lah 442: 115 Ind Cas 529: 30 PLR 517: 30 Cr LJ 485 (DB).

### 2. Appeal.

See also Cr. P. C. S. 476B

——S. 476 — **Interference by Appellate Bench in appeal.**

The power to lay a complaint under S. 476, Criminal P. C., is a discretionary power, and an Appellate Bench of the High Court would not interfere with the exercise of the discretion exercised by a Single Judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record. AIR (Vol 27) 1940 Rang 104: 1940 Rang LR 12: 41 Cr LJ 515: 187 Ind Cas 754 (DB).

——S. 476, 476-B — **Order by Civil Court — Appeal from, whether should be on Civil or Criminal side of High Court.**

Jurisdiction that is exercised by a Court in filing a complaint under S. 476, Criminal P. C., is a jurisdiction exercised under the Criminal P. C., and is, therefore, of a criminal nature. There is no rule that everything done by a Civil Court should be regarded as being of a civil nature.

Consequently, appeals from orders under S. 476 of Civil Court including revisions preferred from appellate orders made under S. 476-B should be filed on the criminal side of High Court and not on civil side. AIR (Vol 26) 1939 Mad 472:49 LW 330: 1939 MWN 243: (1939) 1 MLJ 480: 41 Cr LJ 705: ILR (1939) Mad 439: 189 Ind Cas 25.

**(Overruled in AIR (Vol 27) 1940 Mad 495: 41 Cr LJ 769: 189 Ind Cas 630 (FB)).**

——S. 476 — Section 195 (1) (a), Criminal P. C., applies to non-judicial authorities only while cls. (b) and (c) apply to Courts, a special procedure being provided under Chap. XXXV of the Code, in respect of the latter including an appeal against complaint. AIR (Vol 23) 1936 Pat 74: 16 PLT 808: 2 BR 95: 37 Cr LJ 104 (2): 159 Ind Cas 503.

——S. 476, 475-B — **Munsif holding enquiry under S. 476 — Direction that complaint be lodged before District Magistrate — Direction, whether amounts to decree — Appeal from such order to District Judge — District Judge, whether can transfer it to Subordinate Judge for disposal — Case is governed by Criminal Procedure Code and not any civil enactment.**

Where a Munsif, after holding preliminary enquiry under S. 476, Criminal P. C., directs that the complaint should be lodged before the District Magistrate under S. 195 (1) (b) and (c) read with S. 476, Criminal P. C., the direction does not amount to a decree, and where an appeal is filed to the District Judge from such a direction, the power of the District Judge to transfer the case is not governed by any civil enactment but by the Criminal P. C. And since the Criminal P. C. does not provide for any transfer in a matter like this, the Subordinate Judge, on transfer being made to him, is not empowered to hear the appeal but it should be disposed of by the District Judge himself. AIR (Vol 22) 1935 All 212: 1935 ALJ 66: 1935 AWR 62: 36 Cr LJ 1253: 57 All 687: 157 Ind Cas 900.

——S. 476 — It is discretionary with the Income-tax officer making a complaint in respect of false return to record a finding that he is of opinion that an offence referred to in S. 195 is committed. Under S. 476B the mere fact that a complaint has been filed opens the way to an appeal. An appeal can be filed as soon as the complaint is made and the appeal would be not against the finding but against the filing of the complaint. AIR (Vol 17) 1930 Rang 201: 8 Rang 25: 1930 Cr C 661: 125 Ind Cas 266: 31 Cr LJ 793.

——S. 476 — **Limitation.**

In case of a complaint under S. 476, limitation must be held to run from the date of the complaint, for the words of the section make it clear that it is only on the refusal to make a complaint or on a complaint being made that an appeal is possible. AIR (V 16) 1929 Cal 521 : 33 CWN 329 : 118 Ind Cas 889: 56 Cal 932: 30 Cr LJ 974 : 1929 Cr C 184 (DB).

——S. 476 — An appeal against an order made by a Judge exercising the original jurisdiction of the Court to a Division Bench of the Court lies under S. 476-B, AIR (V 16) 1929 Cal 521 : 33 CWN 329 : 118 Ind Cas 889 : 56 Cal 932 : 30 Cr LJ 974 : 1929 Cr C 184 (DB).

**——S. 476 — Complaint under — Appeal from is regulated by Cr. P. Code, S. 424.**

Chotzner, J. — When a complaint has been made under S. 476, the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate and that appeal must be dealt with as an ordinary appeal under the Cr. P. Code, as is provided for in S. 424 of the Code.

Duval, J. — The appeal must be treated as a miscellaneous appeal and regulated by O. 41, C. P. Code and not by Ss. 422-424, Cr. P. Code. AIR (V 14) 1927 Cal 284 : 100 Ind Cas 351 : 54 Cal 355 : 31 CWN 281 (DB).

——S. 476 — Sanctioning Court cannot be asked to correct defects in complaint — Summary disposal of appeal is bad. AIR (V 14) 1927 Cal 284 : 54 Cal 355 : 31 CWN 281 : 100 Ind Cas 351 (DB).

**——S. 476 — Appeal lies to civil appellate Court and is governed by provisions of C. P. Code and not of Cr. P. Code.**

Where it is a civil Court which has made an order making or filing a complaint under S. 476 of the Cr. P. Code, the appeal against such an order must lie to and be heard by the authority or tribunal to which such civil Court is subordinate, i. e., to an appellate Court exercising civil appellate jurisdiction and therefore the procedure governing an appeal of this description is one which is to be sought for within the four corners of the C. P. Code. AIR (V 14) 1927 Cal 98 : 99 Ind Cas 124 : 53 Cal 827 : 28 Cr LJ 92 (DB).

**——S. 476 — Order by Small Cause Court — Appeal lies to High Court.**

An appeal against an order of the Court of Small Causes, under S. 476 of the Cr. P. Code, directing that a complaint under Ss. 193 and 196 of the Indian Penal Code be filed against the appellants lies to the High Court on its Appellate Side. For this purpose Original Side of the High Court is not different from Appellate Side. AIR (V 12) 1925 Mad 609 : 48 MLJ 290 : 86 Ind Cas 449 : 48 Mad 395 : 21 MLW 664 : 26 Cr LJ 801 (DB).

——S. 476—No appeal lies against an order under S. 476 to the Court to which the Court passing the order is subordinate. AIR (V 11) 1924 Bom 347 : 48 Bom 401 : 26 Bom LR 289 : 81 Ind Cas 947 : 25 Cr LJ 1123 (DB).

**——S. 476 — Sessions Judge.**

A Sessions Judge has no power to deal in appeal with an order of a lower court under S. 476 Cr.P. C. AIR (V 6) 1919 Pat 319 : 20 Cr LJ 413 : 51 Ind Cas 173.

**——S. 476 — Appeal — Refusal to take action.**

A Musif's order refusing to take action, on application by a party, against another party is not appealable. AIR (V 1) 1914 All 373 : 15 Cr LJ 575 : 12 ALJ 684 : 25 Ind Cas 327.

**——S. 476 — Appellate Court — Jurisdiction to direct prosection.**

Where the decree in a civil suit is confirmed on appeal, the first court as well as the Appellate court can take action under S. 476 against a party for forgery committed in a document filed in the first court. (1912) 16 CLJ 569 : 14 Cr LJ 32 : 18 Ind Cas 176 (DB).

**3. Applicability and Scope.**

See also Cr. P. C. S. 195.

(a) General.
(b) Robbery and abetment.

(a) General.

**——S. 476 — The term "Court" interpreted — If S. 476 applied to proceeding before a Munsif about deposit under S. 83, T. P. Act.**

Held, a Munsif's Court accepting a deposit under S. 83, T. P. Act, is a Court for the requirements of S. 476, Criminal P. C., and so it can hold an enquiry under the same section. AIR (Vol 34) 1947 Pat 37: 228 Ind Cas 309: 48 Cr LJ 203: 25 Pat 385 (DB).

**——S. 476 — Magistrate making complaint — It is not obligatory on Magistrate to act on evidence taken on oath.**

The wording of S. 476 does not make it compulsory that all the material upon which a Magistrate acts in making a complaint should be legally admissible evidence taken on oath. Therefore a complaint made by a Magistrate, acting on the post mortem report of a medical officer without examining him as a witness under the proceedings under S. 476 is justified. AIR (Vol 33) 1946 Oudh 227: 223 Ind Cas 527: 47 Cr LJ 531.

**—Ss. 476, 195 (1), cls. (b) and (c) — S. 476 operates to remove bar created by S. 195 (1), (b) and (c).**

Sections 195 and 476 must be read together. Section 195, sub-s. (1) lays down a bar to the cognizance of certain offences. Section 476 lays down the procedure as to how the bar imposed by S. 195, sub-s. (1), cls. (b) and (c) is to be removed. Section 476 operates only to remove the bar created by S. 195, sub-s. (1), cls. (b) and (c). Where, therefore, there is no bar created by these clauses of S. 195 sub-s. (1), S. 476 has no operation. From S. 195, sub-s. (1), cl. (c) it is clear that it bars the cognizance of the offence of forgery and certain connected offences when the offence is committed by a party to any proceedings in Court. It creates no bar if such offence is committed by a person who is not a party to any proceeding in Court. Consequently, in such cases, S. 476 has no application. Hence, where in proceedings under S. 83, T. P. Act, a pleader forges a compromise petition on behalf of his client and withdraws the amount, the Court is not competent to start a proceeding against him under S. 476, Criminal P. C., and enquire into the alleged offence of forgery because the pleader cannot be said to be a party to proceedings under S. 83, T. P. Act. AIR (Vol 32) 1945 Pat 362: 24 Pat 174: 47 Cr LJ 183: 12 BR 136: 221 Ind Cas 471: 26 Pat LT 264 (DB).

——S. 476 — The scope of S. 195, Criminal P. C., as regards the making of complaints is not restricted to the Courts detailed in S. 476 of the Code. AIR (Vol 27) 1940 Cal 286: 44 CWN 530: 41 Cr LJ 662: ILR (1940) 2 Cal 14: 188 Ind Cas 686 (DB).

**——S. 476 — Applies to summons case as well.**

"Inquiry" in S. 476, Criminal P. C., includes any proceedings under Chap. XVI, Criminal P. C. Section 476 is not, therefore, restricted to a warrant case, but applies to a summons case also. AIR (Vol 27) 1940 Lah 233: 42 PLR 505: 41 Cr LJ 766: ILR (1941) Lah 145: 189 Ind Cas 628.

**——S. 476 — Departmental enquiry held by District Judge — S. 476 is not applicable.**

The Amin of the District Court was entrusted under a warrant of that Court to sell certain properties belonging to the judgment-debtor in certain suit. When the Amin went to the village, the sureties were absent and so he could not get

at the properties and the Village Munsif was also absent and the Amin got a false endorsement from two persons in the village on the back of the warrant setting out his presence there and his inability to hold the sale on account of absence of the sureties. The Government was the decree-holder in the suit and the Collector reported the matter to the District Judge. On enquiry by the District Judge, it transpired that these two persons had deposed falsely in the enquiry before the Tahsildar to save the Village Munsif who was guilty of dereliction of duty by absenting himself from the village on the day the sale was to be conducted by the Amin and when the Amin was there. The District Judge ordered proceedings under Ss. 195 and 476, Criminal P. C., for offences against the two villagers under Ss. 191 and 193, I. P. C., and preferred a complaint:

Held, that the enquiry by the District Judge was a departmental enquiry and S. 476, Criminal P. C., was not applicable. AIR (Vol 27) 1940 Mad 892: (1940) MWN 805 (2): 52 LW 345 (1): 42 Cr LJ 224: 191 Ind Cas 761.

——S. 476 — There is no provision of law by which Court can refuse to permit prosecution under S. 500, Penal Code, where facts would justify such prosecution because the proceedings have not been initiated under S. 476, Criminal P. C., by the time before which the offence is alleged to have been committed and because the prosecution is designed to evade provisions of S. 195, Criminal P. C. AIR (Vol 25) 1938 Cal 527: 42 CWN 674: 39 Cr LJ 730: 176 Ind Cas 572 (DB).

**——S. 476 — Complaint under S. 500, Penal Code, filed without complaint of Court.**

Where defamatory statements are made in an affidavit in the course of judicial proceedings, it cannot be said that no complaint of defamation relating to them can be made without complaint of the Court.

Where it is a matter of doubt whether the facts complained of do constitute one of the offences, as provided in S. 193, I. P. C., relating to the administration of justice, it cannot be said that the complainant is thereby debarred from placing his complaint under S. 500, I. P. C. The filing of the complaint under S. 500, does not amount to an evasion of law, the complaint of the Court not being necessary in such a case. AIR (Vol 25) 1938 Sind 129: 39 Cr LJ 736: 176 Ind Cas 365 (DB).

——S. 476 — Section 195 (1) (a), Criminal P. C., must be read with S. 476, Criminal P. C. AIR (Vol 24) 1937 All 714: 1937 ALJ 1073: ILR (1937) All 779: 39 Cr LJ 38: 1937 AWR 748: 171 Ind Cas 994 (DB).

——S. 476 — The language of S. 195, Criminal P. C., must be read in conjunction with the terms of S. 476, Criminal P. C. AIR (Vol 21) 1934 Mad 316: 35 Cr LJ 780: 66 MLJ 471: 57 Mad 682: 39 LW 693: 1934 MWN 609: 148 Ind Cas 851 (2) (DB).

——S. 476 — Mere fact that the Judge had made a reference to S. 476, Criminal P. C. does not make the complaint anytheless one under S. 195, Criminal P. C. AIR (Vol 21) 1934 Oudh 277: 35 Cr LJ 990: 11 OWN 720: 149 Ind Cas 377.

——S. 476 — Section 476, Criminal P. C., and S. 195 (b), Criminal P. C. apply not only when the offence is committed in a Court of law, but also when it is committed in relation to a proceeding in such Court. AIR (Vol 20) 1933 All 318: 34 Cr LJ 686: 144 Ind Cas 194.

——S. 476 — Per Beaumont J. — Both under the old Code and the new Code S. 476 is a corollary of S. 195, Criminal P. C. AIR (Vol 18) 1931 Bom 305: 55 Bom 461: 33 Bom LR 296: 32 Cr LJ 1017: 133 Ind Cas 269 (DB).

**——S. 476 — Person not being party — Right to protection under S. 195 (1) (c).**

Sub-S. (4) of S. 195 means that where a party to a proceeding is alleged to be guilty of conspiracy to commit or of abetment of an offence of forgery committed in respect of a document produced or given in evidence in a proceeding in any Court the bar imposed by S. 195 applies but a person who is not a party gets no protection from Cl. (c) of sub-Sec. (1) of S. 195 and is not within the purview of S. 476 in respect of the offences mentioned in Cl. (c). S. 476 can only apply to cases where by reason of a provision in the Code the Magistrate requires a complaint by a Court in order that he may take cognizance of the charge. AIR (Vol 18) 1931 Cal 438: 58 Cal 727: 132 Ind Cas 241: 32 Cr LJ 883: 35 CWN 98 (DB).

**——S. 476 — Whether review lies. (Quaere)**

It is doubtful whether a Court can review its order refusing to make a complaint under S. 476. However, in view of an appeal being allowed by S. 476B a review would appear undesirable. AIR (Vol 14) 1927 All 571: 49 All 752: 25 ALJ 639: 102 Ind Cas 351: 8 AI Cr R 49: 8 LRA Cr 97: 28 Cr LJ 543.

——S. 476 — Section 339 (1) does not cancel S. 476. It merely imposes an additional condition as essential to the institution of a prosecution for perjury by an approver, and even when that condition is satisfied the prosecution can still be initiated only on a complaint by the Sessions Court or the High Court. AIR (Vol 14) 1927 Nag 189: 103 Ind Cas 101: 23 NLR 35: 28 Cr LJ 645.

**——S. 476 — Witness committing offence of forgery — Complaint can be made.**

The legislature, in introducing the amendments of 1923, intended S. 476 to be co-extensive in its scope with clauses (b) and (c) of S. 195 (1) and there is nothing in S. 195 and S. 476 to prevent a Court from making a complaint under the ordinary law in respect of the offence under S. 471, I. P. C. which is found to have been committed before it, either by a party or a witness. AIR (Vol 13) 1926 All 21: 24 ALJ 122: 26 Cr LJ 1506: 6 LRA Civ 630: 6 LRA Cr 213: 90 Ind Cas 290.

**——S. 476 — Witness leaving jurisdiction of Court for avoiding to give evidence — High Court Judge is not bound to proceed under Cr. P. Code, S. 476, or 480.**

Where a witness left not only the jurisdiction of the Court but actually went out of British India and admittedly did so in order to avoid having to give evidence, the contempt is gross and for such a contempt proceedings under O. 16, R. 17, C. P. Code, are inadequate and a Judge of the High Court is neither bound, nor ought in such a case to proceed under S. 480 or S. 476, Cr. P. Code. AIR (Vol 13) 1926 Rang 188: 98 Ind Cas 57: 4 Rang 257: 27 Cr LJ 1241 (DB).

——S. 476 — The offence must be one which appears to have been committed in or in relation to a proceeding in the Court which passes the order under S. 476. AIR (Vol 11) 1924 All 770: 82 Ind Cas 285: 22 ALJ 772: 46 All 851: 5 LRA Cr 121: 25 Cr LJ 1277.

**——S. 476 — Opinion need not be formed during the progress of proceedings.**

The terms of S. 476, Cr. P. Code indicate that the desirability of prosecuting the offender must be present to the mind of the Court during the proceedings in the course of which the offence was committed, or brought to its notice. But this does not mean that unless it is during the pro-

gress of the actual case that this opinion is formed, no prosecution can be ordered under S. 476, Cr P. Code. AIR (Vol 11) 1924 Rang 54: 1 Rang 372: 2 Bur LJ 154: 26 Cr LJ 523: 85 Ind Cas 362.

——S. 476 — It is only in cases where there is a judicial proceeding pending that S. 476 has any applicability. Where an application is made by a person alleging that he is the husband of X and that X was about to commit a bigamous marriage with another, but on enquiry it is found that the statement of his marriage with X is false, proceedings cannot be taken under S. 476. AIR (Vol 7) 1920 Sind 121: 87 Ind Cas 964: 26 Cr LJ 1044 (DB).

**——Ss. 476 and 195 — "Any offence" meaning of.**

The words "any offence referred to in S. 195" in S. 476 mean offences within the scope of S. 195 and not all offences against sections of the Penal Code enumerated in S. 195 whether or not they fall within the scope of that section. The words incorporate the conditions laid down in S. 195 for taking cognizance of the offence by a Court. 22 C. 1004, Not foll. AIR (V 6) 1919 Mad 7 : 42 Mad 540 : 9 LW 422 : 36 MLJ 448 : 20 Cr LJ 344 . (1919) MWN 459 : 26 MLT 92 : 50 Ind Cas 824 (FB).

**——Ss. 476 and 195 — Any offence of forgery — Order directing prosecution of persons not parties to the suit for using as genuine a forged document.**

The provisions of S. 476 are complete as they stand, and if the offence in question be one of the kind referred to in S.195 and if it be either committed before the Court or brought under its notice in the course of a judicial proceeding, S. 476 can be invoked. AIR (Vol 5) 1918 All 382: 40 All 24: 15 ALJ 817: 19 Cr LJ 15: 42 Ind Cas 927.

**——Ss. 476 and 195 — Court in Presidency Towns — Power to act.**

S. 476 does not apply to an offence committed before a court in Presidency towns. It is not competent to the High Court to direct under S. 476, prosecution for an offence brought to its notice. The qualifications mentioned in S. 195, Cr. P. C. are to be treated as incorporated in S. 476. AIR (V 5) 1918 Cal 346: 19 Cr LJ 638: 45 Ind Cas 686 (DB).

**——S. 476 — Person against whom proceedings are taken — Not an accused.**

In proceedings under S. 476 of the Cr. P. Code the person against whom the proceedings are taken is not an accused person. AIR (Vol 5) 1918 Pat 590: 4 Pat LW 65: 19 Cr LJ 217: 43 Ind Cas 793.

——Ss. 476 and 195 — The prosecution of a complaint being justifiable only in the general public interests it should be carefully guarded against from becoming a means of oppression or revenge in the hands of individuals and therefore the appropriate course would be to give an order under S. 476 rather than under S. 195 Cr. P. C. Per Walsh, J.: — Absence of an authority to decide on prosecutions under S. 211 is a flaw in the criminal procedure of this country. AIR (Vol 4) 1917 All 399: 18 Cr LJ 680: 40 Ind Cas 328 (DB).

——S. 476 — The words "any offence referred to in S. 195 " in S. 476 mean the offences covered by the sections of the Penal Code mentioned in S. 195 and committed under the particular circumstances described in that section. The weight of authority is in favour of the restricted application of S. 476. AIR (Vol 4) 1917 Lah 333: 10 PR Cr 1917: 18 Cr LJ 544: 39 Ind Cas 688.

**——S. 476 — False complaint — No complaint preferred to the Magistrate — Police report.**

Where no complaint was preferred to a Magistrate but he made an order under S. 476 against the informant to the Police on the report of the Police that the case was false, held that the order was not sustainable as the proceedings did not come under any of the provisions of the Code. (1913) 17 CWN 824: 14 Cr LJ 387: 20 Ind Cas 211 (DB).

**——S. 476 — Perjury committed before Munsif — Order for prosecution by his successor in office — Legality.**

An order for prosecution passed by a Munsif for perjury committed before his predecessor in office, does not fall within S. 476. (1905) 9 CWN 859 (860) : 4 Cr LJ 209 (DB).

**(b) Robbery and abetment.**

**——S. 476 — Robbery, and its abetment are not within the scope of S. 476 proceedings.**

Section 476, Cr. P. C. empowers any Civil, Criminal or Revenue Court to send persons in custody to the nearest 1st Class Magistrate when it is of opinion "that there is ground for enquiry into any offence referred to in S. 195 and committed before it or brought under its notice in the course of a judicial proceeding." But robbery and abetment of robbery are not offences referred to in S. 195. AIR (Vol 9) 1922 Sind 9 : 23 Cr LJ 97 : 15 SLR 119 : 65 Ind Cas 481 (DB).

**4. Civil or Revenue Court.**

See also N 2 and 34.

**——Ss. 476, 94 — Civil Court taking action.**

Where a Civil Court conducts an enquiry under S. 476, Criminal P. C., it has no jurisdiction to act under S. 94, Criminal P. C. It cannot order the person proceeded against to give evidence himself or produce documents against his own interest. AIR (Vol 29) 1942 Nag 73 : 1942 NLJ 188 : ILR (1942) Nag 667 : 200 Ind Cas 68.

**——S. 476 — Special Judge under U. P. Encumbered Estates Act, 1934.**

Special Judge sitting as a Court under the U. P. Encumbered Estates Act, has jurisdiction as a Civil Court to proceed under S. 476, Criminal P. C. AIR (Vol 28) 1941 Oudh 48 : 1940 OWN 1004 : 42 Cr LJ 85 : 1941 AWR 8 : 16 Luck 237 : 191 Ind Cas 146.

**——S. 476 — Civil or Revenue Court acting under S. 476 or S. 476-A or S. 476-B, whether becomes Criminal Court.**

There is nothing in the words of Ss. 195, 476, 476-A or 476-B, Criminal P. C., or in the combined effect of the operation of these sections to warrant the view that a Civil or Revenue Court acting u/s. 476 or S. 476-A or S. 476-B is thereby altered into a Criminal Court. AIR (Vol 28) 1941 Rang 163 : 1941 Rang L R 90 : 42 Cr L J 735 : 195 Ind Cas 444 (DB).

——S. 476 — A Civil Court exercising jurisdiction under S. 476 does not cease to be a civil Court. AIR (Vol 16) 1929 All 774 : 51 All 344 : 1929 ALJ 55 : 10 LRA Cr 121 : 12 AI Cr R 199 : 111 Ind Cas 595.

**5. Court, meaning of.**

**(a) General.**
**(a-1) Election Commissioners.**
**(b) New Court.**
**(c) Original Court.**
**(d) Superior Court.**
**(e) Succeeding Court.**
**(f) Transferee Court.**
**(g) Under Police Standing Orders (Madras).**

**(a) General.**

**——S. 476 — Munsif dealing with deposit under S. 83, T. P. Act — Jurisdiction to hold inquiry into alleged offence under S. 476.**

A Munsif before whom a deposit under S. 83, T. P. Act, is made is a Court for the purposes of S. 476, Cr. P. Code, and can therefore hold an inquiry under S. 476. AIR (Vol 34) 1947 Pat 37 : 25 Pat 385 : 13 BR 183 : 48 Cr LJ 203 : 228 Ind Cas 309 (DB).

——S. 476 — 'Court' — Special Judge appointed under Special Criminal Courts Ordinance—Territorial jurisdiction of. AIR (Vol 33) 1946 Nag 38.

**——S. 476 — District Magistrate acting under S. 8 (2), Sind Frontier Regulation (III of 1892), if Court.**

Even though a District Magistrate acting under S. 8 (2), Sind Frontier Regulation does not act upon evidence which he himself has heard, he is still a Court within the meaning of S. 476, Criminal P. C. AIR (Vol 29) 1942 Sind 75 : I L R (1941) Kar 66 : 43 Cr LJ 705 : 200 Ind Cas 630 (DB).

**——S. 476 — Company Judge.**

Company Judge conducting proceedings under S. 195, Companies Act is a "Court" within the meaning of S. 476, Criminal P. C. AIR (Vol 28) 1941 Lah 52 : ILR (1940) Lah 669 : 42 Cr LJ 351 : 193 Ind Cas 170 (DB).

**——Ss. 476, 526 — S. 476 contemplates Court itself.**

Section 476, Criminal P. C., refers not to the "Magistrate" but to the "Court". What the section contemplates is the Court itself and not the personality of the trying Magistrate. Hence a a request made for the transfer of proceedings under S. 476 to the file of the Magistrate before whom the alleged offence was committed on the ground that he is the proper Magistrate to appreciate, whether the complaint under S. 476 should or should not be made, although otherwise very reasonable, cannot be granted by reason of the words of S. 476. AIR (Vol 26) 1939 Sind 181 : 40 Cr LJ 750 : 183 Ind Cas 195.

**——S. 476 — Panchayat Court — False statement made before — Prosecution — Who can complain.**

A panchayat exercising jurisdiction in civil matters is a Civil Court and is subject to the jurisdiction of the District Judge who is exercising principal civil jurisdiction. To such a case S. 195 (3), Cr. P. Code applies. Where in respect of a false statement made before it the Panchayat made a report to the Collector who thereupon launched a prosecution, held that the complaint of the Collector could not be entertained. AIR (Vol 18) 1931 All 141 : 1931 Cr C 200 : 1930 ALJ 1520 : 32 Cr LJ 558 : 52 All 1018 : 130 Ind Cas 488.

**——S. 476 — Applicability of S. 24, Civil P. C.**

The word "proceeding" in S. 24 covers all proceedings contemplated at the date when the C. P. Code of 1908 was passed & not a special proceeding not then in contemplation but established by a subsequent Act, namely, the Criminal Procedure (Amendment) Act (Act XVIII of 1923). Hence the section cannot be invoked to allow a Court other than the Court, in the course of proceedings in which, perjury or forgery was committed, or a Court to which appeals ordinarily lie from that Court to entertain the question of preferring a criminal complaint under S. 476, Cr. P. Code. AIR (Vol 14) 1927 All 469 : 25 ALJ 433 : 49 All 460 : 101 Ind Cas 247.

**——S. 476 — Court receiving guardian's report.**

The Court receiving such report acts as a "Court" and not in its administrative capacity. AIR (Vol 14) 1927 Nag 184 : 28 Cr LJ 388 : 7 AI Cr R 521 : 100 Ind Cas 1044.

——S. 476 — The expression 'Court' in S. 195 is of a wider scope than the expression "civil, revenue or criminal Court" in S. 476. AIR (Vol 13) 1926 All 30 : 48 All 60 : 23 ALJ 956 : 6 LRA Cr 153 : 26 Cr LJ 1485 : 89 Ind Cas 1053.

**——S. 476 — Dealing with application under S. 83, T. P. Act.**

A Judge receiving and dealing with a petition under S. 83 of the T. P. Act, is a Court within the meaning of S. 476 of Cr. P. Code. AIR (Vol 12) 1925 Pat 330 : 3 Pat LR Cr 51 : 6 PLT 225 : 4 Pat 24 : 26 Cr LJ 170 : 83 Ind Cas 730 (DB).

**——S. 476 — Officer acting under Bihar and Orissa Public Demands Recovery Act, Ss. 57, 58, 60, 62, 66.**

A certificate Officer under Ss. 57, 58 and 66 of the Bihar and Orissa Public Demands Recovery Act, 1914 is, while acting in such capacity, a Court. Where a certificate Officer enquires into the question of an affected payment where a certificate has been issued the proceeding before him is a judicial proceeding. It is not legally necessary that notice should be given to show cause, but in fairness, parties should be given an opportunity of being heard before sanction is granted. AIR (Vol 6) 1919 Pat 212 : 4 Pat LJ 475 : (1919) Pat HCC 325 : 20 Cr LJ 529 : 51 Ind Cas 769 (DB).

**——S. 476 — "Court" — Meaning — Judicial proceeding" in the section.**

A Court taking evidence in a proceeding of which it is entitled to take cognizance under the Legal Practitioners Act is a "Court" within the meaning of the section and the proceeding is a "judicial proceeding". A proceeding before a Court of justice acting in the administration of justice is a "judicial proceeding". A District Court is not a "Court" when it takes cognizance of a charge of professional misconduct against a second grade pleader in the sub-court. In exceptional cases only order under S. 476 will be revised either under S. 115, C. P. C. or S. 107, Govt. of India Act. AIR (Vol 5) 1918 Mad 398 : 32 MLJ 402 : (1917) MWN 303 : 6 LW 364 : 18 Cr LJ 785 : 41 Ind Cas 305.

**——S. 476 — C. P. Code, S. 70.**

A Collector acting under S. 70, C. P. C. has power to pass orders under the section. High Court has no power of revising the order. AIR (Vol 4) 1917 All 59 : 14 ALJ 1077 : 18 Cr LJ 307 : 38 Ind Cas 419.

**——S. 476 — "Court" — Meaning of — Officer recording tenant's rights — Statements before.**

A revenue officer preparing a Record of Rights under S. 164 to 167 Estates Land Act is only exercising an executive function of the Government and is not a Court within S. 476 and cannot give sanction for prosecution for the perjury for statements made before him. Per Seshagiri Iyer, J. The test to be applied for ascertaining whether an officer is a Court is to see whether he has power to record evidence and to come to a judicial determination on the evidence. Therefore officers exercising quasi-judicial functions are not generally regarded as Courts. AIR (V 3) 1916 Mad 555: 28 MLJ 123: 2 LW 180: (1915) MWN 177: 16 Cr LJ 241 : 39 Mad 414 : 28 Ind Cas 97 (DB).

**——S. 476 — Assistant Collector — Execution of decree — C. P. Code, S. 70.**

An Assistant Collector has no jurisdiction to order prosecution of an offence under S. 182, I. P. C. which is committed by a person in the course of making an application under R. 30 of the rules framed by the Local Government under Ss. 68 and 70, C. P. C. since the Assistant Collector has no powers of either a Civil Revenue or

Criminal Court while receiving such application. AIR (Vol 2) 1915 All 283 : 37 All 334 : 16 Cr LJ 457 : 13 ALJ 479 : 29 Ind Cas 89.

**——S. 476 — Mamlatdar's Court — Mamlatdar's Court Act.**

A Mamlatdar's Court is a civil court under S. 476 of Cr. P. C. (1913) 15 Bom LR 53 : 14 Cr LJ 80 : 18 Ind Cas 416 (DB).

**——S. 476 — District Registrar — Jurisdiction.**

A District Registrar is not a "Court" as provided in S. 195. He has therefore no jurisdiction to pass an order under S. 476. What is not a "Court" for the purpose of S. 195 is also not a "Court" for S. 476. AIR (V 1) 1914 Bom 202 : 16 Bom LR 946 : 16 Cr LJ 106 : 27 Ind Cas 154 (DB).

**——Ss. 476 and 439—Court, meaning of—Income-tax Officer is not Criminal Court — Direction for prosecution — Delay.**

A Divisional Officer acting under the Income-tax Act as an appellate tribunal is not a Criminal Court, though a Court. The High Court has no power to revise the proceedings of the Officer under S. 476. No revision petition lies to the Board of Revenue against an order for prosecution passed by the Divisional Officer under S. 476, in connection with an income-tax appeal. Per Sundara Aiyar, J. In passing an order under S. 476 long after the proceedings, the Divisional Officer, could not be said to have passed it without jurisdiction. The High Court is not bound to interfere and quash proceedings on certiorari even in cases where the defect can be said to be one of jurisdiction. (1913) 36 Mad 72 : 23 MLJ 393: 13 MLT 367 : (1912) MWN 1012 : 13 Cr LJ 723 : 16 Ind Cas 755 (DB).

**——S. 476 — Legal Practitioner's Act (XVII of 1879) S. 23.**

For the purposes of S. 476, a Magistrate holding an enquiry under S. 23 of the Legal Practitioner's Act is a Court. (1912) 9 ALJ 156 : 13 Cr LJ 190 : 13 Ind Cas 1006.

——S. 476 — A Magistrate cannot act under S. 476 when the offence is not committed before him or brought under his notice, as a court in the course of a judicial proceeding. (1910) 11 CLJ 111 : 11 Cr LJ 212 : 5 Ind Cas 721 (DB).

**——S. 476 — Dy. Collector.**

Dy. Collector directing a prosecution under S. 177 I. P. C. against the applicant for not passing receipts for rent and for not recording the correct realization, was a revenue officer under S. 4 (9) of the U. P. Land Rev. Act and not a Court; His order for prosecution was therefore illegal. (1910) 11 Cr LJ 514 : 13 OC 198 : 7 Ind Cas 612.

**——S. 476 — Income-tax Collector, prosecution by.**

Criminal proceedings instituted on prosecution by an income-tax collector who is not a Court within S. 476 Cr. P. C. should be quashed. (1909) 3 S LR 66 : 10 Cr LJ 395 : 3 Ind Cas 886 (DB).

**——S. 476 — Income-tax Collector — Sanction by the Income-tax Collector — Revision by the High Court.**

The Income-tax Collector is not a court within the meaning of S. 476. (1906) 8 Bom LR 477 (478) : 4 Cr LJ 34 (DB).

**——S. 476 — Rev. Officer holding enquiry under S. 164, of the Mad. Estates Land Act.**

Quaere—Whether a Rev. Officer holding enquiry under S. 164 of the Mad. Est. Land Act is a Court within S. 476. 7 Cr LR 253 (DB).



**(a-1) Election Commissioners.**

**——Ss. 476 and 195 — 'Court' — Election Judge under the provisions of the U. P. Municipalities Act — Complaint by — Cognizance, if can be taken.**

An election Judge under the provisions of the U. P. Municipalities Act is not a "Court" within the meaning of Ss. 476 and 195, Cr. P. Code and so a complaint by such a Judge is not one which could be entertained by a magistrate under S. 195 (1) of the Cr. P. Code. But the Magistrate could take cognizance of it under S. 190 (1) (a) of Cr. P. Code. AIR (V 34) 1947 All 139 : ILR (1947) All 297 : 229 Ind Cas 161 : 48 Cr LJ 282 : 1947 ALJ 1 : 1947 AWR (HC) 18 : 1947 ALW 102.

——S. 476 — An Election Commissioner hearing a dispute regarding an election held under the Madras Local Boards Act, 1920, is a Civil Court within the meaning of S. 476, Criminal P. C. AIR (V 22) 1935 Mad 673 : 1935 MWN 152 (2) : 41 LW 503 : 36 Cr LJ 895 : 69 MLJ 589 : 53 Mad 954 : 156 Ind Cas 311 (DB).

——S. 476 — The Election Commissioners are not a "civil Court" within the meaning of S. 476, Cr. P. Code, and they have no jurisdiction to proceed under that section. The complaint which they purport to make under S. 476 must be deemed to be one under S. 195 (1) (b) by a Court in its wider meaning excluding a "Civil, Revenue or Criminal Court." AIR (V 12) 1925 All 737 : 89 Ind Cas 630 : 47 All 934 : 23 ALJ 845 (DB).

**(b) New Court.**

——S. 476 — An offence of perjury was committed before the Sessions Court at A, commitment to which was made by Magistrate at B. Subsequently another Sessions Division was constituted at K for the district in which B was included as distinct from A.

Held, that an application to the Court at K in respect of the offence was not proper. AIR (V 14) 1927 Bom 47 : 28 Bom LR 1296 : 28 Cr LJ 49: 7 AI Cr R 206 : 99 Ind Cas 81 (DB).

**(c) Original Court.**

**——S. 476 is self-contained — Ordinarily the original Court should prefer complaint.**

Section 476 must be construed as self-contained and exhaustive, in respect of the matter of a Court making complaint against litigants on the ground of perjury or forgery. The legislature did not intend the power of making a complaint conferred by this section to be exercised by anyone but the Court before whom the offence has been committed or a Court to which appeals from that Court ordinarily lie. The section contemplates that ordinarily the Court to prefer the complaint shall be the original Court which heard the case and that an appellate Court should only make a complaint when the suit has been before it on appeal or when the original Court has granted or refused a complaint and its order is appealed from to the appellate Court. It was not intended by the legislature that while proceedings were going on before the original Court the appellate Court should step in and deal with the matter. The District Court, apart from its powers as an appellate Court under S. 476 (B), can only consider the desirability of itself preferring a complaint, if there is some prima facie ground for its so doing. Such prima facie ground will exist if the original Court is considering the matter and certainly will not exist if the appellate Court has no reason to believe that sanction should be granted. AIR (V 14) 1927 All 469: 49 All 460 : 25 ALJ 433 : 101 Ind Cas 247.

——S. 476 — Proceedings under S. 476 cannot be taken by Magistrate before whom complaint is filed but thereafter is transferred to another Magis-

trate for disposal. AIR (V 13) 1926 Cal 788 : 53 Cal 488 : 30 CWN 504 : 27 Cr LJ 648 : 94 Ind Cas 600 (DB).

——S. 476 — If a Court is of opinion that there is ground for enquiry into any offence referred to in S. 195 of Cr. P. Code committed before it in the course of a judicial proceeding even if the case has passed out of the hands of that Court and been decided by another Court, it cannot be held that the first Court's powers under S. 476 of the Cr. P. Code came to an end. The circumstances that a case has passed out of the hands of a Court in so far as an effective order regarding its disposal is concerned does not deprive the Court of its jurisdiction under S. 476. AIR (V 9) 1922 All 233 : 68 Ind Cas 827 : 20 ALJ 666 : 23 Cr LJ 603.

——S. 476 — Only the judge or the Magistrate who actually tried the case in which the offence was committed can proceed under S. 476. 6 PR 1909 Cr : 12 PWR 1909 Cr : 104 PLR 1909 : 10 Cr LJ 158 : 2 Ind Cas 812 (DB).

**(d) Superior Court.**

**——Ss 476, 195 — Trial in High Court — Any Judge, if can deal with the matter.**

The complaint required by S. 195, Criminal P. C., is the complaint of the Court in which the documents were given in evidence and not of the trial Judge and when a suit is tried by a Judge of the High Court, the term 'Court' occurring in the section must be taken to mean 'the High Court'. There is nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience, this would seldom be done. The fact that the matter was placed before another Judge, the trial Judge being absent at the time, is immaterial. AIR (Vol 24) 1937 Mad 716 : 45 MLW 257 : (1937) 1 MLJ 396 : 1937 MWN 330 : ILR (1937) Mad 612 : 38 Cr LJ 871 : 170 Ind Cas 255 (DB).

**——S. 476 — "Court", meaning of — Superior Court.**

Power to make complaint is not confined to Court taking cognizance but superior Court to whom it is transferred or who has withdrawn case to its file under S. 528 may make complaint. AIR (Vol 16) 1929 Cal 724 : 33 CWN 1058 : 1929 Cr C 360 : 31 Cr LJ 430 : 122 Ind Cas 627 (DB).

——S. 476 — A Judge of the High Court can grant a direction to prosecute under S. 476, although the matter out of which the action arose was heard by another Judge of the Court. AIR (Vol 12) 1925 Bom 436 : 49 Bom 710 : 27 Bom LR 616 : 26 Cr LJ 1189 : 88 Ind Cas 709.

**(e) Succeeding Court.**

**——S. 476 — Successors-in-office.**

The successors of the Senior Subordinate Judges are competent to deal with the proceeding under S. 476, Criminal P. C. AIR (Vol 27) 1940 Lah 292 : 41 Cr LJ 843 : 190 Ind Cas 178 (DB).

——S. 476 — A Court of law does not consist of the particular individual or individuals who may be presiding over the proceedings therein at any particular moment but it is a permanent institution and therefore any judicial officer who sits in the Court is just as competent to deal with the matters coming before the Court as any other incumbent of the office. Therefore, the words "such Court" in S. 476 include the successors of the office. AIR (Vol 17) 1930 Cal 721 : 34 CWN 914 : 52 CLJ 87 : 1930 Cr C 1129 (DB).

——S. 476 — The power of acting under this section being vested in a Court the successor-in-office of a Judge is competent to institute proceedings under this section. (1929) 30 Cr L J 862 : 117 Ind Cas 906 (Lah).

——S. 476 — The proposition that a Magistrate has under S. 476 no jurisdiction to put in a complaint relating to evidence taken by his predecessor cannot be accepted. AIR (Vol 16) 1929 Mad 510 : 2 M Cr C 164 : 1929 Cr C 11 : 30 Cr LJ 866 : 118 Ind Cas 112.

——S. 476 — Ss. 195 and 476, C. P. Code, make reference to the "Court" and not to the "Judge" or even the "Presiding Officer" of the Court. It is clear that, whether the Judge or the presiding officer is the same or a different person, the Court remains the same and it is the Court that is competent to make the complaint. AIR (Vol 15) 1928 Lah 759 : 29 Cr LJ 1028 : 11 AI Cr R 380 : 112 Ind Cas 356.

——S. 476 — There is a permanent Court of the District and Sessions Judge with successive incumbents in the Office of Judge, so a Sessions Judge can take action under S. 476 even though the alleged offence under S. 193, Penal Code may have been committed before his predecessor. AIR (Vol 13) 1926 Lah 394 : 27 Cr LJ 527 : 93 Ind Cas 991.

——S. 476 — An action can be taken by the successor of the Judge who tried the case, on an application to initiate proceedings for offences falling under S. 195, Cr. P. Code. AIR (Vol 12) 1925 Rang 195 : 26 Cr LJ 500 : 3 Bur LJ 344 : 3 Rang 48 : 85 Ind Cas 244 (DB).

——S. 476 — The word 'Court' in S. 476, Cr. P. Code, includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. AIR (Vol 11) 1924 Lah 101 : 4 Lah 58 : 24 Cr LJ 180 : 71 Ind Cas 596.

——S. 476 — A successor Subordinate Judge can continue the proceedings under S. 476, which had been commenced by his predecessor. The theory that every time one judge is transferred and another takes his place, the Court over which the former presided ceases to exist and a new Court is created, is not correct. AIR (Vol 9) 1922 Lah 479 : 65 PLR 1922 : 23 Cr LJ 451 : 67 Ind Cas 723.

——S. 476 — The word "Court" in S. 476, includes the successor of the Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. AIR (Vol 8) 1921 All 210: 19 ALJ 819 : 22 Cr LJ 680 : 63 Ind Cas 616.

**——S. 476 — Successor in office — Competency of — Delay — Effect of.**

The power to direct prosecution under S. 476 is not confined to the individual officer before whom the offence was committed but may be exercised by his successor in the office.

Where proceedings for directing a prosecution are commenced in the course of a judicial proceeding or so soon thereafter as to make the former substantially a continuation of the latter the order directing the prosecution will not be vitiated by the fact that it was passed more than a year afterwards. AIR (Vol 6) 1919 Mad 896 : 25 MLT 18 : 9 LW 74 : (1919) MWN 112 : 20 Cr LJ 172 :49 Ind Cas 492.

**——S. 476 — Successor of Judge before whom offence was committed — Order.**

The word "Court" used in S. 476 includes the successor of the Judge before whom the alleged offence was committed or to whose notice the commission of the alleged offence was brought in the course of a judicial proceeding. An order under S. 476 will not be revised if the Court below has arrived at a judicial opinion on evidence that there is a ground for enquiring into an offence ref-

erred to in S. 185 though the High Court might disagree with that opinion. AIR (Vol 4) 1917 Nag 136 : 14 NLR 16 : 18 Cr LJ 1015 : 42 Ind Cas 759.

**——S. 476 — Successor in office.**

The expression "Court" in S. 476 includes the successor in office. A final order directing a prosecution may be validly made by the successor of the Judge who originally heard the case. A I R (Vol 1) 1914 All 537 : 12 ALJ 1003 : 16 Cr LJ 97 : 27 Ind Cas 145 (DB).

——S. 476 — The failure under S. 250 to award compensation against a complainant does not preclude the Magistrate from directing the prosecution of the complainant for perjury. A succeeding Magistrate, who pronounces judgment can order a person to be prosecuted for perjury for giving false evidence before his predecessors, as it is an offence committed and brought to his notice in the course of a judicial proceeding under S. 476. The word "Court" shows the continuity of the jurisdiction though the personnel was changed. (1911) 4 Bur LT 246 : 12 Cr LJ 521 : 12 Ind Cas 289.

**(f) Transferee Court.**

——S. 476 — If a case is transferred it is not only the Court which originally received the forged document can complain under S. 426. It is a continuing offence and any Court seised of the case can complain. AIR (Vol 17) 1930 Mad 192 : 1930 Cr C 192 : 1930 MWN 76 : 31 MLW 384 : 3 M Cr C 61 : 31 Cr LJ 986 : 126 Ind Cas 112.

——S. 476 — The only Court competent to exercise the powers under S. 476 is the Court having jurisdiction over the suit in respect of which the offence has been committed whether the case comes to its file by transfer from any other Court or otherwise. AIR (Vol 13) 1926 Sind 215 : 20 SLR 90 : 27 Cr LJ 780 : 95 Ind Cas 316 (DB).

**(g) Under Police Standing Orders (Madras).**

**——Ss. 476 and 200 — Sub-Divisional Magistrate enquiring into case and finding prima facie case — Whether can file complaint of cognizable offence — Power of Court to file complaint outside limits of S. 476.**

A complaint outside the provisions of S. 476 cannot be filed by Civil, Revenue or Criminal Court under its inherent powers. When the Code has made provision for circumstances under which a Court can file complaint, it must be considered to be exhaustive in respect of it and to limit the powers of the Court in making such complaints.

Where the Sub-Divisional Magistrate investigates a case sent to him under Police Standing Orders (Madras), to see whether certain persons had really committed the offences alleged, the Magistrate acts as a 'Court' and he has no jurisdiction to file complaint into which he has enquired into, although the offence may be a cognizable one. Though any citizen can file a complaint of a cognizable offence, the complaint here is by the 'Court' as such, whose powers to file complaint are limited by S. 476. There is a difference in procedure in complaints filed by individuals and those filed by 'Court'. (Proceedings were quashed). AIR (Vol 32) 1945 Mad 458 : 58 MLW 389 : (1945) 2 MLJ 125 : 1945 MWN 431.

**6. Delay.**

**——S. 476 — Order under — Limitation.**

An order under S. 476 passed months after the termination of proceedings directing the prosecution of a person for having committed an offence in those proceedings, is bad if the Magistrate was aware of the offence during the pendency of the proceedings. AIR (Vol 7) 1920 Pat 500 : 21 Cr LJ 633 : 57 Ind Cas 457.

**——S. 476 — Time limit for passing such orders.**

Though no time is fixed for making an order under S. 476 yet an order passed after an undue delay can be set aside by the High Court. AIR (Vol 7) 1920 Pat 430 : (1920) Pat HCC 205 : 1 PLT 331 : 56 Ind Cas 853.

**——S. 476 — What constitutes — Effect of.**

A Judge, discovering the commission of offence after the proceedings thereof have ended, cannot prosecute the offender under S. 476; he can only act under S. 195 by way of complaint. AIR (Vol 6) 1919 Mad 410 : 9 LW 315 : 36 MLJ 352 : 25 MIT 296 : (1919) MWN 223 : 20 Cr LJ 309 : 42 Mad 422 : 50 Ind Cas 485 (FB).

**——S. 476 — Sanction by subordinate Court after appeal.**

A Munsiff can institute proceedings under S. 476 though he does it at the direction of District Judge after the decision on appeal. Mere delay does not vitiate such proceedings. AIR (Vol 6) 1919 Pat 78 : 20 Cr LJ 274 : 50 Ind Cas 162.

**——Ss. 476 and 250 — Delay — False charge — Prosecution — Complainant ordered to pay compensation — Proceedings under S. 476 of the termination of trial.**

A Magistrate disposing of a criminal case ordered the complainant to pay compensation to the accused under S. 250. Three weeks after the disposal of the case the Magistrate passed an order to show cause why he should not be prosecuted. The order was not proper in the circumstances and would not be justified in the exercise of a sound judicial discretion. AIR (Vol 6) 1919 Pat 81 : 20 Cr LJ 226 : 49 Ind Cas 850.

**——S. 476 — Direction to prosecute.**

A Court is competent to exercise powers conferred upon it by S. 476 of the Cr. P. Code, in respect of an offence committed before it in the course of a judicial proceeding, although the fact that it had been committed did not come to the knowledge of the Court until long after the close of the proceeding.

Per Huda, J. — The powers conferred by S. 476 should invariably be exercised only at or immediately after the conclusion of the trial in which the offence is alleged to have been committed, by the Court to whose notice it was brought in the course of a judicial proceeding. AIR (Vol 6) 1919 Cal 391 : 20 Cr LJ 184 : 49 Ind Cas 600 (DB).

**——S. 476 — Inquiry after termination of Judicial proceeding.**

The powers conferred by S. 476 of the Cr. P. Code can be exercised by the Court at any time after the determination of a judicial proceeding during which the commission of the offence is brought to its notice. 32 Mad 49, 11 CWN 568 and 2 MLT 298, Diss. AIR (Vol 5) 1918 Oudh 407 : 5 OLJ 622 : 19 Cr LJ 981 : 48 Ind Cas 161.

**——S. 476 — Subject of an enquiry under.**

The section does not require the Court to take action immediately after the case in which the offence is said to have been committed is finished or within any fixed time afterwards. The evidence of a witness taken before the committing Magistrate, which is read out in the Sessions Court may be made the subject of an order by the Sessions Judge under S. 476. AIR (Vol 4) 1917 Lah 303 : 29 PR 1916 Cr : 18 Cr LJ 337 : 38 Ind Cas 721 (DB).

**——Ss. 476 and 537 — Delay — Order under S. 476.**

The delay that occurs between dismissing a complaint and passing under S. 476 an order for prosecution, does not take away Magistrate's jurisdiction under the section. 31 M. 140, 32 Mad 49, Disapproved. AIR (Vol 4) 1917 Pat 15 : 1 Pat

LJ 553 : 18 Cr LJ 52 : (1918) Pat HCC 30 : 37 Ind Cas 36 (DB).

——S. 476 — **Order directing prosecution — Revision.**

An order under S. 476, should be passed either during the judicial proceedings with which it is connected or at least so soon after, that it might be considered as a part of the same judicial transaction. Therefore the Chief Court on revision set aside the order passed 3 months after disposal of the case as technically unsound. AIR (Vol 3) 1916 Lah 259 : 88 PLR 1916 : 53 PWR (Cr) 1916 : 17 Cr LJ 470 : 36 Ind Cas 150.

——S. 476 — **Delay in initiation of proceedings.**

There is nothing in S. 476 which requires a Court to take action if at all immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. Case Law considered. AIR (Vol 2) 1915 All 135 : 37 All 344 : 16 Cr LJ 465 : 13 ALJ 466 : 29 Ind Cas 97 (DB).

——S. 476 — **When action may be taken — No prima facie evidence on record.**

Action under S. 476 should be taken very soon after the end of the trial or proceedings. A I R (Vol 1) 1914 Sind 129 : 7 SLR 187 : 15 Cr LJ 541 : 24 Ind Cas 949 (DB).

——S. 476 — **Steps taken 5 months after close of trial — Order without jurisdiction.**

A Magistrate acting under S. 476 of the Cr. P. Code five months after the close of trial is in the absence of a satisfactory explanation of the delay acting without jurisdiction. AIR (Vol 1) 1914 Mad 380 : 15 Cr LJ 283 : 23 Ind Cas 491 (DB).

——S. 476 — **Delay — Action under — When to be taken — Successor, if can direct.**

A sanction for the prosecution of the complainant should not be made long after the acquittal of the accused. An order under S. 476 cannot be made by another Magistrate before whom there was no judicial proceeding. (1913) 40 Cal 444 : 17 CWN 290 : 14 Cr LJ 57 : 18 Ind Cas 345 (DB).

——S. 476 — **Time for proceeding under.**

To justify an action under S. 476 it is sufficient if it is taken so shortly after the conclusion of the proceedings so as to make it practically in continuation of the same. (1912) MWN 1206 : 13 Cr LJ 825 : 17 Ind Cas 569.

——S. 476 — **Delay in passing order under — Effect.**

An order of a District Munsiff in proceedings under S. 476 of the Criminal Procedure Code passed on the suggestion of the District Judge, 19 days after the termination of the execution proceedings, is illegal. (1911) 10 MLT 333: 12 Cr LJ 496: 12 Ind Cas 216.

——S. 476 — Proceedings to be taken under S. 476, Cr. P. C. should not be postponed till the disposal of the original case. (1911) 2 MWN 98 : 12 Cr LJ 327 : 10 Ind Cas 623.

——S. 476 — **Delay in proceedings under.**

Proceedings under S. 476 should be taken at a very early date, after the decision of the original case, except under very special circumstances. (1910) 11 Cr LJ 20 : 5 Ind Cas 17 (All).

——S. 476 — **Enquiry by Assistant Collector — Reference to District Magistrate as head of Police — Delay — Effect of.**

Under S. 476 of the Cr. P. Code it is the case that has to be sent for enquiry to the nearest Magistrate and not necessarily all the offenders who might be concerned in the offence. A reference by an Assistant Collector to the District Magistrate as the head of the Police and not in his judicial capacity does not deprive the jurisdiction of the former. Though speedy action under S. 476 is desirable there is nothing to compel an enquiry in the actual course of the judicial proceedings or so shortly after so as to make it a continuation of those proceedings to be retained. 32 M. 49; 34 C. 551; 37 C 642, Not foll. AIR (Vol 6) 1919 Bom 103 : 43 Bom 300 : 20 Bom LR 998 : 20 Cr LJ 433 : 51 Ind Cas 257 (DB).

——S. 476 — **Delay in starting proceedings under S. 476 should be discouraged.**

An order under S. 476 should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that that the order is part of the proceeding. The power conferred by S. 476 can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence was committed. The delay in starting proceedings under S. 476 should not receive any encouragement, as it is highly unjust and improper. 43 Bom 300, Not foll. AIR (Vol 17) 1930 Lah 316: 31 Cr LJ 1135: 1930 Cr C 348: 126 Ind Cas 794.

——S. 476 — Where the suit was dismissed on August 6, 1934, and the application under S. 476, Criminal P. C. was made on October 13, 1934, as no time limit is prescribed by the Criminal P. C., the delay is not so great ground alone. AIR (Vol 24) 1937 Nag 91 : ILR (1938) Nag 298 : 169 Ind Cas 816.

——S. 476 — **Complaint should be made without delay.**

The offences mentioned in Cls. (b) and (c), S. 195, sub-s. (1), criminal P. C., are offences against public justice and relating to documents, and when such offences are committed in or in relation to a proceeding in any Court; it is solely within the discretion of that Court whether a prosecution for these offences should be instituted or not. By the amendments of the Code, which were made in the year 1923, the right of a private person to lay a complaint of such offences has been taken away. Before exercising its discretion to lay a complaint, the Court should find, first that it is in the interests of public justice that a complaint should be made, and secondly, that there is a reasonable probability of a conviction resulting from the complaint. In regard to the first point, although no time limit for the institution of such prosecutions is laid down in the section, it has been held by all the High Courts that prompt action is desirable, and that delay on the part of a party in making his application to move the Court to lay a complaint may, if unexplained, be fatal to the application. If the application is delayed, and the delay is not satisfactorily explained, evidence called in support thereof naturally comes under suspicion and the inference arises that the interests of public justice are less likely to be served than the interests of the applicant by the laying of a complaint. AIR (Vol 24) 1937 Rang 62 : 38 Cr LJ 615 : 1937 Rang LR 276 : 168 Ind Cas 632.

——S. 476 — **Setting aside on ground of delay.**

No hard and fast rule can be laid down that in all cases an order for prosecution under S. 476, must be set aside on the ground of delay. The section itself does not limit the time within which action should be taken. AIR (Vol 22) 1935 Oudh 113 : 10 Luck 503 : 36 Cr LJ 319 (2) : 1935 OWN 28 : 153 Ind Cas 346.

——S. 476 — **Expediency of prosecution — Offence committed to get over a wrong order of a**

**Civil Court — Delay in filing complaint — Effect.**

Where persons in order to get over an admittedly wrong order of a Civil Court commit an offence and there is a delay in filing the complaint and the whole matter is not free from doubt, it is not a case for passing an order under S. 476, Cr. P. Code. AIR (Vol 35) 1948 All 287 : ILR (1948) All 212 : 1948 AWR (HC) 20 : 1948 OA (HC) 20 : 1948 ALJ 65 : 1948 ALW 183 : 49 Cr LJ 361 (DB).

**——S. 476 — Expediency of prosecution — Delay in moving Court — Court not acting suo motu but moved by interested party — Prosecution — If inexpedient and to be withdrawn.**

When serious offence are committed, the fact that there have been delay in moving the Court or that the Court did not act suo motu but acted only on the application of an interested party, cannot be regarded as a good or sufficient ground for the Court refusing to file a complaint or for withdrawal of a complaint already filed. A I R (Vol 34) 1947 Sind 129 : 48 Cr LJ 296 : 229 Ind Cas 170 (DB).

**——Ss. 476 and 195 — Delay of Court to proceed under S. 476 in proceedings under S. 195 — Circumstances for cancelling sanction.**

When sanction to prosecute has been refused that there is considerable delay on the part of the complainant in applying to have the order of refusal set aside under S. 195, Cr. P. Code, a Court cannot make an order under S. 476 of the Code. 19 PWR (Cr.) 1911 : 12 Cr LJ 434 : 11 Ind Cas 618.

### 7. Detention in custody.

——Ss. 476 and 491 — Power to detain in custody or to put on bail by the complainant Court only accrues to the Court when he has recorded his finding and decided to make a complaint — Custody before that stage is illegal and action under S. 491 is called for. AIR (Vol 31) 1944 Lah 328 : 46 PLR 188 : 45 Cr LJ 768 : 215 Ind Cas 58.

### 8. Discretion.

**——S. 476 — Enormous delay in proceedings is factor in favour of person sought to be proceeded against.**

The plaintiff's suit on a pronote was decreed against the defendant on 9th August 1940. On 14th December 1940 an application was made by the plaintiff to the Court praying that proceedings under S. 476 should be started against the defendant in respect of certain false statements made by him in the course of the suit on the pronote. After many adjournments the Court on 6th December 1941 directed that a complaint under S. 193, Penal Code, should be filed against the defendant. An appeal to the District Judge was dismissed. In revision before the High Court :

Held that the fact that there had been enormous delay in the proceedings and that the defendant had been sufficiently punished by the suspense in which he had been all that time was a factor in favour of the defendant in considering whether the proceedings against the defendant under S. 476 were expedient in the interest of justice. AIR (Vol 33) 1946 All 156 : 1945 OWN (HC) 280 : 1945 ALJ 456 : ILR (1946) All 62 : 224 Ind Cas 13 (DB).

**——S. 476 — Person applying for withdrawal of his statement as soon as he found that it was wrong — Prosecution for perjury is hardly desirable.**

The fact that the person making a wrong statement applied for withdrawal of it as soon as he found that the statement was wrong is a factor in his favour. A prosecuion for perjury is hardly desirable in such a case. AIR (V 33) 1946 All 156: 1945 OWN (HC) 280 : 1945 ALJ 456 : ILR (1946) All 62 : 224 Ind Cas 13 (DB).

**——Ss. 476, 482, 480 — Option to proceed either under S. 480, or under S. 476.**

The provisions of S. 482, Criminal P. C., can only be employed where cognizance has already been taken under S. 480. The section is in no way independent of S. 480. Therefore, in the case of a contempt committed coram judice and punishable under S. 228, I. P. C., a Court has the option of proceeding either under Ss. 480 to 482, Criminal P. C., or under S. 476. AIR (V 27) 1940 Lah 233 : 42 PLR 505 : 41 Cr LJ 766 : ILR (1941) Lah 145 : 189 Ind Cas 628.

**——S. 476 — Held, discretion of trial Court should not be interfered with.**

In the course of the hearing of a suit, the plaintiffs produced certain rent receipts. Finding them to be forged the Court dismissed the suit. Plaintiffs appealed to the High Court. In the meanwhile, the defendants applied to the trial Court for prosecution of the plaintiffs in respect of the forged documents. On dismissal of the application, they appealed and the Appellate Court ordered the case to go back to the trial Court for reconsideration:

Held, that in the circumstances what was to be considered was what step was best calculated to assist the cause of justice and that the order of the Appellate Court was proper as the discretion as to stay lay with the trial Court and that discretion was not to be interfered with. AIR (V 24) 1937 Pat 139 : 3 BR 376 : 38 Cr LJ 476 : 167 Ind Cas 895.

——S. 476 — Where the main allegation against the accused is disobedience of an order of the Magistrate trying the case, the prosecution is objectionable as the Magistrate makes himself Judge in his own case. AIR (V 23) 1936 Rang 116 : 37 Cr LJ 527 : 161 Ind Cas 993.

——S. 476 — It is within the discretion of a Court proceeding under S. 476, Criminal P. C., to hold a preliminary inquiry or not to hold such inquiry. AIR (V 22) 1935 Pat 515 : 1 BR 872 : 16 PLT 693: 36 Cr LJ 1354 : 15 Pat 69 : 158 Ind Cas 324 (DB).

——S. 476 — A preliminary inquiry under S. 476, Criminal P. C., is discretionary. It is not necessary, where a prima facie case is made out. AIR (V 21) 1934 Pat 536 : 1 BR 13 : 15 PLT 694 : 36 Cr LJ 26 : 152 Ind Cas 228.

——S. 476 — The question of the propriety of the prosecution is, in the first instance, a matter for the discretion of the Courts affected, and the High Court in revision will not lightly interfere with this discretion. AIR (V19) 1932 Pat 243 : 13 P LT 370 : 33 Cr LJ 860 : 139 Ind Cas 543 (DB).

——S. 476 — Per Costello, J. — The High Court ought to be reluctant to interfere with the Court's discretion to hold or not to hold an enquiry before making a complaint under S. 476. AIR (V 17) 1930 Cal 721 : 34 CWN 914 : 52 CLJ 87 : 1930 Cr C 1129 (DB).

——S. 476 — Under S. 476, it is entirely discretionary and not obligatory with a Court to issue a notice and hold a preliminary enquiry. AIR (V 17) 1930 Lah 55 : 120 Ind Cas 687 : 1930 Cr C. 23 : 31 Cr LJ 179.

——S. 476 — The question whether a complaint should be made under S. 476, Cr. P. Code, is almost invariably a matter of discretion, and the High Court is under those circumstances always loath to interfere except in extra-ordinary cases.

Where the trial Court and first appellate Court conclude that certain documents are not genuine, and the District Court makes a complaint for pro-

secution, it has sufficient ground to make a complaint and its order would not be set aside by the High Court. AIR (V 13) 1926 Pat 81 : 5 Pat 262: 7 PLT 114 : 1926 PHCC 89 : 27 Cr LJ 641 : 94 Ind Cas 593 (DB).

——S. 476 — Where the trial Court or the Court to which that Court is subordinate thinks that complaint is not desirable, High Court should not interfere since a complaint under S. 476 is almost invariably a matter of discretion. AIR (V 11) 1924 Bom 347 : 48 Bom 401 : 26 Bom LR 289 : 25 Cr LJ 1123 : 81 Ind Cas 947 (DB).

**——S. 476 — Discretion of Criminal Court.**

A Court can make an order under S. 476 Cr. P. C. without taking any evidence at all, if it chooses to take evidence, it can direct when and where that evidence should stop, the section gives the widest discretionary power to a Criminal Court and deliberately refrains from imposing any special formalities to hamper that discretion. AIR (V 3) 1916 Bom 218 : 18 Bom LR 284 : 17 Cr L J 249: 34 Ind Cas 969 (DB).

**——Ss. 476 and 439 — Revision — Discretion of Court to initiate proceedings of offence against bailiff — Revision.**

It is within the discretion of a Court to take action under Sec. 476 and the High Court will not interfere with the exercise of discretion. AIR (V 3) 1916 Oudh 121 : 19 OC 91 : 18 Cr LJ 3 : 36 Ind Cas 835.

**9. Findings as to offence.**

——S. 476 — Necessity.

The terms of S. 476, Criminal P. C., indicate that the desirability of prosecuting the offender should be present in the mind of the Court during the proceedings in the course of which the offence was committed or brought to its notice. No prosecution ought to be directed unless there is a reasonable probability of conviction. It is not the intion that when the proceedings had terminated, the attention of the Court should be subsequently drawn by some private person to the fact that in those proceedings, there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. AIR (Vol 23) 1936 Rang 473: 38 Cr LJ 226: 166 Ind Cas 489.

——S. 476 — When complaints under S. 476 are made, the officer making them must state the evidence on which he relies otherwise the Magistrate to whom the case is referred for decision has no means of ascertaining what the evidence is on which the prosecution case is based. AIR (Vol 17) 1930 Oudh 404: 7 OWN 638: 125 Ind Cas 838: 31 Cr LJ 938: 1930 Cr C 944.

**——S. 476 — Sufficiency of evidence.**

Before a Court is justified in making an order under S. 476 of the Cr. P. Code, directing the prosecution of any person, it ought to have before it direct evidence fixing the offence upon the person whom it is sought to charge. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence but there must be distinct evidence of the commission of offence by the person who is to be prosecuted. (1929) 115 Ind Cas 174: 30 Cr LJ 407 (DB) (Nag).

**——S. 476 — Direct evidence — Essential.**

The measure of proof to prove that a document is forged required in civil Court is very different from that required in a criminal Court. Before a Court is justified in making an order under S. 476 directing the prosecution of any person, it ought to have before it direct evidence fixing the offence upon the person whom it is sought to charge. (1929) 115 Ind Cas 174: 30 Cr LJ 407: 12 AI Cr R 264 (Nag) (DB).

**——S. 476 — Finding of offence — Provision to record a finding that an offence has been committed is mandatory.**

Before a complaint under S. 476 is made, it is necessary that a Court which thinks that an offence mentioned in S. 195, sub-S. (1), cl. (b) or cl. (c) has been committed should record a finding to that effect, and, after recording such finding, may make a complaint. The provision to record a finding is not merely directory but it is mandatory. When the section of the Code requires a certain thing to be done, it is not open to the Court to say that it is optional for a Court to do it or not, and, therefore, failure by the Court to record a finding is not irregularity curable by S. 537. AIR (Vol 15) 1928 Mad 783: 1928 MWN 229: 10 AI Cr R 378: 1 M Cr C 126: 29 Cr LJ 732: 110 Ind Cas 588.

**——S. 476 — Recording finding of two alternative offences mutually inconsistent is not sufficient compliance.**

The provisions of S. 476 are not satisfied by simply recording a finding of two alternative offences which were mutually inconsistent. The Court must record a finding that an offence or offences have been committed and he must make a complaint in writing signed by him and setting out the particulars of each of such complaints which he intends to forward to the Magistrate. AIR (Vol 14) 1927 All 567: 104 Ind Cas 904: 8 AI Cr R 59: 8 LRR Cr 102: 28 Cr LJ 888.

**——S. 476 — Right of applicant.**

Case in which alleged offence committed decided on oath — Court cannot refuse defendant opportunity to prove that case was false. AIR (Vol 13) 1926 All 577: 7 LRA Cr 130: 27 Cr LJ 1021: 96 Ind Cas 877.

——S. 476 — When a criminal offence is alleged to have been committed in the course of revenue or civil proceedings, the rule is that the facts upon which the criminal offence is founded, should as far as possible be finally determined in the Civil or Revenue Court. A refusal to follow the rule materially affects the criminal proceedings and amounts to a denial of the right of fair trial. AIR (Vol 13) 1926 Pat 25: 7 PLT 199: 26 Cr LJ 1565: 90 Ind Cas 445.

**——S. 476 — Particulars of offence.**

In a complaint under S. 476 the setting out of the particulars of the offence charged against the accused is absolutely necessary. AIR (Vol 12) 1925 Cal 721: 89 Ind Cas 251: 52 Cal 478: 26 Cr LJ 1307 (DB).

**——S. 476 — Naming of witnesses — Complaining Court must name witnesses to be examined.**

It is for the Court directing complaint to be filed to hold such enquiry that its order, when sent to the Magistrate, will amount to a complaint under S. 200 of Cr. P. Code. For that purpose, the complaining Court must decide upon and name the witnesses to be examined by the Magistrate, or the complaint is liable to be dismissed on the ground that there are no witnesses. AIR (Vol 12) 1925 Mad 609: 86 Ind Cas 449: 48 Mad 395: 21 MLW 664: 26 Cr LJ 801: 48 MLJ 290 (DB).

**——S. 476 — Duty of Court — Stating of section.**

Complaint under need not state the section of the Penal Code. AIR (Vol 12) 1925 Nag 337: 88 Ind Cas 283: 26 Cr LJ 1115.

——S. 476 — It is absolutely essential to the validity of an order under S. 476 that the Court which passes the order should apply its mind to the matter upon its merits. Merely acting on the remarks

of the appellate Court is not enough. AIR (Vol 11) 1924 All 453: 83 Ind Cas 498: 21 ALJ 930: 5 LRA Cr 52: 26 Cr LJ 18 (DB).

——S. 476 — In giving direction for a prosecution the Court is bound to find that there is a prima facie case with respect to all the elements which are essential to constitute the offence with respect to which the order is passed. An order not setting forth all the elements of the offence is without jurisdiction. AIR (Vol 9) 1922 Pat 84: 67 Ind Cas 205: 1922 PHCC 204: 3 PLT 268: 23 Cr LJ 381.

**——S. 476 — Court holding that either plaintiff or defendant is guilty and sending up both for trial, acts illegally.**

Where without making any enquiry as to which of two parties committed the offence, the Court is of the opinion that either the one or the other is guilty and sends the case under S. 476 for trial of both the parties for the offence, the action of the Court is illegal. An action under S. 476, Cr. P. Code, ought not to be taken by the Court without coming to any conclusion as to which of the parties had committed the offence. AIR (Vol 8) 1921 Lah 56: 61 Ind Cas 57: 2 Lah 63: 22 Cr LJ 329.

**——Ss. 476, 195 — Offences against public justice — Duty of Courts to act under.**

When offences against public justice are committed, it would be well if courts availed themselves more fully of S. 476, Cr. P. C., instead of leaving the prosecution to private parties who often use the sanction granted to them for the gratification of private ends. (1902) 4 Bom LR 618: 26 B 785 (791).

### 10. Expert evidence.

——S. 476 — It is not always very safe to order prosecutions to be started where there is no other testimony than that of an expert to support it. AIR (Vol 12) 1925 Nag 358: 86 Ind Cas 428: 26 Cr LJ 796.

**——S. 476 — Sanction should not be based upon expert's report in absence of his affidavit or examination.**

The report of the Government Expert, who never came into the witness-box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. A sanction based on a piece of evidence that can in no circumstances be called legal evidence and especially when there is positive legal evidence against it is illegal. The power of sanction should be used with great caution. AIR (Vol 10) 1923 All 601: 75 Ind Cas 148: 21 ALJ 399: 4 LRA Cr 92: 24 Cr LJ 900.

### 11. Finding of expediency.

(a) General.
(a-1) Object.
(b) Necessity.
(c) Recording of finding.
(d) Sind Frontier Regulation.

#### (a) General.

**——S. 476 — Expediency of prosecution — Absence of finding as to — Defect, if curable.**

The absence of a finding that the prosecution is expedient in the interests of justice in an order under S. 476, Cr. P. Code, is an incurable defect. AIR (Vol 35) 1948 Mad 297: 60 LW 705: 49 Cr LJ 340: (1947) 2 MLJ 384: 1947 MWN 759.

**——S. 476 — Expediency of prosecution — Consideration.**

AIR (Vol 33) 1946 All 156 : ILR (1946) All 62 : 224 Ind Cas 13: 47 Cr LJ 545.

——S. 476 — Expediency of prosecution — Witness making false statement not calculated to receive credence but with a view to appropriate to himself credibility as witness. AIR (Vol 32) 1945 Pat 295: 47 Cr LJ 177.

**——S. 476—Suit—Money suit on false evidence — Plaintiff agreeing to get suit dismissed if complaint withdrawn — Complaint should not be made in interests of justice.**

The plaintiff suing zamindar on absolutely false allegations to avoid the application of the Dekkhan Agriculturists' Relief Act — The defendant filed an application under S. 476, Criminal P. C., for prosecution of the plaintiff. In the meanwhile, in appeal before the Chief Court, the plaintiff agreed to withdraw his suits and to have them dismissed and thus lose Rs. 11,000 in all on defendant's withdrawing application under S. 476:

Held, dismissal of the plaintiff's suit would amount to a sufficient punishment to him and, therefore, it was not necessary in the interests of justice to prosecute the plaintiffs. AIR (Vol 31) 1944 Sind 212: ILR (1944) Kar 211: 219 Ind Cas 434: 46 Cr LJ 622 (DB).

**——Ss. 476, 195, 164—Subsequent statement, if false prosecution is expedient; but if statement under S. 164 is false, prosecution is not expedient.**

Under S. 476, Criminal P. C., the Court must be satisfied that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in S. 195, which includes offences under S. 193, I. P. C.

Consequently, where a person has resiled in the Sessions trial from his statement under S. 164, Criminal P. C., it is absolutely essential that the Court should make up its mind whether it was the statement before the Magistrate under S. 164 or the statement subsequently made in Court which was false. If the statement in Court was false, then, in the interests of justice, there should be a prosecution; but supposing it was the statement under S. 164 which was false, a prosecution would not be expedient in the interests of justice. No doubt, a man making a statement on oath before a Magistrate under S. 164 should speak the truth; but if he does not, the least he can do is to tell the truth when subsequently, he goes into the witness-box. To prosecute a man who has resiled from a false statement made under S. 164 is to encourage him in the belief that it pays to tell a lie and stick to it. AIR (Vol 28) 1941 Bom 408: 43 Bom LR 864: 43 Cr LJ 167: ILR (1942) Bom 26: 197 Ind Cas 416.

**——S. 476 — Evidence of witness believed by Appellate Court though disbelieved by trial Court — Trial Court, if can prosecute him for perjury on strength of very testimony which has been disbelieved by Appellate Court.**

It would almost be a judicial scandal if a witness whose evidence was accepted by the Appellate Court is prosecuted by the trial Court for perjury on the strength of the very testimony which had been disbelieved by the Appellate Court. Such a prosecution in the interest of justice, cannot be allowed. AIR (Vol 26) 1939 Mad 779: 1939 MWN 471: 40 Cr LJ 890: 184 Ind Cas 188.

——S. 476 — It is only when a Civil, Revenue or Criminal Court is of opinion that it is expedient in the interests of justice that enquiry should be made into any offence referred to in S. 195, sub-s. (1), cl.

(b) or cl. (c) of the Criminal P. C., which appears to have been committed in or in relation to a proceeding in that Court, that such Court may, after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof and shall forward the same to a Magistrate of the first class having jurisdiction to try the complaint:

Held, on facts that it was not expedient in the interests of justice that the accused should be prosecuted for an alleged offence of perjury. AIR (V 23) 1936 Oudh 373: 37 Cr LJ 885: 1936 OWN 763: 164 Ind Cas 107.

——S. 476 — **Lower Court not applying its mind to facts.**

In the case of an order for prosecution under S. 476, Criminal P. C., the absence of a finding by the lower Court that it is expedient in the interests of justice than an enquiry should be made is not in itself fatal to the proceedings. Where the Court of first instance has not applied its own mind to the facts, the Appellate Court may look at them independently and, in doing so, will not make the usual presumptions in favour of the correctness of the first Court's findings; an order to prosecute should not be set aside on purely technical grounds if it appears on the facts that the Court below had come to a finding as to the desirability of a prosecution and the only defect was the omission to use the exact words of the section. AIR (V 23) 1936 Pat 162: 2 BR 112: 37 Cr LJ 193: 159 Ind Cas 817.

——S. 476 — **Court not expressing in so many words that a prosecution should follow — Penal Code, S. 193.**

Where, after making an enquiry, the Court ordered under S. 476, Criminal P. C., that a complaint should be made against the applicant under S. 193, I. P. C. :

Held, that although the Court did not express in so many words that it was expedient that a prosecution should follow, the order was not thereby rendered illegal and that the prosecution for perjury that followed was a perfectly proper proceeding. AIR (V 22) 1935 All 608 (1): 1935 ALJ 395: 36 Cr LJ 781 (1): 1935 AWR 384: 155 Ind Cas 490.

——S. 476 — **Failure of Magistrate to state that he was of opinion that enquiry should be made in interests of justice — High Court, if should assume that he properly considered the matter.**

Where the Magistrate has not stated whether he is of opinion that it is expedient in the interests of justice that an inquiry should be made in a Magistrate's Court, it is not incumbent on the Sessions Judge or the High Court to assume that he properly considered the matter and came to a correct conclusion. AIR (V 22) 1935 Nag 199: 36 Cr LJ 1371: 31 NLR 370: 158 Ind Cas 496.

——S. 476 — Penal Code, Ss. 193, 211, 324 — Acquittal no benefit of doubt — Complaint by accused requesting Magistrate to prefer complaint under S. 476, Criminal P. C. — Magistrate not conducting enquiry — No order under S. 476 — Held, the Magistrate did not follow the procedure laid down under S. 476, and it was incumbent upon him to record a finding that it was expedient in the interests of justice that an enquiry should be made into the offences said to have been committed. AIR (V 21) 1934 Oudh 272: 35 Cr LJ 908: 11 OWN 683: 10 Luck 14: 149 Ind Cas 201.

——S. 476 — **It is the duty of the tribunal making complaint under S. 476, Criminal P. C,. to come to a judicial finding that the allegations made before it are prima facie false. AIR (V 19) 1932 Lah 246: 33 PLR 174: 33 Cr LJ 409: 13 Lah 568: 137 Ind Cas 157.**

——S. 476 — **Finding by necessary implication.**

Under S. 476 it is not necessary that there should be an excess finding to the effect that an enquiry is expedient in the interests of justice. Such a finding may be implied in the complaint itself. AIR (V 18) 1931 Mad 16: 32 Cr LJ 200: 54 Mad 331: 1930 MWN 991: 59 MLJ 850: 32 MLW 513 (DB).

——S. 476 — In connexion with the conduct of a proceeding under S. 145, Cr. P. Code, the order of the Magistrate was as follows: "Considered. Cause shown and heard pleaders. There is material for prosecution of (1) B under Ss. 465, 467 and 193, Penal Code; (2) S under Ss. 467, 114 and 193, Penal Code; (3) R under Ss. 467, 114, 471, 193 and 196, Penal Code. Draw up formal complaint against them for their prosecution and trial for the above-noted offences".

Held, that in stating that there was "material for prosecution" of these persons the Magistrate indicated that in his opinion there may be a prima faice case against them. But nowhere within the four corners of this order could it be said that there was any finding recorded such as is referred to in S. 476, nor has he in any way directed his mind to the question as to whether any such order as he makes is expedient in the interest of justice as to bring the order within S. 476. AIR (Vol 17) 1930 Cal 705(1): 52 CLJ 52: 1930 Cr. C 1105 (DB).

——S. 476 — **Suspicion — Insufficient.**

Although there is some indication pointing in the direction of an accused's guilt, yet if the indications do not amount to anything more than mere suspicion, it is not in the interest of justice to start a prosecution against the accused. (1928) 109 Ind Cas 358 : 10 AI Cr R 238 : 29 Cr LJ 534 (Lah).

——S. 476 — **Complaint should not necessarily be made in every case.**

Though the Courts should be anxious to put down perjury as much as possible, it is not every case of perjury that should form the subject of an inquiry. It is only when the interests of justice require that a complaint should be made, then and then only a complaint should be made. AIR (V 15) 1928 Mad 783: 1928 MWN 229: 10 AI Cr R 378: 1 M Cr C 126: 29 Cr LJ 732: 110 Ind Cas 588.

### (a-1) Object.

——S. 476 — **Before finding complaint under, there must be finding by Court that prosecution is expedient in interests of justice.**

Before a Court can start the machinery contemplated by S. 476 against a private individual, he must be clearly told that his prosecution is in the interest of justice. Till this condition is fulfilled there can be no foundation for a proceeding of this character. Therefore before filing a complaint under S. 476 there must be a finding by the Court that the prosecution is necessary in the interests of justice. AIR (Vol 33) 1946 All 156: 1945 OWN (HC) 280: 1945 ALJ 456: ILR (1946) All 62: 224 Ind Cas 13 (DB).

——S. 476 — Section assumes that offence appears to have been committed.

It is not correct to say that only after the Courts have come to a conclusion that an offence of the kind contemplated by S. 476, Criminal P. C., appears to have been committed they can direct their minds to the next question, namely, whether it is expedient in the interests of justice that a prosecution should be launched. The section assumes that an offence appears to have been committed. AIR (V 28) 1941 Nag 155: 1941 NLJ 91: ILR (1942) Nag 388: 194 Ind Cas 583.

——S. 476 — It is the policy of the law, as appears from the amendment of the relevant sections of the Criminal P. C., whereby such prosecutions have not now been left to private prosecutors but their conduct has been entrusted to the Courts, that in dealing with such matters, the Court should see that the prosecution is undertaken in the interests of justice and not to satisfy the private grudge of litigant. AIR (V 24) 1937 Lah 867: 39 PLR 812: 39 Cr LJ 237: 172 Ind Cas 942.

——S. 476 — The object of S. 476, Criminal P. C., is to secure against reckless prosecution.

All that S. 476 requires is a finding that it is expedient in the interests of justice that an enquiry should be made into an offence referred to in S. 195, Criminal P. C. AIR (V 21) 1934 All 385: 1933 ALJ 1623: 4 AWR 285: 35 Cr LJ 785: 148 Ind Cas 866.

——S. 476 — The important words in S. 476, Criminal P. C., are that the Court must be of opinion that it is expedient in the interests of justice that an inquiry should be made.

It is necessary that a strong prima facie case should be made out which can serve as a foundation for making a complaint or for ordering an inquiry before an order is made under S. 476, Criminal P. C. AIR (V 19) 1932 Bom 551: 34 Bom LR 1247: 34 Cr LJ 33: 140 Ind Cas 619 (DB).

——S. 476 — Sufficient compliance with.

Although under S. 476 there should be not only a finding to the effect that it is expedient in the interests of justice that an inquiry should be made but also a complaint, still where the proceedings are embodied in a single document which serves the dual purpose of a finding and also of a complaint, there is no reason why it should not be held sufficiently to comply with the requirements of that section. AIR (V 18) 1931 Mad 16: 59 MLJ 850: 32 Cr LJ 200: 54 Mad 331: 1930 MWN 991: 32 MLW 513 (DB).

——S. 476 — Sufficiency of.

The words "expedient in the interests of justice" are not a formula or incantation which must of necessity appear in every order made under S. 476. Section 496 merely requires that the Courts concerned should be of opinion that the interests of justice render it expedient that an inquiry should be made into any offence referred to in S. 195(1) (b) or (c). It is sufficient that the Court arrives at such an opinion and also that there is a reasonable prospect of the conviction of the accused there being sufficient evidence to support prosecution. Whether the evidence is believed or not or will be sufficient to justify the conviction of the accused is quite another matter. AIR (V 17) 1930 Lah 347: 1930 Cr C 395: 127 Ind Cas 859.

——S. 476 — Re-opening a complaint once dropped.

If it is expedient in the interests of justice that an enquiry should be made into a particular offence and if there is a prima facie case there is no reason why a matter once dropped should not be re-opened and a complaint can be made even if an order was previously passed dismissing for non-prosecution the application of a particular party under S. 476. AIR (V 16) 1929 Pat 242: 8 Pat 736: 120 Ind Cas 629: 11 PLT 75: 31 Cr LJ 143 (DB).

(b) Necessity.

——S. 476 — Order to prosecute under S. 211, Penal Code — There should be finding that prosecution is necessary in interests of justice.

Undoubtedly, it is necessary in considering an application for an order to prosecute under S. 476, Criminal P. C., to bear in mind that whereas had the original complaint gone to trial, the entire burden of proof would have lain on the complainant, the opposite party will have to carry the whole burden should the complainant be prosecuted under S. 211, Penal Code, and the ingredients of S. 211, go a good deal further than the mere absence of proof of the guilt of the person said to have been falsely charged with an offence.

Prosecutions under S. 211, Penal Code, are not to be undertaken lightly and although the absence of a finding that the prosecution is necessary in the interests of justice, is not necessarily fatal, it is certainly desirable that Courts dealing with these matters should apply their minds directly to the question; and in doing so, they should consider whether an attempt to use the law in aid of a private grudge is being made and whether the Courts should allow themselves to become the instrument of a private grudge and also what facts can be proved and whether these facts are likely to be sufficient to support the conviction. As regards the facts that can be based merely on improbability or on what a particular officer suspects. AIR (Vol 26) 1939 Pat 178: 5 BR 203: 40 Cr LJ 157: 179 Ind Cas 167.

——S. 476 — Finding that the prosecution is in the interests of justice is absolutely necessary for filing a complaint under the section. ('34) 1934 MWN 923.

——S. 476 — It is only when a Court is expressly of opinion that it is expedient in the interests of justice that an inquiry should be made that an order under S. 476, Criminal P. C., can be made. In the absence of such an express finding an order under S. 476, is not maintainable. AIR (Vol 20) 1933 Cal 147: 34 Cr LJ 684 (1): 144 Ind Cas 88 (DB).

(c) Recording of finding.

——S. 476 — Expediency of prosecution — Court if bound to record express finding that prosecution is necessary in the interests of justice.

It is well-established that a Court acting under S. 476, Cr. P. Code, has to conisder the expediency of the prosecution, that is, whether a prosecution is necessary in the interests of justice. But the failure to record an express finding on the point is not fatal and does not necessarily render the order invalid. It is sufficient if the record shows that the Court applied its mind to the point before making the order. AIR (V 35) 1948 Pat 5: 48 Cr LJ 942: 13 BR 309: 229 Ind Cas 343.

——Ss. 476, 537 — Failure to record finding — Defect, whether cured by S. 537.

Although it is necessary that if the Court decides to make a complaint under S. 476, Cr. P. C., it must record a finding that in its opinion it is expedient in the interests of justice that an enquiry should be made, yet the absence from the record of an express finding or a finding in the exact words of the section, will not invalidate the complaint. It is sufficient, if the record shows clearly that the Court has applied its mind to the question of expediency, and has come to a conclusion that an enquiry is expedient. AIR (V 26) 1939 Sind 170: ILR (1939) Kar 280: 40 Cr LJ 707: 182 Ind Cas 914.

——S. 476 — Duty of Courts of fact to express opinion.

It is certainly desirable that Courts of fact should express themselves definitely and unequivocally on the question whether it is expedient in the interests of justice that an inquiry under S. 476 should be made; otherwise, the High Court may have to look into the facts for itself and form its own opinion as to whether a prosecution is desirable or not. AIR (V 24) 1937 Pat 534: 4 BR 141: 39 Cr LJ 103: 172 Ind Cas 237.

——S. 476 — Duty of Court to record finding that prosecution is expedient.

Before making complaints under S. 476, Criminal P. C., Courts should expressly record a finding that in their opinion, a prosecution is expedient in the interests of justice. They should not put the superior Courts to the task of discovering whether they mean something which they have not written. AIR (Vol 20) 1933 Mad 67 (1): 1932 MWN 1081: 63 MLJ 670: 36 LW 636: 33 Cr LJ 960: 56 Mad 157: 140 Ind Cas 323 (DB).

——S. 476 — Finding of necessity of prosecution.

There must be an express finding by the Court that "it is expedient in the interest of justice" that a complaint should be made into the offence of giving false evidence under S. 476. Such an express provision for a finding to be recorded is not satisfied by inferences which may or may not be drawn from other findings of facts arrived at by the Court. AIR (V 17) 1930 Cal 352: 51 CLJ 208: 126 Ind Cas 416 (DB).

——S. 476 — A Magistrate should record a finding that it is expedient in the interests of justice that an enquiry should be made under S. 476. AIR (V 15) 1928 Cal 862: 113 Ind Cas 842: 30 Cr LJ 221: 12 A I Cr R 142: 55 Cal 1312 (DB).

### (d) Sind Frontier Regulation.

——S. 476 — The questions which may be referred to the Council under S. 8, Sind Frontier Regulation, are the guilt or innocence of persons accused of offences punishable under the I. P. C., with death or transportation for life. An order under S. 476, Criminal P. C., is not such a question. It is only a finding that a prosecution is expedient. AIR (Vol 29) 1942 Sind 75: 43 Cr LJ 705: ILR (1942) Kar 66: 200 Ind Cas 630 (DB).

### 12. Grounds for interference.

——S. 476 — Preliminary inquiry — Power to order — Delegation to another Magistrate — Legality — If ground for interference in revision.

A Magistrate who has taken cognizance of an offence can dispense with the preliminary inquiry and such an inquiry is not obligatory. If in such a case, he wrongfully orders an inquiry to be made by another Magistrate and files a complaint upon the report of the latter, the report can be disregarded; no interference is called for under S. 439, Cr. P. Code, on the ground that the Magistrate making the complaint had no power to delegate his powers to order an inquiry to be made by another Magistrate. AIR (Vol 35) 1948 Sind 114: 49 Cr LJ 454: ILR (1947) Kar 126 (DB).

——S. 476 — Mere harvesting of crops under attachment does not come under S. 406, I. P. C. — Court ordering attachment filing complaint under S. 476, against person harvesting crops:

Held, that the order was not justified and interference under S. 439. Criminal P. C., was justified. AIR (Vol 25) 1938 Mad 976: 48 LW 441: 1938 MWN 1009: (1938) 2 MLJ 843: 40 Cr LJ 312: 179 Ind Cas 980.

——S. 476 — Failure to exercise proper judicial discretion in sanctioning prosecution is a good ground for interference in revision. AIR (Vol 16) 1929 Lah 676: 116 Ind Cas 711: 11 LLJ 103: 30 PLR 392: 30 Cr LJ 666: 13 AI Cr R 99.

——S. 476 — Conviction in an irregular trial must be set aside.

An Assistant Collector, after deciding to act under S. 478 neglected to follow the directions contained in the second sub-section of that section, which requires that if he concludes the enquiry himself, his proceedings shall be conducted as nearly as may be in accordance with Chapter 18, Cr. P. Code. He framed no charge and although he made some sort of enquiry it was of a perfunctory character and when he came to write his committal order he incorporated as the main grounds for committing for trial the reasons which he had given in his judgment in the civil suit in which the document with false entry was filed. The result was that there was nothing in any way resembling a proper record in the committing Magistrate's Court.

Held, that the trial was irregular and there having been no proper proceedings before the committing Magistrate, the accused must be discharged. AIR (Vol 10) 1923 All 610: 77 Ind Cas 883: 25 Cr LJ 483.

——S. 476 — There must be an error of law, an abuse of or failure to exercise judicial discretion, to justify interference in revision. Revision is proper, if the lower Court acts on grounds merely fanciful, grounds so empty and so obviously wrong, that the Court cannot be said to have formed a serious judicial opinion. AIR (Vol 10) 1923 Bom 201: 72 Ind Cas 359: 25 Bom LR 282: 24 Cr LJ 359 (DB).

——S. 476 — Sanction to prosecute for perjury by Munsif — Omission to specify the statements for which prosecution ordered.

The omission by a Munsif to specify the false statements for which he directs the prosecution of a certain person for perjury and also to mention the forged portion of a document for which he directs his prosecution for forgery amounts to material irregularity within S. 115 C. P. C. and his direction to the Magistrate that such person may be convicted of any other offences that may be proved against him is without jurisdiction. In such cases the High Court can interfere under S. 115. Where steps under S. 476 are to be taken, it is highly desirable that they should not be delayed for several months after the trial of the suit. AIR (Vol 4) 1917 All 425: 14 ALJ 814: 38 A 695: 18 Cr LJ 4: 36 Ind Cas 836.

——S. 476—Revision — Interference of High Court in sanction to prosecute.

The High Court can interfere with the sanction proceedings under section 476, of a Civil

Court exercising Civil jurisdiction under section 115. AIR (Vol 3) 1916 Upp Bur 13: UBR (1915) II 83 : 17 Cr LJ 82 : 32 Ind Cas 674.

**13. Initiation of proceedings.**

**(a) General.**
**(a-1) Application if necessary.**
**(b) Court to act of its own motion.**
**(c) Making of complaint.**
**(d) Panchayat Court.**

**(a) General.**

**——S. 476 — Inaccurate statement by complainant to take credit to himself and not to add to gravity of offence alleged against accused — Complaint, if desirable.**

Where the complainant made an inaccurate statement that he had been acquitted in a certain case, not with a view to adding anything to the gravity of the offence, but with a view to appropriate some amount of credibility for himself and the statement was not a material statement in the sense that it did not, in any way, hamper the course of justice :

Held, that it was not one of those cases in which it could be said that the interests of justice would be advanced by prosecuting a person who has given a fraudulently false evidence which has interfered with the course of justice. It was one of those routine statements which are made by almost every witness. AIR (Vol 32) 1945 Pat 295: 26 PLT 216 : 12 BR 131 : 47 Cr LJ 177 : 11 Cut LT 22 : 221 Ind Cas 407.

——S. 476 — Person taking illegal proceedings under S. 476, filing complaint to Magistrate :

Held, that such illegality did not affect the taking of cognizance by the Magistrate. AIR (V 30) 1943 Lah 208 : 45 PLR 226 : 44 Cr LJ 666 : 207 Ind Cas 639.

**——S. 476 — Perjury — Court should not rely on opinion of Appellate Court in making complaint.**

The plaintiff's claim which was decreed by the first Court was reversed in appeal, Appellate Court not believing the plaintiff's testimony . The first Court was moved by the defendant to lodge a complaint for giving false evidence. The Court lodged a complaint relying on the estimate of the evidence by the Appellate Court :

Held, that the Court itself should have exercised its independent judgment and should not have lodged the complaint relying solely upon the estimate of evidence by the Appellate Court. AIR (Vol 29) 1942 Nag 80 : 1942 NLJ 257 : 43 Cr LJ 649 : ILR (1942) Nag 695 : 201 Ind Cas 170.

**——S. 476 — False statements made in family dispute.**

The circumstance that the false statements were made in family dispute is not sufficient reason for refraining from action by prosecution under S. 476, Criminal P. C., against those who made those false statements. AIR (Vol 29) 1942 Sind 98 : ILR (1942) Kar 64 : 43 Cr LJ 720 : 200 Ind Cas 814 (DB).

**——S. 476 — During pendency of complaint for rioting, house-trespass and hurt, relation of accused filing another complaint before another Magistrate against complainants in first case, offences under Ss. 161, 193 and 116, Penal Code, for offering bribe to public servant to obtain false medical certificate — Other Magistrate held, had no jurisdiction to entertain complaint — Proper course, held was application under S. 476 to first Magistrate.**

During the pendency of a complaint implicating certain person on charges of rioting, house trespass and hurt, a complaint was filed by a relation of the accused in the Court of another Magistrate, against the complainants in the first case, of offences punishable under Ss. 161 and 193, read with S. 116, I. P. C., alleging that on a day previous to filing of the first complaint, they offered bribe to the Medical Officer in order to obtain a false certificate about the injuries alleged to have been sustained by them in their complaint :

Held, the complaint of the Magistrate trying the first case was necessary in respect of the offence alleged under S. 193, I. P. C. and as the two offences were part and parcel of the same transaction, the other Magistrate had no jurisdiction to entertain the complaint. The proper procedure was to apply to the first Magistrate under S. 476. AIR (Vol 27) 1940 Sind 133 : 41 Cr LJ 821 : ILR (1940) Kaer, 500 : 190 Ind Cas 119 (DB).

**——S. 476 — Action, if to be taken before close or after termination of proceedings.**

Obiter. — While, no doubt, a Court may properly hesitate to make a complaint on an application which is presented long after proceedings have ended and which is obviously not prompted by any other motive than personal grudge, there is nothing in the statute warranting the proposition that action under S. 476 is only to be taken before the close of the proceedings in which the perjury is alleged to have been committed, or in strict continuation of them, or within any particular time after their termination. Nor is there justification for the view that only applications prompted by high motives are to be entertained. AIR (Vol 25) 1938 Lah 429 : 40 PLR 136 : 39 Cr LJ 698 : 176 Ind Cas 116.

**——S. 476 — Accused suborning evidence before Sub-Divisional Magistrate in committal inquiry— Sessions Judge trying case — Sub-Divisional Magistrate, if can file complaint.**

The allegations were that the accused attempted to suborn evidence. The alleged attempt was during the commitment injury and was with reference to the commitment proceedings :

Held, that the Sub-Divisional Officer who held the commitment inquiry had jurisdiction to make the complaint under S. 476, Criminal P. C. AIR (Vol 24) 1937 Pat 534 : 4 BR 141 : 39 Cr LJ 103 : 172 Ind Cas 237.

**——S. 476 — Defendant making untrue statement in written statement.**

In a suit upon a promissory note in which the plaintiff relied on an endorsement by the defendant to save limitation, the defendant denied the endorsement in the written statement and stated that it was forgery but he did not go into the witness box or contest the suit any further. It was found that the defendant's statement was false and the plaintiff applied for prosecution of the defendant for perjury :

Held, that as the defendant had made a false statement on oath knowing it to be false, he made himself liable to be prosecuted for perjury and the mere fact of his having kept out of the witness-box and not prosecuting his defence could not absolve him from liability to be prosecuted :

Held, further, that the fact that the plaintiff who had applied for the prosecution of the defendant died and his legal representatives did not take any steps to prosecute the application could not affect the duty of the Court to proceed with the application under S. 476, Criminal P. C. AIR (V 23) 1936 Mad 350 : 37 Cr LJ 557 : 1936 MWN 991 : 162 Ind Cas 285.

**——S. 476 — Decree sent to Collector for execution under S. 68, Civil P. C. — Mamlatdar holding sale — Judgment-debtor producing receipt of adjustment of decree and asking for adjournment — Receipt forged — Held, that Mamlatdar cannot make complaint under S. 476, Criminal P. C.**

When in course of execution proceedings pending before a Mamlatdar of a decree sent to the Collector for execution under S. 68, Civil P. C., the judgment-debtor produced a receipt on the date fixed for sale and applied for postponement, but the receipt was suspected to be a forged one :

Held that the Mamlatdar was acting merely as an agent for executing the decree of the Court of the Subordinate Judge and was not exercising the functions of the Court under O. 21, R. 2, Civil P. C., which could not be delegated to the Collector or his subordinates. Therefore, the offence of forging this document was committed in or in relation to proceedings in the Court of the Subordinate Judge, and not in or in relation to any proceedings before the Mamlatdar constituting a Court. Consequently, the Mamlatdar was not the proper authority to file a complaint under S. 476, Criminal P. C. AIR (Vol 22) 1935 Bom 158 : 37 Bom LR 93: 36 Cr LJ 1005: 59 Bom 345 : 158 Ind Cas 752.

**——S. 476 — Complaint, what is.**

Writing to the Magistrate to take action on Receiver's report is not a complaint. ('34) 1934 MWN 191.

——S. 476 — Application for transfer with sworn affidavit — Denial of allegations by accused by counter-affidavit and also by trial Magistrate's statement — Complaint against applicant under S. 193, I. P. C., on the basis of counter-affidavit and Magistrate's statement :

Held, that complaint was unwise and that proper procedure was directing an inquiry under S. 476. AIR (Vol 18) 1931 Cal 344 : 53 CLJ 184 : 32 Cr LJ 674 : 35 CWN 690 : 58 Cal 1211 : 131 Ind Cas 262 (DB).

——S. 476 — Order 21, R.2 (3), Civil P. C., does not prohibit the executing Court from making an enquiry under S. 476, Criminal P. C., into an alleged adjustment with a view to file a complaint under S. 210, I. P. C. AIR (Vol 18) 1931 Rang 148 : 9 Rang 104 : 132 Ind Cas 713.

**——S. 476 — Persons entitled to move under.**

Since 1923 proceedings under S. 476, Cr. P. Code are taken only by the Court in the interests of justice when it thinks fit to do so. It is now open to a private person to take proceedings after taking the sanction of the Court under S. 195. A private person may move the Court but it is for the Court to decide whether to take action and initiate the proceedings. A person moving the Court to take action under S. 476 cannot therefore be considered to be an interested person within the meaning of S. 526 (3) and also has no locus standi to apply for the transfer of a case, the Court being the "complainant". A I R (Vol 17) 1930 Lah 873 : 31 PLR 840 : 1930 Cr C 917 : 127 Ind Cas 152.

**——S. 476 — Applicant — If need be a party.**

Under S. 476, Cr. P. Code, a complaint may be made by a Court either on an application or otherwise. Hence whether the person making an application was a party in the original suit is immaterial. AIR (Vol 16) 1929 Pat 242 : 8 Pat 736 : 11 PLT 75 : 31 Cr LJ 143 : 120 Ind Cas 629 (DB).

——S. 476 — When the person who preferred a false charge to the police has also taken the same facts by way of complaint to the Magistrate then before that person can be prosecuted, the complaint of the Magistrate is necessary. 7 Mad 292, Not foll. AIR (Vol 14) 1927 Mad 851 : 26 MLW 405 : 39 MLT 103 : 1927 MWN 694 : 9 AI Cr R 7 : 28 Cr LJ 645 : 53 MLJ 455 : 104 Ind Cas 625.

**(a-1) Application if necessary.**

**(i) General.**
**(ii) When to be made.**
**(iii) By private persons.**
**(iv) Stranger.**

**(i) General.**

**——S. 476 — Application, if necessary.**

It must be borne in mind that under S. 476, there is no necessity for an application and the Court can be moved otherwise to take action under the section. AIR (Vol 27) 1940 Lah 292 : 41 Cr LJ 843 : 190 Ind Cas 178 (DB).

**(ii) When to be made.**

**——S. 476 (as amended in 1923) — Applications, when should be made.**

Under S. 476, as it now stands, the application need not be made in the course of the proceedings out of which it arises, or immediately thereafter. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the merits and would no doubt depend upon all the circumstances. AIR (Vol 27) 1940 Bom 131 : 42 Bom LR 231 : 41 Cr LJ 526 : ILR (1940) Bom 403 : 187 Ind Cas 867.

**(iii) By private persons.**

——S. 476 — Proceedings under S. 476, Criminal P. C., regarding the institution of a complaint ought not to be undertaken on the application of private persons unless the prosecution was clearly in the interests of the State. ('35) 1935 OWN 444.

——S. 476 — Proceedings under S. 476 should not be undertaken on the application of private persons unless the prosecution is clearly in the interests of the State and is reasonably certain to result in conviction. The Court cannot take proceedings under S. 476 against person who is not a party to a proceeding in any Court. AIR (V 17) 1930 Oudh 404 : 7 OWN 638 : 31 Cr LJ 938 : 1930 Cr C 944 : 125 Ind Cas 838.

**(iv) Stranger.**

**——S. 476 (as amended in 1923) — Stranger can apply.**

Under S. 476, Criminal P. C., as amended, it is open to the Court to entertain an application under S. 476 at the instance of a stranger to the proceedings out of which the application arises and in the course of which the offence is alleged to have been committed. AIR (Vol 27) 1940 Bom 131 : 42 Bom LR 231 : 41 Cr LJ 526 : ILR (1940) Bom 403 : 187 Ind Cas 867.

**(b) Court to act of its own motion.**

**——S. 476 — Complaint under S. 476, whether rests only with private individual.**

A complaint to be made in the interests of justice on an inquiry under S. 476, Criminal P. C., does not rest only upon private individuals. The Court has its duty and can, of its own motion, inquire under S. 476, Criminal P. C.

Hence, where a conspiracy to commit an offence under Ss. 206 and 207, I. P. C., is discovered, the Court should not place solely upon the complainant, the responsibility as to the inquiry of persons responsible for the offence but should itself endeavour to probe this business to the bottom and make a complaint against those against whom he considers a prima facie case of complicity in this conspiracy had been made out, and if the sanction of Government under S. 197, Criminal P. C., is required, then the Subordinate Judge should ask Government for that sanction. AIR (Vol 28) 1941 Sind 217 : ILR (1941) Kar 422 : 43 Cr LJ 259 : 197 Ind Cas 774 (DB).

——S. 476 — Under S. 476 the Court may take action of its own motion. Where the pleader merely brings the matter to the notice of the Court it is not necessary that he should file a fresh vakalatnama. AIR (V 17) 1930 Cal 721 : 34 CWN 914 : 52 CLJ 87 : 1930 Cr C 1129 (DB).

——S. 476 — Per Costello, J. — It is very much to be deprecated that the idea should be prevalent that matters under S. 476 are mainly matters inter partes. It must be viewed at merely as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration of public justice. AIR (Vol 17) 1930 Cal 721 : 34 CWN 914 : 52 CLJ 87 : 1930 Cr C 1129 (DB).

**——S. 476 — Court alone should in such matter take action.**

Although criminal procedure allows it, it is very reprehensible course for the parties in a litigation to prosecute a criminal matter of the kind contemplated by S. 476. If it is obvious to Subordinate Judge that a criminal offence had been committed, then undoubtedly it is his duty to proceed in bringing the culprit to justice. AIR (V 17) 1930 Pat 194 : 30 Cr LJ 1144 : 1930 Cr C 277 : 120 Ind Cas 45.

**——S. 476 — Court before whom offence is committed is to take initiative.**

The law requires that when certain classes of offences are committed, no Court should take cognizance of such offences unless the Court, before whom or in relation to the proceeding before which such offences have been committed moves for this purpose and removes the legal bar to the prosecution. AIR (Vol 14) 1927 Cal 718 : 46 CLJ 40 : 8 AI Cr R 433 : 28 Cr LJ 840 : 104 Ind Cas 456 (DB).

**——S. 476 — Court generally takes action on application by parties.**

If it was always to be left solely to the self-acting motion of the Courts concerned to institute a complaint much of S. 476 would be surplusage: as it is frequently only upon application made to it that a Court either under S. 476 or S. 476-A of the Cr. P. Code takes action. AIR (Vol 13) 1926 Pat 81 : 5 Pat 262 : 7 PLT 114 : 1926 PHCC 89 : 27 Cr LJ 641: 94 Ind Cas 593 (DB).

**(c) Making of complaint.**

**——S. 476 — Making of complaint — Court must itself make complaint.**

Section 476 requires that the Court should record a finding that in the circumstances of the case before it an enquiry into the offences mentioned should be made and that he should make a complaint in those terms in writing signed by him. A note made by the presiding officer to his office: "Write to A.M.D. about the matter" is not in any way a recommendation or a complaint to the criminal Court to take action in the matter. AIR (Vol 14) 1927 Cal 718 : 46 CLJ 40 : 8 AI Cr R 433 : 28 Cr LJ 840 : 104 Ind Cas 456 (DB).

**——S. 476 — Persons causing proceedings to be started may not be party to proceedings.**

Court may make a complaint against a person under S. 476 for an offence under S. 211, Penal Code, if it is of opinion that the proceedings before the Court were caused to be started by that person though he was not a party to a proceeding before it. AIR (Vol 17) 1930 Cal 671 : 52 CLJ 149 : 1930 Cr C 1063 : 127 Ind Cas 65 (DB).

——S. 476 — Under S. 476 as amended by the Act of 1923 where a Court thinks that proceedings should be taken it is bound to make a complaint in writing signed by the presiding officer of the Court and to forward it to a Magistrate of the First Class having jurisdiction. AIR (Vol 11) 1924 Bom 347 : 48 Bom 401 : 26 Bom LR 289 : 25 Cr LJ 1123 : 81 Ind Cas 947 (DB).

**(d) Panchayat Court.**

——S. 476 — Institution of proceedings by a Panchayat Court under S. 476, Criminal P. C., is barred under S. 77(2) of Madras Village Courts Act. ('34) 1934 MWN 395 (DB).

**14. 'In relation to' meaning of**

See also N. 13.

**——Ss. 476 and 195 (1) (b) — Police submitting charge sheet in Court of Chief Presidency Magistrate on basis of false complaint — Subsequent charge-sheet under S. 211, Penal Code, against complainant in Court of Chief Presidency Magistrate — Complaint transferred to file of third Presidency Magistrate — Complaint of Chief Presidency Magistrate, necessity of.**

A case against B in the Court of the Chief Presidency Magistrate started on a charge-sheet filed by the police on the basis of a complaint by A of an offence under S. 406, I.P.C., resulted in the discharge of B. Thereupon, the Police filed a complaint under S. 211, I.P.C., against A. The complaint was transferred to the file of the third Presidency Magistrate:

Held, that the offence was committed in relation to proceedings in the Court of the Chief Presidency Magistrate. Consequently, without the complaint from the Chief Presidency Magistrate, the third Presidency Magistrate could not take cognizance of the case against the complainant. AIR (V 32) 1945 Mad 461: 58 LW 357: (1945) 2 MLJ 115: 1945 MWN 425.

——S. 476 — Offence committed by constable. Magistrate who was actually trying a certain case issued warrants for arrest, which were made over to a constable for execution. As an explanation of his failure to make any arrest, the constable gave false information in the thana that certain persons had committed an offence under S. 225-B, I.P.C.:

Held, that the constable committed an offence under S. 211, I. P.C., in a transaction which arose out of the execution of those warrants. The offence was committed in relation to those proceedings and consequently complaint was necessary under S. 476, Criminal P.C. AIR (V 28) 1941 Cal 263: 42 Cr LJ 626: 45 CWN 195: 194 Ind Cas 829 (DB).

——S. 476 — Statement made during the course of an investigation under S. 164 into an offence of murder which is triable only by a Sessions Court must be held to be "in relation to" the trial in that Court within S. 476. AIR (V 20) 1933 Mad 125: 1933 MWN 100: 34 Cr LJ 92: 140 Ind Cas 756.

——S. 476 — A person made a statement under S. 164, Criminal P.C. in connection with an offence and made another contradictory statement in the Court which subsequently tried the offence:

Held, that the words "in or in relation to" are to be widely interpreted and they clearly cover both the statements made by him. ('33) 1933 MWN 896 (DB).

**——S. 476 — 'In or in relation to a proceeding in that Court', meaning of.**

Section 476 can only apply to cases where the Magistrate requires a complaint by a Court in order that he may take cognizance of the charge. The use of the words "in or in relation to a proceeding in that Court" is merely to say that the Court is not to take action where the offence has relation to a proceeding in some other Court. It is merely to identify the Court itself which is to take action under S. 476. AIR (Vol 18) 1931 Cal 438 : 35

CWN 98: 32 Cr LJ 383: 58 Cal 727: 132 Ind Cas 241 (DB).

——S. 476 — **Offence committed before arbitrator.**

Where a person is alleged to have given false evidence before an arbitrator appointed under Sch. II, Civil P.C., an application under S. 476, Criminal P.C., by the Court in which the suit was instituted is necessary. AIR (V 18) 1931 Cal 436: 58 Cal 215: 32 Cr LJ 826: 132 Ind Cas 93.

——S. 476 — Decree-holder applying for execution --Judgment-debtor pleading payments — Executing Court refusing to recognize — Judgment-debtor producing receipt and moving Court to institute proceedings under Ss. 209 and 210, Penal Code against decree-holder — Order for drawing up complaint— Revision by decree-holder under S. 439, Criminal P. C.:

Held, that revision was competent.

Held, also that the execution proceedings had terminated and the receipt which formed the basis of the order was not before the Court during the proceeding. No offence, therefore, was committed in or in relation to a proceeding in that Court and the action of the Court was ultra vires. High Court could also interfere under S. 115, Civil P.C. AIR (V 18) 1931 Lah 105: 32 CrLJ 647: 32 PLR 46: 131 Ind Cas 216.

**——S. 476 — False complaint to Court X against A, B and C — Transfer of case to Court Y for trial of A and B — Power of Court Y to complain on application of C.**

One essential ingredient for the exercise of powers under S. 476, Criminal P. C., by any Court is that the offence should have been committed in or in relation to proceedings in that Court.

R. instituted a complaint in the Court of the Sub-Divisional Magistrate of Lucknow against A, B and C under Ss. 392 and 394, Penal Code. The Sub-Divisional Magistrate, on receving the Police report, transferred the case to the Bench Magistrate, Lucknow, for the trial of A and B under S. 384. The Bench Magistrates ultimately dismissed the complaint. Subsequently, C made an application to the Bench Magistrates under S. 476, Criminal P.C., for prosecution of R under S. 211, Penal Code:

Held, that the Bench Magistrates had no jurisdiction to take action under S. 476, Criminal P.C., inasmuch as the alleged offence, so far as C was concerned, was not committed in or in relation to any proceedings in the Court of the Bench Magistrates. AIR (V 18) 1931 Oudh 417: 8 OWN 1086: 33 Cr LJ 160: 7 Luck 222: 135 Ind Cas 377.

**——S. 476 — Complaint against person not party to proceeding.**

The Court may make a complaint against a person under S. 476 for an offence under S. 211, I.P.C. if it is of opinion that the proceeding before the Court was caused to be started by that person though he was not a party to the proceeding before it. An offence may be committed by a person in relation to a judicial proceeding though it may not be in a judicial proceeding. AIR (V 17) 1930 Cal 671: 127 Ind Cas 65: 52 CLJ 149: 1930 Cr C 1063 (DB).

**——S. 476 — "In relation to the proceeding in Court."**

The mere fact of a telegram sent by the complainant to the D.S.P. being exhibited and filed in the case does not make the contents of it a matter "in relation to the proceeding" in the Court so as to give the Court jurisdiction to take action under S. 476 against persons not parties to the proceeding but mentioned in the telegram. 1930 MWN 1130 (FB).

——S. 476 — False charge of theft made to Police —Sessions Court complaining under S. 476 — Institution of false case to Police being basis of proceedings in Sessions Court, the offence is committed "in relation to" proceedings in Sessions Court within the meaning of S. 476. AIR (V 14) 1927 Cal 478: 28 Cr LJ 324: 100 Ind Cas 708: 7 AI Cr R 551 (DB).

### 15. Judicial proceedings.

**(a) General**
**(a-1) Calling for records**
**(b) Enquiry**
**(c) Execution proceedings**
**(d) Legal Practitioners' Act.**

#### (a) General

——S. 476 — Since 1923 proceedings under S. 476, Cr. P. Code are taken only by the Court in the interests of justice when it thinks fit to do so. It is not now open to a private person to take proceedings after taking the sanction of the Court under S. 195. A private person may move the Court but it is for the Court to decide whether to take action & initiate the proceedings. AIR (V 17) 1930 Lah 873: 31 Punj LR 840: 127 Ind Cas 152 : 1930 Cr C 917.

——S. 476 — Forged document filed in Court — Court having power only to return plaint to be filed in another Court — Document is still filed in judicial proceeding. AIR (V 16) 1929 Cal 203: 49 CLJ 193: 116 Ind Cas 632: 30 Cr LJ 656: 13 AI Cr R 73 (DB).

**——S. 476 — Scope of amended section.**

Under the amended section it is not essential that the proceeding in respect of which action is taken should be of a judicial character. AIR (V 12) 1925 Pat 330: 83 Ind Cas 730: 4 Pat 24: 6 PLT 225: 3 Pat LR Cr 51: 26 Cr LJ 170 (DB).

——S. 476 — An order under S. 476, Cr P. Code, is bad in law where there is no judicial proceeding pending before the Magistrate as contemplated by S. 476. An order under S. 476, Cr P. Code, to prosecute the complainant under S. 211, I.P.C., can only be passed when such an offence is committed in or relation to any proceeding in any Court. AIR (V 11) 1924 Pat 789: 81 Ind Cas 158: 5 PLT 300: 2 Pat LR Cr 184: 1924 PHCC 124: 25 Cr LJ 670.

**——S. 476 — A non-judicial and irregular enquiry —Improper basis to decide that an information given to the Magistrate was false.**

A private or a personal enquiry conducted on non-judicial lines without the recording of any evidence, without cross-examination and based upon unrecorded and irregular methods of taking testimony does not justify the conclusion that a petition to a Magistrate to proceed under S. 144, Cr P Code, was false and does not justify the petitioner's prosecution under S. 182 of the Penal Code. AIR (V 10) 1923 Pat 542 : 74 Ind Cas 710 : 1 Pat LR Cr 137: 24 Cr LJ 806.

**——S. 476 — "Committed before it."**

The words "committed before it" in S. 476 are qualified by the words "in the course of a judicial proceeding." Where the signatures on an application for the return of a document made after the suit in which the document was filed has been finally disposed of, turn out to be forged, the Court has no jurisdiction to take action under S. 476 as there is nothing pending before it. AIR (V 8) 1921 Cal 433: 23 CWN 660: 71 Ind Cas 666 (DB).

——S. 476 — Statement unconnected with judicial proceedings cannot be basis of order under S. 476. AIR (V 8) 1921 Lah 332: 63 Ind Cas 413: 3 LLJ 535: 22 Cr LJ 653.

——Ss. 476 and 195 — Forgery — Order directing prosecution — Persons not parties — Documents alleged to be farged not produced.

Petitioner produced a bond in a suit eventually compromised. The deft. filed a complaint against petitioner under S. 417 I.P.C. alleging that he had been deceived into the compromise. Evidence was recorded and a warrant of arrest issued. On the date of hearing, deft. alone was examined but the bond was not produced by him or given in evidence and the petitioner was discharged.

Held, that the bonds were not given in evidence during the proceedings to which the petitioner was a party; and the Magistrate had no jurisdiction to take action under section 476, Cr P. C. AIR (V 7) 1920 Lah 89: 21 Cr LJ 7: 4 PWR 1920 Cr: 54 Ind Cas 55.

——S. 476 — Proceedings before Deputy Commissioner sitting as chairman of a District Board are not judicial proceedings under S. 476. AIR (V 7) 1920 Oudh 199: 23 OC 136: 2 UPLR (JC) 133: 57 Ind Cas 934.

——S. 476 — Whether necessary.

It is not necessary that the judicial proceedings should be in existence before an order is passed under S. 476. What is necessary is that the order should be passed with respect to an offence which may have been committed before the Court or brought to its notice in the course of judicial proceedings. AIR (V 7) 1920 Pat 430: 1 Pat LT 331: 21 Cr LJ 549: (1920) Pat HCC 205: 56 Ind Cas 853.

——Ss. 476 (1) and 202 — Investigation under S. 202 — Dismissal of complaint summarily.

It is doubtful whether the investigation under S. 202 of the Cr. P. C. can be regarded as a judicial proceeding and may be used for supporting an order under S. 476 of the Code. Where a complainant is not allowed to adduce whole of his evidence in support of his complaint which is dismissed, exceptionally strong reasons are required to justify an order against him under S. 476, Cr P. C. AIR (V 6) 1919 Lah 37: 20 Cr LJ 315: 53 Ind Cas 719.

——Ss. 476 and 202 — Judicial proceedings — Order under S. 202 — Complainant not allowed to adduce whole of his evidence — Investigation.

Strong reasons are required to justify an order under S. 476 where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint.

Where the Magistrate did not himself give any reason for holding that the complaint of the petitioner was false and he did not record any evidence except the statement of the complainant and proceeded entirely upon the result of the investigation made under S. 202, Cr P.C., an order under S. 476, is inadmissible. Quaere: It is doubtful whether an investigation under S. 202 Cr P.C. can be regarded as a judicial proceeding, and may be used for supporting an order under Section 476. AIR (V 6) 1919 Lah 37: 20 Cr LJ 815: 2 Lah LJ 239.

——Ss. 476 and 195 — Lands attached under S. 146 Cr. P. C.—Settlement of lands by auction — Complaint made during proceeding — Sanction to prosecute complainant.

Proceedings started by the sub-divisional Magistrate under S. 145 of the Cr P. Code having terminated with the final order under S. 146 of the Code, settlement of the attached lands was not a judicial proceeding, therefore, the complaint of the accused against the conduct of the Nazir in settling the lands not having been made during the course of a judicial proceeding, the sub-divisional Magistrate was not competent to direct the prosecution of the accused under S .476 of the Cr P. Code. The order made by the Sub-Divisional Magistrate should be treated as a complaint on which cognisance of an offence under S. 182 I.P.C. can be taken under S. 195 clause (1) of the Cr P. Code. The failure to examine the sub-divisional officer on the complaint undr S. 200 of the Cr P. Code was a mere irregularity converted by S. 537 of the Code and did not vitiate the trial. AIR (V 6) 1919 Pat 203: 20 Cr LJ 247: 49 Ind Cas 919.

——S. 476 — Meaning of appeal — Offence under Ss. 209 and 210, Penal Code brought to Court's notice in the course of a judicial proceeding — Jurisdiction, if offence committed in another province.

Per Sharfuddin, J. — S. 476 is a self-contained section and the reference in it to S. 195 is only for avoidance of enumeration of the sections mentioned in S. 195. Where an appeal from a decision of the Dt. Munsiff of A, setting aside a decision of the Small Cause Court at B in the Central Provinces on the ground of fraud, the District Court, to which the decree set aside had been transferred for execution, ordered the prosecution of the decree-holder and two others under Ss. 209 and 210 Penal Code. Held, that the District Judge could under S. 476 Cr. P. Code order the prosecution of petitioners. The hearing of the appeal by him was a judicial proceeding and the offences alleged to have been committed by the petitioners were brought to his notice in the course of that proceeding. AIR (V 3) 1916 Pat 97 : 1 Pat LJ 298 : 18 Cr LJ 135: 3 Pat LW 33: 37 Ind Cas 487 (DB).

——S. 476 — A Magistrate has no power to take action under S. 476 against a village headman incriminating police officer and other persons who were found to have made false statements on oath before him while he was inquiring into the reasons for village headman's tendering the resignation: this inquiry is not a judicial proceeding. AIR (V 2) 1915 All 457: 38 All 32: 13 ALJ 1050: 16 Cr LJ 807: 31 Ind Cas 823.

——S. 476 — Magistrate acting under Section 125 —Documents filed before.

Documents filed by petitioner, during the course of proceedings under Section 125 before a District Magistrate are not presented to the Magistrate in a judicial proceeding and hence cannot form the basis of prosecution of the petitioner under Section 471 Indian Penal Code. (1910) 37 Cal 72: 11 Cr LJ 147: 14 CWN 306: 5 Ind Cas 555 (DB).

——Ss. 476, 478 — "Brought under the notice of court," meaning of.

In order to make an order under Ss. 476, 478 of Cr P. C. there must be a judicial proceeding before the court and it is in the course of the judicial proceeding that some supposed offence must be brought under its notice. The words "brought under its notice" are wide enough to cover an offence which may have been committed in another forum and on some previous occasion, but it must be an offence brought under the notice of the court holding the enquiry. A civil suit was brought against N and was decreed ex parte. N was arrested and put in jail, and on his application for restoration of the case it was dismissed. And the plaintiff then brought a suit and obtained a decree and arrested N in execution. N was rescued. A report was made before the Munsiff who held an enquiry and in the course of that enquiry he came to the conclusion that both the suits against N were false suits and were brought by G in the name of the plaintiff. He made an order committing G to sessions for committing certain offences.

Held, that the offences were brought to the notice of the court in the course of judicial proceedings and the Munsiff's order was a valid order. (1909) 6 ALJ 392 (398): 1 Ind Cas 306: 9 Cr LJ 219 (DB).

——**Ss. 476 and 195 — Appellate stage.**

Where a Munsif refused to give sanction and on appeal, the District Judge refused sanction under S. 195 (6) but ordered prosecution under S. 476 it was held that the judge's order was without jurisdiction, because the offence was not committed before him nor brought to his notice in the course of a judicial proceeding. (1909) 9 Cr LJ 181: 1 Ind Cas 220: 6 ALJ 487.

——S. 476 — Where the court officers, who went to effect an attachment, were resisted by the judgment debtors, the court which directed the attachment has power to hold an enquiry and make an order under S. 476 Cr P. C. for prosecution of the judgment debtors under S. 183, I.P.C. inasmuch as the facts on which it directed the prosecution came to its knowledge while it was engaged in a judicial proceeding. (1909) 10 CLJ 450: 10 Cr LJ 564: 4 Ind Cas 368 (DB).

——S. 476 — Order passed by Court under S. 476 should show that it was part of the proceedings in the trial in which the alleged offence was committed; otherwise the order should be considered as made without jurisdiction. (1909) 6 MLT 92: 10 Cr LJ 8: 2 Ind Cas 425 (DB).

**——S. 476 — Local inquiry not authorised by law —Ss. 100, 552 — Custody of female child — Rival claim of husband and mother — Question for civil court — Proceeding before Deputy Magistrate — Order for prosecution for perjury by District Magistrate.**

An application was made before the District Magistrate on behalf of a mother for the recovery of the custody of a female child from her grandfather G who was thereupon called by a Deputy Magistrate to show the cause. G declared before the Deputy Magistrate that the child had been already married to R. The Deputy Magistrate examined R and G, and having satisfied himself that the marriage had actually taken place, submitted the case for orders before the District Magistrate, who dismissed the application. The District Magistrate upon a subsequent application, in which the story of the marriage was challenged as false, held a local inquiry and came to the conclusion that G and R had given false evidence before the Deputy Magistrate and ordered their prosecution for perjury.

Held, that the alleged offence for perjury had not been brought to the notice of the District Magistrate in a 'judicial proceeding' within the meaning of S. 476, Cr. P. C., and the order for prosecution was made without jurisdiction. The local enquiry held by him was one which in the circumstances of the case he was not authorized by law to make. Question as to legal guardianship should be determined by the civil court. (1905) 9 CWN 1030 (1032): 2 Cr LJ 851 (DB).

——S. 476 — Sanction — Stamp Act, Ss. 43 and 42 — Reference by Registrar.

Where a Sub-Registrar impounded a document presented for registration as insufficiently stamped and sent it to the Collector and the Deputy Collector on orders from the Collector reported on enquiry that the petitioner failed to prove the execution of the deed by the alleged executant and that it was not genuine and the Collector thereupon made an order sanctioning the prosecution of the petitioner under S. 471 or some cognate section of the Penal Code.

Held, that the order for prosecution was made without jurisdiction as neither the Collector nor the Deputy Collector acted as a court, and the enquiry by the latter was not a judicial enquiry having been held solely for the purpose of determining who should be called on to pay stamp duty. (1903) 7 CWN 795 (797) (DB).

**(a) Calling for records**

**——S. 476 — Calling for records under S. 435 not a judicial proceeding' — Lapse of time.**

Calling up for the records of a case from a Subordinate Magistrate under S. 435, Cr. P.C., will not constitute a 'judicial proceeding' within the meaning of S. 476. Where a District Magistrate called for the records of a case from a Sub-Magistrate in which the Sub-Magistrate had refused to accord sanction for perjury against a witness under S. 195, Cr. P. C., and passed orders under S. 476, Cr. P. C. committing the witness for trial before the nearest Magistrate.

Held, that the District Magistrate had no jurisdiction to proceed under S. 476. Immediate action is contemplated by S. 476, Cr P. C., and procedure taken under it after the lapse of several months is illegal. (1905) 15 MLJ 489 (490) : 3 Cr LJ 118 (DB).

**——S. 476 — Records of case called for by the District Magistrate in his executive capacity.**

Though an order passed after records have been called for any of the purposes stated in S. 435 of the Criminal Procedure Code may be a judicial proceeding for the purposes of S. 476 of the Criminal Procedure Code, yet where the District Magistrate called up the records in his executive capacity to see whether an application for an inquiry into the conduct of a police constable should be granted and passed an order sanctioning his prosecution:

Held, that there was no judicial proceeding within the meaning of S. 476, and that the order must be set aside. (1902) 25 M 659 (661) : 2 Weir 599 (DB).

**(b) Enquiry.**

**——S. 476 — Enquiry into — Conduct of jury called in question — Enquiry is judicial.**

Whenever the conduct of the jury is taken exception to during the progress of the trial in the Sessions Court, the presiding Judge has undoubted jurisdiction to enquire into the same and such an enquiry is a judicial enquiry. In the course of such an enquiry the Sessions Judge is entitled to call upon any persons to appear before him, to administer oath to such persons and to require them to give evidence. AIR (Vol 14) 1927 Cal 628 : 31 CWN 828 : 104 Ind Cas 111 : 28 Cr LJ 783 : 8 AI Cr R 319 (DB).

**——S. 476 — Enquiry started by Magistrate directing a person to show cause against his prosecution is not "judicial proceeding."**

There is no provision in the Cr. P. Code empowering the Magistrate to hold what may be called a judicial or preliminary enquiry, unless there is a complaint lodged before him under S. 190 (1) (a) of the Code, S. 202 of the Cr. P. Code under which alone an enquiry can be made relates exclusively to complaints. No such inquiry can be made when cognizance is taken under Cls. (b) and (c) of S. 190 of the Code. Therefore the enquiry started by a Magistrate, directing a person to show cause why he should not be prosecuted is not a judicial proceeding and his order under S. 476 in the course of or after the enquiry

is, therefore, without jurisdiction. AIR (Vol 8) 1921 Pat 302 : 64 Ind Cas 47 : 2 PLT 220 : 22 Cr LJ 735.

**——S. 476 — Nature of.**

Enquiry under section 476 is a judicial proceeding. (1910) 37 Cal 52 : 11 Cri LJ 45 : 5 Ind Cas 62 (DB).

**——Ss. 476, 192, 202 — Proceeding under S. 476 — Competency of Magistrate to whom a case is sent for inquiry and report to institute.**

Where a Magistrate, after taking cognizance of a case on a petition of complaint sent it to another Magistrate for inquiry prior to the issue of process against the accused, and the latter Magistrate made the inquiry, examined witnesses and came to the conclusion that the case was false and then took proceedings under S. 476, Cr. P. C., against the complainant and committed him for trial under S. 211, I. P. C.

Held: — Whether the case was transferred to the latter Magistrate under the provisions of S. 192 or S. 202, Cr. P. C., as he, in carrying out the order received with the order of transfer, examined witnesses and recorded evidence on oath, the proceeding conducted by him was a judicial proceeding within the meaning of S. 4, Cl. (m), Cr. P. C., and therefore he was competent to draw up proceeding under S. 476, Cr. P. C., against the complainant for any offence referred to in S. 195, Cr. P. C., and committed before him or brought to his notice in the course of the proceeding. (1909) 13 CWN 122 (123, 124) : 36 C 72 : 1 Ind Cas 203 : 9 Cr LJ 295 (DB).

**——S. 476 — Enquiry by Magistrate — Criminal courts — Statements by accused in the course of inquiry — Judicial proceeding.**

A Magistrate holding an inquiry into matters disclosed in a communication containing imputations against a certain person is a criminal court, and false statements knowingly made in the course of such an inquiry, are deemed to be made in a 'judicial proceeding' within the meaning of the Code. The definition of that term as used in the Code is wide enough to include an inquiry in which the false statements are repeated. (1905) 2 ALJ 717 : 1905 AWN 195 : 28 A 89 (90) : 2 Cr LJ 454.

**(c) Execution proceedings.**

**——S. 476 — Judicial proceedings — Execution proceedings — Action, when to be taken.**

The proceedings in execution are judicial proceedings within S. 476 of the Cr. P. Code till they are finally disposed of by the Court. No Court should direct or sanction a prosecution unless there is a reasonable probability of conviction. The opinion of the Court should be judicial opinion based on evidence and formed after a thorough enquiry into the matter. AIR (Vol 1) 1914 Nag 40 : 10 NLR 177 : 16 Cr LJ 161 : 27 Ind Cas 545.

**——S. 476 — Judicial proceeding.**

Execution proceedings of a decree are judicial proceedings and a Court has jurisdiction under S. 476 to make an order as regards matters which came within its knowledge in execution proceedings. AIR (Vol 1) 1914 Oudh 407 : 17 OC 309 : 1 OLJ 568 : 16 Cr LJ 91 : 26 Ind Cas 1003.

**——S. 476 — Judicial proceedings — Execution proceedings — Delivery of possession — Obstruction — Jurisdiction of execution court to make order under S. 476 of the Code of Criminal Procedure (Act V of 1888) — Enforcement of process of court — Offence committed — Cr. P. C., S. 195.**

An execution proceeding is a judicial proceeding within the meaning of S. 479 of the Code of Criminal Procedure, and consequently the court while engaged in such a proceeding is competent to make an order under that section if the fact is brought to its notice that offences have been committed while the process of the court was attempted to be enforced. (1910) 12 CLJ 618 (619) : 12 Cr LJ 21 : 8 Ind Cas 1106 (DB).

**——S. 476 — "Court" — Judicial Proceeding — Execution proceeding, a judicial proceeding — Prompt action under section necessary.**

The word "court" in S. 476, Cr. P. C., is to be understood as bearing its natural meaning with the sense of continuity; this implies notwithstanding any change of officers. An execution proceeding is a "judicial proceeding" within the meaning of S. 476 of the Code, the definition in S. 4, Cl. (m) being clearly not exhaustive. Action under S. 476, Cr. P. C., should as far as possible be prompt and expeditious. (1904) 14 CWN 799 (806) : 12 CLJ 45 : 11 Cr LJ 942 : 37 Cal 642 : 6 Ind Cas 201.

**——S. 476 — Judicial proceedings — Court — Meaning.**

Execution proceedings are judicial proceedings within the meaning of S. 476. An order can be made by a Judge under S. 476, though the offence was brought to the notice of his predecessor and not himself. (1910) 37 Cal 642 : 14 CWN 799 : 12 CLJ 45 : 11 Cr LJ 407 : 6 Ind Cas 801 (FB).

**——S. 476 — Judicial proceedings — Test.**

To determine what are and are not judicial proceedings, the test is whether evidence can legally be taken on oath, and not whether the judge has taken the evidence on oath. Execution proceedings are judicial proceedings within the meaning of S. 476. 1 PR 1910 Cr : 3 PWR 1910 Cr : 11 Cr LJ 90 : 161 PLR 1910 : 5 Ind Cas 257 (DB).

**——S. 476 — In the course of a judicial proceeding — Execution proceeding.**

In execution of a decree for money, attempt was made by the officers of the court to attach and seize the moveables of the judgment-debtor. Resistance was thereupon offered by persons present on the spot. The court held an enquiry and under S. 476 of the Criminal Procedure Code, directed the prosecution of the persons who had offered resistance.

Held, that an execution proceeding is a judicial proceeding and the resistance having taken place and brought to the notice of the Court in the course of such proceeding, the order under S. 476 was made with jurisdiction.

Quaere:—Whether a Civil Bench or a Criminal Bench should hear the revision from orders under the section by civil court. But the Chief Justice can order the case to be heard by any Bench. (1909) 10 CLJ 450 (451, 452) : 4 Ind Cas 368 : 10 Cr LJ 564.

**——S. 476 — Order for prosecution — Proceeding in execution of decree — Attachment — Obstruction — Judicial proceeding.**

A decree-holder proceeded to execute a warrant of attachment of the moveable properties of the judgment-debtor. The judgment-debtor and several other persons beat the decree-holder and threatened to beat the peon. The peon reported the matter to the Munsif and the decree-holder also complained before him. The Munsif, after holding an inquiry, ordered the prosecution of the offenders under S. 183, I. P. C.,

Held, that the Munsif had power under S. 467, Cr. P. C., to direct the prosecution, as the facts

did come to his knowledge while he was engaged in a judicial proceeding, namely, in a proceeding in an execution case which had not been finally disposed of. (1906) 10 CWN 55 (56) : 3 Cr LJ 142 (DB).

**(d) Legal Practitioners' Act.**

**——S. 476 — Legal Practitioners' Act — Misconduct — Enquiry.**

Where a District Judge in an enquiry into the conduct of a second grade pleader in a matter in a sub-court, sent a witness to a magistrate under S. 476, Cr. P. C., the proceedings were ultra vires as the District Court had no jurisdiction to enquire into the pleader's conduct. AIR (Vol 5) 1918 Mad 398 : 32 MLJ 402 : (1917) MWN 303 : 6 LW 364 : 18 Cr LJ 785 : 41 Ind Cas 305.

**——S. 476 — Legal Practitioners' Act — Proceedings not properly initiated under.**

Acts are not judicial proceedings and S. 476 Cr. P. Code does not apply to such proceedings. (1911) 15 CWN 269 : 13 CLJ 456 : 12 Cr LJ 33 : 9 Ind Cas 225 (DB).

**16. Jurisdiction.**

**——S. 476 — Jurisdiction to file complaint under in respect of offences not falling under S. 195 Cr. P. Code — Such complaint, how to be treated.**

Where the offences in question do not fall within the purview of S. 195, Cr. P. Code, a Court has no jurisdiction to make a complaint. But such complaint if made, can be treated as information within the meaning of S. 190 (1) (c), Cr. P. Code and cognizance taken by the magistrate. AIR (Vol 35) 1948 All 80 : ILR (1947) All 440 : (1947) AWR (HC) 70 : 1947 ALW 92 : 48 Cr LJ 410 : 1947 A Cr C 47 : 1947 ALJ 263.

**——S. 476 — Magistrate taking cognizance under S. 191 (1) (c) — Power to file complaint in respect of offences mentioned in S. 195 (1) (b) or (c).**

When a Magistrate takes cognizance of an offence under S. 190 (1) (c), Cr. P. Code, he has full powers to file a complaint in pursuance of S. 476, Cr. P. Code, against persons who have, according to him, committed offences mentioned in S. 195 (1) (b) or (c) even if his jurisdiction to take cognizance is disputed or challenged. There is no reference in S. 476 to jurisdiction. AIR (Vol 35) 1948 Sind 114 : 49 Cr LJ 454 : ILR (1947) Kar 126 (DB).

**——Ss. 476, 164 (as amended in 1923) — Power of Special Tribunal to make complaints.**

The Special Tribunal has jurisdiction under S. 476, Criminal P. C., to hold an inquiry, record a finding, and make a complaint both as regards the statement in its own Court and the statement before the Magistrate under S. 164 Criminal P. C. AIR (Vol 21) 1934 Lah 981 : 36 Cr LJ 402 : 16 Lah 153 : 37 PLR 534 : 153 Ind Cas 547.

**——S. 476 — Jurisdiction of Court — Complaint against persons not parties to the proceeding.**

When the charge is made by the complainant to the police against more than one individual, and the police while charging before the Court one or more of such individuals with the offence complained, do not charge them all, the Court has jurisdiction to take action under S. 476 against those not so charged. 1930 MWN 1130 (FB).

——S. 476 — The successor in office of a Magistrate who has started proceedings under S. 476 Cr. P. C. cannot be said to be the nearest magistrate, indicated by the section to whom the case might be sent for inquiry or trial. AIR (Vol 7) 1920 Pat 225 : (1920) Pat HCC 61 : 21 Cr LJ 29 : 54 Ind Cas 173.

**——Ss. 476 and 4 (4) — False Complaint — Judicial proceeding — Complaint — Inquiry by Magistrate.**

Application by petitioner asking for a judicial enquiry of the charge made by him and reported by the police to be false is a complaint. A Magistrate enquiring into it has jurisdiction to direct the prosecution of the petitioner for an offence under S. 211 I.P.C. the offence having been brought to his notice in the course of a judicial proceeding. AIR (V 6) 1919 Pat 530: 20 Cr LJ 389: 50 Ind Cas 997.

**——S. 476 — Enquiry by Magistrate other than Magistrate taking cognizance of the case — Jurisdiction.**

The preliminary enquiry required to be held under S. 476 could not be delegated to any other Magistrate except the Subdivisional Magistrate himself who thought that the case of the complainant was false and gave him a chance to show causes. An Honorary Magistrate has therefore no jurisdiction to record the evidence of the petitioner and that the petitioner therefore, did not give false evidence at any stage of a judicial proceeding within S. 193, I. P. C. and could not be prosecuted for perjury. AIR (Vol 6) 1919 Pat 266: 20 Cr LJ 245: 49 Ind Cas 917.

**——Ss. 476, 478 and 195 — Proceedings before Dt. Munsiff — Commission of offence under Ss. 193, 209 and 210 I.P.C. — Committal of accused for trial to Sessions Court.**

The words "referred to in S. 195" which have found a place in S. 476 are merely words descriptive of the class of offences with which a particular court can deal with. They do not mean that S. 195 governs S. 476 to any extent other than this. Where in the course of a judicial proceeding before the Munsif in Agra District certain offences under Ss. 193, 209, 210 and 467 and 471 I.P.C. committed in Bengal, were brought under the notice of the court and the Munsif committed the accused for trial to the court of Session at Agra, held that the court had jurisdiction under S. 478 read with S. 476. AIR (V 5) 1918 All 129: 40 All 116: 15 ALJ 912: 19 Cr LJ 148: 43 Ind Cas 436.

**——Ss. 476 and 439 — Perjury — Sessions Judge refusing adjournment to accused — Summary trial.**

Section 477 of the Cr P. Code does not lay down that the trial for any offence committed before a Court should be a summary one nor does it demand a decision which is to be more prompt and speedy than that of any ordinary trial. A Magistrate charged a witness with having given false evidence before him in connection with a trial proceeded with the trial after refusing an adjournment prayed for by the accused for the purpose of taking legal advice to put in his defence, and in consequence the accused refrained from making any defence. Held that the court in so acting had acted hastily and irregularly in the exercise of its jurisdiction and the trial and conviction were bad in law. AIR (V 5) 1918 All 1: 41 All 197: 16 ALJ 926: 20 Cr LJ 33: 48 Ind Cas 673.

**——S. 476 — Legality of order under, to be on specific charges.**

An order under S. 476 should specify clearly the exact charges against the accused. A Court has jurisdiction to grant sanction under S. 476 even though no sanction is necessary for a prosecution under Section 182, I.P.C. AIR (V 1) 1914 Sind 66: 8 SLR 179: 16 Cr LJ 104: 27 Ind Cas 152 (DB).

——S. 476 — Where a Magistrate directs a Deputy Magistrate to make a judicial inquiry as to the information laid before the Police, and the Dy. Magistrate finds that the information was false he has jurisdiction to make an order under S. 476 directing prosecution of the informant under Ss. 182 and 211 I.P.C. The Magistrate to whom the Deputy Magistrate may send his report of inquiry, has no power to do so. It is desirable that a prosecution under S. 476 should be entertained as speedily as possible when the evidence on both sides is fresh. (1909) 13 CWN 398: 11 Cr LJ 4: 4 Ind Cas 485 (DB).

——S. 476 — Opinion of officer ordering prosecution — Superior Court interfering.

Where a Munsif, having been directed by the District judge, sanctioned prosecution of a party under S. 476, Criminal Procedure Code, and it appeared that the case did not come before the Judge in the course of a judicial proceeding and that the offence was not committed before him: Held, that the order was without jurisdiction. (1909) 6 ALJ 924 (925): 4 Ind Cas 260: 10 Cr LJ 525.

——S. 476— Order for prosecution — Complaint before Police proved false — Inquiry by Deputy Magistrate — Order for prosecution by District Magistrate — Jurisdiction — Judicial proceeding.

A complaint lodged with the police was reported false. The District Magistrate thereupon directed an inquiry which was held by a District Magistrate, who also considered the case to be false. The District Magistrate then passed final orders on the Police report intimating the complaint was false and directing the prosecution of the person who had lodged the complaint under S. 211 of the Penal Code. Held, that the order for prosecution was without jurisdiction as it was passed with regard to a matter which did not come up to his cognisance in the course of a judicial proceeding. (1906) 10 CWN 30: 33 C 30 (31): 3 Cr LJ 125 (DB).

——S. 476 — Delivery of possession of immoveable property in execution of decree — Resistance — Jurisdiction of Civil Court to direct prosecution — Penal Code, S. 186—Cr. P. C., S. 195—C.P.C. S. 622.

Where, a Nazir proceeds to deliver possession in execution of a decree there is no 'judicial proceeding' within S. 476. A Munsif has no jurisdiction on the report of his Nazir to take proceedings under S. 476 and direct the prosecution of a person under S. 189 of the Penal Code for having obstructed the Nazir in the act of delivering such possession. (1905) 1 CLJ 161: 9 CWN 364 (368): 32 C 367: 2 Cr LJ 110 (FB).

### 17. Legality of order.

(a) General.
(a-1) Propriety of.
(b) Warrant of attachment.
(c) Injunction.

#### (a) General.

——S. 476 —There is nothing in the Code which lays down that once a Magistrate declines under S. 476 to file a complaint he is 'functus officio', or that a complaint subsequently filed by him confers no jurisdiction to deal with the person complained against. A refusal by the Magistrate under S. 476, to file a complaint against an accused person does not attract the applicability of the doctrine of 'autrefois acquit' enunciated by S. 403. Nor does it amount to judgment within the meaning of Ss. 366 and 369 which may not therefore be subsequently reviewed.

Where an application under S. 476 for prosecution of a person is rejected, but on appeal the appellate Court purporting to act under S. 476 (b) remands the proceedings for further enquiry which results in the complaint being filed against the person, and his conviction, the procedure followed is in strict conformity with the Code, and though the order of remand may be illegal, where the illegality has not led to failure of justice, it is sufficiently covered by the wide provisions of S. 537. AIR (Vol 17) 1930 Sind 315: 24 SLR 446: 32 Cr LJ 521: 1930 Cr C 1147 (DB).

——S. 476 — A person who has not appealed against an order resulting in a complaint under S. 476, cannot argue before the Magistrate whether the complaint is a good complaint or made by a proper officer or so forth. AIR (Vol 16) 1929 Cal 203: 49 Cr LJ 193: 30 Cr LJ 656: 116 Ind Cas 632: 13 AI Cr R 73 (DB).

——S. 476 — Order under S. 476, not containing finding as required by S. 476, nor giving reasons for such finding — Complaint giving such reasons — Order is defective and its defects cannot be made good by complaint. AIR (Vol 16) 1929 Mad 74: 28 MLW 774: 2 M Cr C 35: 30 Cr LJ 370: 114 Ind Cas 834.

——S. 476 — Order under, passed without giving reasons is not illegal.

Although it is desirable that the Court passing an order under S. 476 should state reasons for the order, still an order without reasons is not illegal. S. 476 merely states that the Judge should record a finding. It does not state that the finding should be supported by reasons or that it should contain issue for decision. AIR (Vol 14) 1927 Sind 89: 21 SLR 43: 27 Cr LJ 1249: 98 Ind Cas 97 (DB)

——S. 476 — Complaint of cheating before Tahsildar having powers of a second-class Magistrate — Act of Tahsildar enquiring and ordering prosecution under S. 476 is legal. AIR (Vol 12) 1925 All 99: 25 Cr LJ 628: 81 Ind Cas 116.

——S. 476 — Order passed by Court on complaint made by Police is not complaint by Court. AIR (Vol 12) 1925 Pat 483: 4 Pat 323: 6 PLT 457: 26 Cr LJ 889: 86 Ind Cas 825 (DB).

——S. 476 — Sufficient evidence on record — Court directing enquiry by Police — Inclusion of Police report does not render Court's enquiry extra judicial. AIR (Vol 8) 1921 Pat 94: 2 PLT 609: 6 PLJ 178: 1921 PH CC 240: 22 Cr LJ 403: 61 Ind Cas 642 (DB).

——S. 476 — Evidence inadmissible in the main case relied on for an order under S. 476 — Order is not without jurisdiction. AIR (Vol 8) 1921 Pat 94: 2 PLT 609: 6 PLJ 178: 1921 PH CC 240: 22 Cr LJ 403: 61 Ind Cas 643 (DB).

——S. 476 — Legality of order — Complaint not inquired in.

Where without any inquiry into a complaint presented by the complainant, he was ordered to show cause why he should not be prosecuted under S. 182 of the Penal Code, held, that the order was illegal as the complainant could not be made to suffer without full enquiry into the truth of the complaint. AIR (Vol 7) 1920 All 303: 22 Cr LJ 81: 2 LRA (Cr) 126: 59 Ind Cas 369.

——S. 476 — Prosecution order.

The order of sanctioning prosecution is not maintainable until the Court has before it direct evidence as to the commission of offence in the preli-

minary enquiry, or in the earlier proceedings. AIR (Vol 7) 1920 Lah 91 (2): 21 Cr LJ 601: 57 Ind Cas 169.

——S. 476 — **Judicial Proceeding — Appellate Court improperly admitting additional evidences — Effect of.**

Where additional evidences are improperly admitted in appeal, the court has no jurisdiction to direct the prosecution of a witness on the basis of such evidence and an order made under S. 476, Cr. P. C. in such a case cannot be sustained. AIR (Vol 6) 1919 Pat 341: 20 Cr LJ 826: 53 Ind Cas 826.

——S. 476 — **Legality of order — Commitment order by Munsif — Procedure not followed.**

The Munsif not having followed the procedure as laid down in S. 478, the order of commitment is illegal. AIR (Vol 5) 1918 All 415: 40 All 32: 15 ALJ 805: 19 Cr LJ 40: 42 Ind Cas 1000.

——S. 476 — **Execution petition filed by a wrong person — Prosecution of a person not a party.**

A person filed a petition for execution of a decree on behalf of a decree holder who was dead at the time and on the judgment debtor's objection, the execution case was dismissed. The judgment debtor thereupon applied for sanction to prosecute the person who filed the petition, who appeared and contended that he had nothing to do with the execution petition but the Court directed his prosecution under S. 476. Held that as there was no evidence on the record to show that the petitioner had anything to do with the execution petition, the order for his prosecution was bad in law. Under S. 476 the Court can order the prosecution of a person not a party to the proceeding. AIR (Vol 5) 1918 Pat 251: (1919) Pat HCC 352: 20 Cr LJ 94: 48 Ind Cas 894 (DB).

——Ss. 476 and 494 — **Any offence — District Magistrate taking case to his file — Subsequent proceedings under S. 476 — Validity.**

A Dt. Magistrate ignoring the judgment of a joint Magistrate written and signed whi'e that officer was on leave took the case to his own file and allowed the public prosecutor to withdraw from prosecution under S. 494. Thereafter satisfying himself by an inquiry that an offence was committed in respect of a document used as evidence in the case directed his prosecution under S. 476. Held, that the Dt. Magistrate could pass the order under S. 476. AIR (V 4) 1917 Cal 310: 21 CWN 755: 18 Cr LJ 10: 36 Ind Cas 842 (DB).

——S. 476—**Court, mentioning of — District Magistrate acting executively — Order for prosecution.**

Where a commissioner received a complaint against P and sent it to the Collector and Dt. Magistrate for disposal, and he sent the file to his subordinate to take evidence and report on it and the latter reported that there was nothing in the complaint, whereupon, the Dt. Magistrate ordered the prosecution of the complainant under S. 476. Held that the magistrate was not acting in his judicial capacity and that his order is neither a legal sanction nor a valid order under S. 476. AIR (Vol 4) 1917 All 41: 15 ALJ 654: 18 Cr LJ 942: 42 Ind Cas 174.

——S. 476 — **False deposition — Hostile witnesses — Sanction to prosecute before close of trial — Legality.**

A witness made a statement in examination which he was not expected to make, by the prosecution; thereupon he was declared hostile and subjected to cross-examination and on the close of his deposition, the Magistrate directed his prosecution in respect of certain statements made by him in the course of his deposition under S. 193, I.P.C., the Magistrate presumably acting under S. 476, Cr. P. C. Held, that the Magistrate, before conclusion of the trial, should not have taken such proceedings against the witness. AIR (V 4) 1917 Pat 661: 1 PLW 545: 18 Cr LJ 626: 39 Ind Cas 994.

——S. 476 — **Proceedings based on occurrence in another Court — Validity.**

Under S. 476 of the Cr. P. Code proceedings under that section need not be based on what has occurred in another Court. AIR (V 4) 1917 Pat 339: 1 Pat LW 580: 18 Cr LJ 640: 39 Ind Cas 1008.

——S. 476 — **Sanction for perjury — Materials in cross examination.**

An order directing a prosecution merely upon materials arising out of a protracted cross Examination is very unsafe especially where the appellate Court had itself suggested the probability of the statements being true. AIR (V 4) 1917 Pat 329: 2 Pat LW 99: 18 Cr LJ 727: 40 Ind Cas 727.

——S. 476 — An order under S. 476 by a magistrate, to whom a complaint has been referred by another magistrate for enquiry and report is ultra vires. Such an order under S. 476 would be valid if the case had been referred to the Magistrate for disposal. AIR (Vol 3) 1916 Cal 867: 43 Cal 173: 20 CWN 63: 17 Cr LJ 146: 33 Ind Cas 626 (DB).

——S. 476 — **False complaint — Offence under S. 211 I.P.C. (false information,).**

Petitioner petitioned to the collector for a refund of money which he alleged the Reddi had collected from him and misappropriated. This was inquired into and the Collector sanctioned the prosecution of the Reddi under section 409, I.P.C. He was tried and acquitted. The Magistrate granted sanction to prosecute petitioner under S. 476 for an offence under section 211 I. P. C. Held, the petitioner did not institute or cause to be instituted criminal proceedings and the order must be set aside as illegal. AIR (Vol 2) 1915 Mad 1120: 1915 M WN 253: 16 Cr LJ 252: 28 Ind Cas 108 (DB).

——Ss. 476 and 537(b) — **Legality of the order — Order to prosecute.**

An order to prosecute under S. 476 is not illegal but irregular if it does not at once direct the accused to be taken to the nearest first class Magistrate, and the irregularity is such as is expressly cured by S. 537 (b) of the Code. AIR (V 2) 1915 Mad 493: 37 Mad 317: 16 Cr LJ 39: 26 Ind Cas 631 (DB).

——S. 476 — **Order for prosecution — Complaint to District Magistrate — Enquiry by the Deputy Magistrate — Order for prosecution.**

A commplaint was made before a District Magistrate against a Police Officer but the complainant was asked to make his complaint before the Dy. Magistrate transferred the investigation to the Sub-Divisional officer, who found the case false. The Dy. Magistrate at the head quarters recalled the case, and passed the trial of the complaint under S. 211 I. P. C. Held, that the order for prosecution under S. 476 was without jurisdiction. The order of transfer to the subdivisional Magistrate, was erroneous & the Deputy Magistrate at the head quarters can

have no jurisdiction to recall case and deal with it under S. 203 or pass any order under S. 476. (1912) 39 Cal 1041: 16 CWN 885: 13 Cr LJ 484: 15 Ind Cas 484 (DB).

**——S. 476 — Legality of — Order made without cross examination — Illegality.**

An order made by a Magistrate under S. 476 before the prosecution witnesses have been cross-examined and without giving opportunity to the defence evidence being let in, is illegal and should be set aside. (1912) MWN 400: 13 Cr LJ 144: 13 Ind Cas 832: 11 MLT 191.

**——S. 476 — Order declining to proceed — Review — Subsequent passing of an order.**

Where a Magistrate first declined to pass order, under Section 476 in a case but subsequently on the motion of the opposite party passed the order, held, that the latter order was one passed in review of the former order and was therefore illegal. (1911) 2 MWN 431: 12 Cr LJ 556: 12 Ind Cas 644: 10 MLT 389 (DB).

——Ss. 476 and 202 — An order passed under S. 476 based on evidence taken under S. 202 Cr. P. C. which is not legal evidence, is illegal. (1911) 10 MLT 47: 21 MLJ 795: (1911) 2 MWN 9: 12 Cr LJ 323: 10 Ind Cas 619 (DB).

**——S. 476 — Scope.**

Per Sundara Aiyar, J. An order under S. 476 passed by the first court does not cease to be operative 'ipso facto' by the order of an Appellate Court, reversing the order of dismissal of a complaint which led to the order under S. 476. (1911) 21 MLJ 795: 10 MLT 47: (1911) 2 MWN 9: 12 Cr LJ 323: 10 Ind Cas 619 (DB).

——Ss. 476 and 537 — Where sanction to prosecute is given to the 'Sheristadar' without an application, it is virtually a complaint and the procedure laid down in S. 476, Cr. P. C. should be followed. But if it is not followed and there has been no justice to the accused, the defect is cured by S. 537 of the Cr. P. C.(1911) 12 Cr LJ 320: 10 Ind Cas 616 (Sind).

**——S. 476 — Any offence — Application to execute a false decree.**

If the Court to which an application is made for execution of a decree finds on inquiry that the decree is false it can order prosecution of the applicant. The non-existence of decree does not render proceedings under S. 476 void and legally ineffective. 1 PR (1910) Cr: 3 PWR 1910 Cr: 11 Cr LJ 90: 161 PLR (1910): 5 Ind Cas 257 (DB).

**——S. 476 — Order passed at the suggestion of District Judge.**

An order by a Dt. Munsif directing the prosecution of a person for an offence committed before him not on his own responsibility but at the suggestion of the Dt. Judge, who had himself no jurisdiction to pass such an order is illegal. (1909) 6 ALJ 924: 10 Cr LJ 525: 4 Ind Cas 260.

**——S. 476 — Penal Code, S. 123 — Examination of accused on oath — Perjury—Sanction to prosecute.**

A complaint was preferred against the petitioners for criminal breach of trust. The Magistrate examined the complainant on oath in support of the allegation made in the plaint. He next examined the petitioners on oath and, being of opinion that they had perjured themselves, he granted, under S. 476 of the Criminal Procedure Code, a sanction to prosecute the petitioners.

Held, that the Magistrate was not justified in examining the petitioners on oath, his proceedings were irregular and illegal, and his order under S. 476 of the Criminal Procedure Code was 'ultra vires'. (1906) 8 Bom LR 587 (589): 4 Cr LJ 165 (DB).

**——S. 476 — "Court" — Acquittal under S. 211, I. P. C. — Subsequent sanction for prosecution under S. 193 I. P. C.**

Where a person having been charged by a Joint Magistrate with the offence of bringing a false case, had been tried and acquitted, held that an order for his prosecution for perjury in the same case by the same Magistrate in the capacity of a District Magistrate was bad and should be set aside as calculated to bring the administration of justice into contempt. Quaere:—Whether the officer who tried the original case as Joint Magistrate was competent to make an order therein subsequently as District Magistrate. (1904) 1 ALJ 388: 1 Cr LJ 692.

**(a-1) Propriety of.**

**——S. 476 — Time for making it.**

Proceedings under S. 476 Cr P. C. should not be taken until the very close of the case otherwise it is likely to intimidate subsequent witnesses and defeat the object of the trial. A Magistrate should not make up his mind to start proceedings under S. 476, Cr. P. C. against a witness before he has heard all the evidence in the case. AIR (Vol 7) 1920 Pat 225: (1920) Pat HCC 61: 21 Cr LJ 29: 54 Ind Cas 173.

**——S. 476 — Order before final disposal of the case.**

An order under S. 476, Cr. P. C. more than a year old and made before the final disposal of the case is liable to be set aside, having regard to the evidence and the fuller investigation of the case. AIR (Vol 6) 1919 Cal 165: 20 Cr LJ 286: 50 Ind Cas 174 (DB).

**——S. 476 — Proceedings taken before the close of trial — Propriety of.**

A Magistrate should not take proceedings under S. 476 against a witness in the case before the close of the trial. Such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial. But the impropriety of such proceedings is, however, no ground for quashing such proceedings. AIR (Vol 3) 1916 Sind 8 (1): 9 SLR 176: 17 Cr LJ 77: 32 Ind Cas 669 (DB).

**(b) Warrant of attachment.**

——S. 476 — A warrant for the attachment of property was signed by the 'Sheristadar' of the Court 'by order' and was addressed to the Bailiff 'Nazir' of the Court. The warrant was delegated to a peon and the accused resisted the execution of warrant. Held, on revision, that there was no illegality in the warrant, that the words 'by order' showed that the 'Sheristadar' was authorized to sign it and that the Nazir was right in delegating it to a peon. AIR (Vol 7) 1920 Pat 805: 22 Cr LJ 300: 3 UPLR (Pat) 41: 60 Ind Cas 796.

**(c) Injunction.**

**——S. 476 — Injunction under S. 144 without enquiry — Disobedience.**

A magistrate issued injunction under S. 144 'ex parte' on the statement of petitioner. The next day the same magistrate issued notice under S. 188 I. P.

C. This order is illegal. He could have prosecuted under S. 195 or 476. AIR (Vol 3) 1916 Cal 69: 20 CWN 981: 17 Cr LJ 464: 36 Ind Cas 144 (DB).

**18. Nature of order and proceedings.**

**——S. 476 — Whether criminal proceedings.**

For the purposes of an action for malicious prosecution, proceedings under S. 476, Criminal P. C., although they are in a Civil Court, are to be deemed criminal proceeding. AIR (Vol 20) 1933 Cal 909 : 60 Cal 1022 : 35 Cr LJ 925 : 148 Ind Cas 1129.

**——Ss. 476, 476-A, 476-B — Proceedings, whether civil or criminal.**

Applications under Ss. 476, 476-A, 476-B originating in Civil Courts must be dealt with according to the provisions of the Civil P. C., and in such proceedings, the Court has ample power under O. XLI, Civil P. C., to make an order for further enquiry. But where the lower Court has rejected an application in exercise of its discretion, it is unwise and improper to interfere with such discretion if it has been judicially exercised.

If the provisions of the Civil P. C., do not apply to applications under Ss. 476, 476-A, or 476-B, Criminal P. C., the provisions of the Criminal P. C., under Chap. XXXI, will apply except where it is clear from the sections themselves that the provisions are restricted to matters arising solely under that Chapter. Section 423, Criminal P. C., clearly applies to those proceedings. AIR (Vol 18) 1931 Cal 604: 59 Cal 68: 35 CWN 775: 33 Cr LJ 38: 134 Ind Cas 1063 (DB).

**——Ss. 476 and 439 — Nature of — Order under.**

An order under S. 476 should disclose the materials on which it is based, it is a judicial order and is liable to be set aside in revision by the High Court if it does not disclose the basis. An order under this section can only be passed if an offence is committed before a Court, or is brought to its notice in the course of a judicial proceeding. 57 Ind Cas 457: 21 Cr LJ 633: 1 PLT 717: AIR (Vol 7) 1920 Pat 500.

**——Ss. 476 and 195 (5) — Order under — A complaint or sanction.**

An order under S. 476, Cr. P. C., is not a complaint. The provisions of S. 195 (5) of the Cr. P. C., only apply when a court has on the application of some person sanctioned the trial of any of the offences named in S. 195 and cannot apply to a case sent to a Magistrate under S. 476, Cr. P. C., for an order under the latter section is not a sanction. AIR (Vol 5) 1918 Nag 59: 20 Cr LJ 770: 53 Ind Cas 610.

**——Ss. 476 and 195 — Order under — Conversion of order.**

Dt. Judge on appeal to him against grant of sanction can convert the proceedings under S. 195 into proceedings under S. 476. 1 Pat LJ 607: 18 Cr LJ 300: 2 Pat LW 388: 38 Ind Cas 332: AIR (Vol 3) 1916 Pat 86.

**——S. 476 — Nature of—Proceedings under—Civil Court acting under, whether becomes a criminal Court.**

Proceedings under S. 476 are of a Quasi Criminal nature but a Civil or Revenue Court acting under that section does not as such become a criminal Court. AIR (Vol 1) 1914 Oudh 225: 17 OC 25: 25 Ind Cas 1001: 15 Cr LJ 217 (DB).

**19. Notice or opportunity**

See also N. 28.

**(a) General.**
**(b) Notice if desirable.**

**(a) General.**

**——S. 476 — Opportunity should be given to person, against whom enquiry is directed, to cross-examine witnesses produced by the applicant.**

A Magistrate, when he decides to hold a preliminary enquiry under S. 476, Criminal P. C., should give opportunity to the person against whom the enquiry is directed to cross-examine the witnesses produced by the applicant. AIR (Vol 25) 1938 Rang 297: 40 Cr LJ 56 (2): 178 Ind Cas 305.

——S. 476 — The Court may, under S. 476, make the complaint on application made to it or otherwise and it need not hold a preliminary enquiry. Notice to the person proceeded against is not essential. AIR (Vol 24) 1937 Mad 716: 45 LW 257: (1937) 1 MLJ 396: 1937 MWN 330: ILR (1937) Mad 612: 38 Cr LJ 871: 170 Ind Cas 255 (DB).

——S. 476 — Witness resiling from statement made in committing Magistrate's Court—Notice to show cause for prosecution for perjury while proceedings are pending should not be issued — Witness cannot then be said to be free witness — Effect of S. 288 indicated. AIR (Vol 23) 1936 Sind 140: 37 Cr LJ 1045: 164 Ind Cas 1036 (DB).

**——S. 576 — Issue of notice.**

There is nothing in the provisions of S. 476 making it obligatory on the Court to issue notice before taking action under that section. No doubt, in most cases, it would be desirable that such notice should be given in order to give the accused an opportunity to offer any explanation which he might be in a position to give. But when the accused has failed to make out any grounds to show that he has been prejudiced for want of notice, the proceedings cannot be set aside on the ground of want of notice. Though S. 476 does not require a notice being given to the accused, yet it makes provision for a preliminary inquiry. The making of this preliminary inquiry or the extent of it has been left entirely to the discretion of the Court. Nor is it essential that the preliminay inquiry, if any, must be made in the presence of the accused or after giving notice to him. AIR (Vol 22) 1935 Oudh 113: 36 Cr LJ 319 (2): 1935 OWN 28: 10 Luck 503: 153 Ind Cas 346.

——S. 476 — Apart from a complaint made by a Court under S. 476 (1), no complaint is in any sense invalid merely because the person accused has not had an opportunity of showing cause against the complaint being made. 115 Ind Cas 882: 10 PLT 77: 30 Cr LJ 545: 12 AI Cr R 363: AIR (Vol 16) 1929 Pat 92.

——S. 476 — Application to take action made to successor of Judge — Notice to opposite parties should be given. 104 Ind Cas 456: 46 CLJ 40: 8 AI Cr R 433: 28 Cr LJ 840: AIR (Vol 14) 1927 Cal 718 (DB).

——S. 476 — Prosecution under, on evidence of witnesses whose evidence is not tested — Accused is entitled to have notice. 99 Ind Cas 1027: 28 Cr LJ 227: AIR (Vol 14) 1927 Lah 173.

**——Ss. 476 and 195, Cl. (4) — Notice or opportunity —Order under S. 476—Perjury — Particulars to be stated.**

Magistrates passing an order under S. 476 of the Cr. P. C., should carry out the requirements of S. 195, Cl. (4) of the Code. The record should satisfy the High Court that the order has been passed with due care and consideration. An order was passed under Section 476 against four persons who had given evidence but it did not specify the court or the place and the occasion on which the offence was committed. Held, that the order did not give the accused proper notice of the offence alleged against them and the order was

set aside. 18 ALJ 381: 2 UPLR (A) 145: 21 Cr LJ 400: 55 Ind Cas 1008: AIR (Vol 7) 1920 All 217.

**——S. 476 — Offence under S. 209 — Prosecution — Opportunity to show cause.**

The dismissal of a suit without a clear finding that the suit was false and brought with intent to injure defendant is not a justification for directing the prosecution of plaintiff under S. 209, I. P. C. A plaintiff called upon to show cause should be afforded every opportunity of adducing evidence in support of his claim and remove any doubt in the mind of the court as to the falsity of the case. 54 Ind Cas 686: AIR (Vol 7) 1920 Pat 548: 21 Cr LJ 158.

**——Ss. 476 and 537 — Notice to accused — Order without notice.**

Before making an order under S. 476, Cr. P. C., the court is not bound to issue notice to accused. Where a Court after very careful consideration arrived at the conclusion that an order under S. 476, Cr. P. C., is called for, the omission to make a preliminary inquiry is a mere irregularity under S. 537 of the Code. 21 Cr LJ 276: 55 Ind Cas 292: AIR (Vol 6) 1919 All 15.

**——Ss. 476 and 537 — Notice — Want of notice — Irregularity.**

The High Court would not approve of an order under S. 476, Cr. P. Code, without notice to the persons concerned. Any irregularity in the proceedings under S. 476 is not a sufficient ground or either reversing or altering an order passed by a Court of competent jurisdiction. Although it is always fair, and a course which should be followed, that notice should be given, the want of notice cannot be put on higher ground than a mere irregularity. (1912) 10 ALJ 247: 13 Cr LJ 707: 16 Ind Cas 515.

**(b) Notice if desirable.**

**——S. 476 — Notice to person proceeded against under — Necessity of.**

Although the plain terms of S. 476 do not insist upon notice being given to person sought to be proceeded against nevertheless it is highly desirable that such notice should be given. With the reception of additional evidence it becomes imperative upon the Court to give proper notice. AIR (Vol 33) 1946 All 156: 1945 OWN (HC) 280: 1945 ALJ 456: ILR (1946) All 62: 224 Ind Cas 13 (DB).

——S. 476 — Where, after issue of notice of perjury nothing further has been done for more than four years, the proceedings may well be dropped. AIR (Vol 30) 1943 Bom 113: 45 Bom LR 191: 206 Ind Cas 421.

——S. 476 — It is not necessary in an enquiry under S. 476, Criminal P. C., for the Court to issue a notice to a person alleged to have committed an offence. AIR (Vol 25) 1938 Lah 641: ILR (1938) Lah 188: 40 PLR 951: 40 Cr LJ 140: 178 Ind Cas 795.

——S. 476 — Quaere.— Whether any notice is necessary to be given before acting under S. 476, and recording a finding as to the expediency of an enquiry:

Held, on facts, that the action of the District Judge in ordering further inquiry without giving notice was perfectly legal. 1934 MWN 192.

——S. 476 — As a matter of strict law no notice would be necessary to a person before taking the proceedings against him under the law which now exists, but it is right that he should have notice. 88 Ind Cas 709: 49 Bom 710: 27 Bom LR 616: 26 Cr LJ 1189: AIR (Vol 12) 1925 Bom 436.

**——S. 476 — Notice is highly desirable before action.**

The notice is not essential under law. It is highly desirable that it is given in proceedings under S. 476. In a case where preliminary enquiries in which additional evidence was taken and another independent private enquiry by the Circle Inspector were made without notice to the accused the order must be set aside. 77 Ind Cas 888: 5 LRA Cr 5: 25 Cr LJ 488: AIR (Vol 11) 1924 All 435.

**——S. 476 — Notice to show cause is not essential.**

Section 476 does not requires the issue of a notice to the party to be proceeded against and such notice is not invariably necessary. Whether notice is to issue or not, depends upon the particular circumstances of each case. 73 Ind Cas 976: 1 Bur LJ 153: 24 Cr LJ 736: AIR (Vol 10) 1923 Rang 79.

——S. 476 — Where it was found that the plaintiff's claim was true but an order for his prosecution under Ss. 467 and 471, I. P. Code, was made on the ground that the hand note sued on was spurious.

Held, that the order directing the prosecution of the plaintiff without deciding the genuineness or otherwise, of the document in the presence of the plaintiff, was wholly illegal and without jurisdiction. Although no notice is essential in proceeding under S. 476 of the Cr. P. Code, yet, in the circumstances of the present case, notice was necessary, and the order having been passed without notice, it was wholly invalid. 60 Ind Cas 425: 22 Cr LJ 233: AIR (Vol 7) 1920 Pat 778.

**——S. 476 — Notice to person proceeded against — Necessity for.**

Although notice to the person immediately concerned is not essential in a proceeding under S. 476 of the Cr. P. C., yet an order passed without such notice particularly where there is no evidence one way or the other to show a dishonest motive, will not be upheld. 6 OLJ 457: 20 Cr LJ 791: 53 Ind Cas 695. AIR (Vol 6) 1919 Oudh 348.

**——S. 476 — Notice to accused is desirable.**

Where proceedings under S. 476 of the Cr. P. C., are initiated notice is not legally necessary to the accused, but it is desirable that such notice should be given more especially where the matter has not been already judicially dealt with. AIR (Vol 5) 1918 Nag 61: 20 Cr LJ 777: 53 Ind Cas 617.

**20. Other offences.**

See also N. 24.

**——S. 476 — Proceedings ultra vires, and illegal — Offences under S. 193 or S. 471, Penal Code, committed in such proceedings — S. 476, if attracted.**

If, during the course of proceedings, which were ultra vires and illegal, any offence under S. 193 or S. 471, I. P. C., was committed it cannot be said that it was committed in or in relation to, or by a party to any judicial proceedings so as to attract the provisions of S. 476, Criminal P. C. AIR (Vol 29) 1942 All 11: 1941 ALJ 682: 43 Cr LJ 319: ILR (1942) All 42: 198 Ind Cas 148.

**——Ss. 476, 195 (1), (b) — Offence under S. 193, Penal Code.**

Where one of the offences alleged is an offence under S. 193, I. P. C., in connection with a proceeding before the District Munsif, such an offence clearly falls under S. 195 (1) (b), Criminal P. C., and a complaint under S. 476, Criminal P. C., is necessary. The fact that the District Munsif has also complained that the facts establish offences under other sections to which S. 476, Criminal P. C., has no application, is not a ground for cancelling the complaint which was valid and

necessary so far as the offence under S. 193, I. P. C., was concerned. AIR (Vol 28) 1941 Mad 576: 1941 MWN 220 (1): 53 LW 320: (1941) 1 MLJ 363: 42 Cr LJ 800: 196 Ind Cas 27.

——S. 476 — Application under S. 476 to file complaint for offence under S. 175, I. P. C. — Transfer of, to District Court on abolition of Court — Application dismissed but complaint made under S. 482 — Complaint, held was not competent because the alleged offence cannot be said to have been committed in view of presence of District Court. ('40) 187 Ind Cas 470: (1940) 1 MLJ 272: 41 Cr LJ 465: 51 LW 230: 1940 MWN 240 (1).

——S. 476 — Where a Magistrate acting under S. 476, Criminal P. C., considers that a complaint should be made, it would be open to him to include in that complaint not merely offences which are referred to in S. 195, Criminal P. C., but also other offences such as one under S. 161, Penal Code. AIR (Vol 27) 1940 Sind 133: 41 Cr LJ 821: ILR (1940) Kar 500: 190 Ind Cas 119 (DB).

——S. 476 — Sections 476 and 195 are intended really to prevent indiscriminate prosecutions under the various sections mentioned therein. Once the bar is removed, there is no difference between the cases mentioned in Ss. 476 and 195 and any other cases, e. g., if a complaint is filed under S. 471, Penal Code and it appears that some other offence also has been committed, it is not necessary to have a fresh complaint. AIR (Vol 21) 1934 Pat 536: 15 PLT 694: 1 BR 13: 36 Cr LJ 26: 152 Ind Cas 228.

——S. 476 — Proceedings in respect of offence under S. 409, I. P. C., cannot be started under S. 476. 96 Ind Cas 526: 13 OLJ 653: 3 OWN 618: 1 Luck 527: 27 Cr LJ 974: AIR (Vol 14) 1927 Oudh 210.

——S. 476 — Section 476, sub-s. (1) does not authorise a complaint with reference to offence described in S. 195, sub-s. (1), Cl. (a), committed in or in relation to a proceeding in a Court. The jurisdiction to make a complaint under that sub-section is limited to such cases as are provided for in sub-s. (1), Cl. (b), or Cl. (c) of S. 195 only and therefore complaint by a Court under Ss. 183 and 185, I. P. Code, is ultra vires and without jurisdiction. 98 Ind Cas 63: 2 Luck 395: 3 OWN 757: 27 Cr LJ 1247: 7 AI Cr R 49: AIR (Vol 14) 1927 Oudh 51.

——S. 476 — Prosecution can't be directed for offences under Ss. 358, 341 and 147. AIR (Vol 11) 1924 Cal 501: 39 CLJ 33 (DB).

**——S. 476 — Publication of pending proceedings.**

Any Act or publication of a writing likely to obstruct or interfere with justice or lawful process of the Courts is a contempt of Court. Reference as to consistency of some persons' conduct was made by Dt. Judge to the registrar of the High Court. The editor of a newspaper published the reference with his comments thereon before its determination, Held, it was contempt of Court.

Without the previous permission nobody can comment or publish extracts from pending proceedings; as the publication amounts to the contempt of the Court. High Courts can exercise their power to protect inferior Courts and those of the moffusil under their supervision. AIR (Vol 7) 1920 Bom 175: 22 Bom LR 368: 58 Ind Cas 915 (DB).

**——S. 476 — Publication of pending proceedings.**

As all proceedings pending before a court are privileged, they must not be published until the case comes on for hearing before it. 22 Bom LR 31: 21 Cr LJ 722: 44 Bom 443: 58 Ind Cas 462: AIR (Vol 7) 1920 Bom 174 (DB).

**——S. 476 — Refusal to produce a document — C. P. C., O. 16, R. 7 — Evidence Act, Ss. 130, 131 — Order to produce document — Non-compliance.**

Where under O. 16, R. 7, C. P. C., the court called upon a person merely present in Court to produce a document and on his stating that the document was not with him then, the Court instituted proceedings against him under S. 476, Cr. P. C. Held, that the Court was not justified in taking such proceedings and that before taking any such proceedings it should determine whether the document in question was one which he could be compelled to produce. (1911) 14 CLJ 120: 12 Cr LJ 450: 11 Ind Cas 794 (DB).

**——S. 476 — Refusal to produce document — Power when to be invoked.**

Proceeding under S. 476, for disobeying the order of Court, to produce a document, not necessary for the determination of a suit, is improper. (1910) 11 Cr LJ 20: 5 Ind Cas 17.

——S. 476 — A party guilty of contempt of court cannot be heard when he comes to the Court with a voluntary application asking for something or for some indulgence. But the Court is not bound to deny him all assistance or protection and it will act in such a manner as will maintain its own dignity and at the same time serve the ends of justice. (1909) 10 CLJ 631: 4 Ind Cas 746 (DB).

**——S. 476 — Fair comment.**

To publish in a newspaper that Judge of a High Court submitted to the behests of Government, or that he was a medical quack in red robe or an enemy of the accused is not a fair comment but libel upon the Judge. (1909) 33 Bom 240: 10 Bom LR 1040: 4 MLT 359: 8 Cr LJ 426: 2 Ind Cas 288 (DB).

### 21. Orders against Strangers

——S. 476 — (as amended in 1923), S. 476 — Applicability — Person not party to proceeding in Court —Proceedings against — Powers of Court to start. See AIR (V 32) 1945 Pat 362 : 12 BR 136 : 221 I.C. 471 : 47 Cr LJ 183.

**——Ss. 476, 195 (1) (c) — Forgery.**

Section 476, Criminal P.C., does not inhibit the classes of Courts mentioned therein, from making a complaint in respect of any of the offences specified in S. 195 (1) (c), against persons not parties to a proceeding before it, in which or in relation to which the offence was committed. AIR (V 26) 1939 Nag 85: 1938 NLJ 348: 40 Cr LJ 572: ILR (1940) Nag 652: 181 Ind Cas 751 (DB).

**——S. 476 — Penal Code, Ss. 467, 114 — Power of Court to make complaint against witness.**

A complaint for an offence under Ss. 467 and 114, Penal Code cannot be made under S. 476, Criminal P.C., against a person who was not a party to the proceedings in which the offence was committed but only a witness in such proceedings. AIR (V 22) 1935 Mad 1044: 1935 MWN 945: 42 LW 653: 37 Cr LJ 15: 69 MLJ 783: 158 Ind Cas 1040.

——S. 476 — For the offences under S. 195 (1) (c), to be complained of under S. 476, Criminal P.C., the person against whom the offence is alleged to have been committed must be a party to the proceedings.

Where the Vakil's clerk was not a party the Court could not complain under S. 476 against him. 1935 MWN 589.

**——Ss. 476, 195 (1) (b) — Complaint against many —Police charge against some — Power to proceed against others.**

When a charge is made by the complainant to the Police against more than one individuals and the Police while charging before the Court one or more individuals with the offence complained of,

**do not charge them all, the Court has no jurisdiction to take action under S. 476, Criminal P. C., against those not charged.**

The mere fact of the telegram containing a false report of the offence being exhibited and filed in the case did not make the contents of it a matter "in relation to the proceeding" in the Court so as to give the Court jurisdiction to take action under S. 476 against the author of the telegram in respect of persons not charged before the Court, though named in telegram as having committed the crime referred to therein. AIR (V 19) 1932 Mad 363: 1930 MWN 1130: 62 MLJ 425: 35 LW 481: 33 Cr LJ 479: 137 Ind Cas 312 (FB).

**——S. 476 — Any person who appears to have committed an offence under S. 195 (1) (b) and not only parties to proceedings is contemplated by S. 476.**

Section 476 is not restricted to the party making the complaint or actually before the Court, but is wide enough to include any person who appears to have committed an offence mentioned in S. 195 (1) (b) which is not restricted to parties to the proceedings like Cl. (c) of that section. The Court has therefore jurisdiction to prosecute a person who causes a false complaint to be lodged. All that S. 476 requires is that the Court should be satisfied that it is expedient in the interest of justice that an enquiry should be made into an offence which appears to it to have been committed in or in relation to a judicial proceeding. It does not speak of a party to the proceeding. AIR (V 17) 1930 Cal 515: 1930 Cr C. 859: 126 Ind Cas 553: 31 Cr LJ 1055 (DB).

——S. 476 — Proceedings under S. 476 cannot be taken against person not party to proceedings. AIR (V 17) 1930 Oudh 404 : 7 OWN 638 : 125 Ind Cas 838 : 31 Cr LJ 938 : 1930 Cr C 944.

**——S. 476 — Complaint can be made against person though he is not a party to the proceeding.**

The presiding officer of a Court can make a complaint not only against persons who are parties to proceedings before him but also against persons who are not parties. Every person including the presiding officer of a Court has power to make complaint as a rule. It is only when that general power is taken away by statute that a complaint becomes incompetent unless made by the only authority allowed to do so. There being nothing in S. 476 to the effect that the presiding officer of a Court cannot make a complaint against a person who is not a party, it follows that the general power of the presiding officer to make a complaint is not taken away by implication, because he is the only person who can make a complaint against a party in certain circumstances; AIR 1925 Rang 28; 3 Rang 48; and AIR 1928 Sind 69, Diss. from.; AIR (V 15) 1928 Lah 510 : 9 Lah 678 : 10 AICrR 474 : 29 Cr LJ 652 : 110 Ind Cas 108 (DB).

——S. 476—Section 476 must be read with S. 195 and the Courts should not exercise the powers conferred by S. 476 with regard to offences referred in S. 195 (1) (c) unless they are committed by parties to proceedings in such Courts. AIR (V 15) 1928 Sind 69 : 22 SLR 201 : 9 AICrR 154 : 105 Ind Cas 802 : 28 Cr LJ 978 (DB).

——S. 476 — It is open to a Court to make a complaint in respect of any person other than persons who were parties to the proceedings before it. AIR (V 12) 1925 Rang 28 : 84 Ind Cas 439 : 2 Rang 374 : 26 Cr LJ 295 (DB).

——S. 476 — Accused neither party nor witness in Court — Alleged forged document used in Court by another person — Accused not guilty under S. 476. AIR (V 11) 1924 Cal 986 : 81 Ind Cas 919 : 28 CWN 880 : 25 Cr LJ 1095 (DB).

**——Ss. 476 and 195 — Any offence referred to in S. 195 — Meaning of — Person not a party.**

The words referred to in S. 195, which occur in S. 476 of the Cr. P. Code, do not mean that S. 195 governs S. 476 to any extent other than this. Proceedings under S. 476 are not invalidated by the mere fact that the accused was neither a party nor witness in the original suit. If an offence is brought to the notice of a Court in the course of a judicial proceeding, it has jurisdiction to proceed under S. 476 it being immaterial whether the person concerned appeared before the Court or not. AIR (V 6) 1919 Nag 89 : 20 Cr LJ 426 : 51 Ind Cas 202.

**——Ss. 476 and 195 — Order against persons not party — Forgery — Sessions Judge on appeal, if can direct prosecution.**

The sessions judge on appeal from an order of discharage in another case is entitled under S. 476, Cr. P. C. to direct the prosecution of the petitioner for forgery, irrespective of the fact that he was not a party to the original proceedings. AIR (V 6) 1919 Pat 551 : 20 Cr LJ 630 : 52 Ind Cas 390.

**——Ss. 476 and 195(1) (c) — Order against—Quaere:—Persons not party under S. 476.**

Whether the limitation contained in S. 195 (1) (c) of the Cr. P. Code, in the words "a party to any proceeding in any Court" applies also to an order under S. 476 of the Code by reason of the words in the latter section, "any offence referred to in S. 195." AIR (V 5) 1918 Pat 640 : 19 Cr LJ 236 : 43 Ind Cas 828.

**——Ss. 476 and 195 — Orders against persons not before the Court — Forgery — Not by a party—S. 476 and inter-relation — Penal Code S. 467.**

S. 476 applies only where the offences mentioned in S. 195, are committed by the person or in the circumstances mentioned therein. Held, therefore, a Munsiff had no jurisdiction to take action under S. 476 against the executant and attestors of document found to be forged if they were not parties to any proceedings before the Court. AIR (V 2) 1915 Mad 1033 : 40 Mad 100 : 18 MLT 488 : 2 LW 1135 : 16 Cr LJ 979 : 31 Ind Cas 653 (DB).

**——S. 476 — Order against persons not before the Court.**

The person proceeded against under S. 476 need not be a party or a witness in the proceedings before the Court. What is required is that such an offence should be either committed before the Court or brought under its notice in the course of judicial proceedings. (1912) 14 Bom LR 968 : 13 Cr LJ 848 : 17 Ind Cas 720 (DB).

### 22. Pending proceedings.

——S. 476 — Appeal from main case pending — Proceeding under S. 476 should await disposal of appeal. AIR (V 14) 1927 Cal 718 : 46 CLJ 40 : 104 Ind Cas 456 : 8 AICrR 433 : 28 Cr LJ 840 (DB).

——S. 476 — Court need not wait till the proceedings in respect of which the offence is committed to pass an order under S. 476. AIR (V 14) 1927 Sind 89 : 21 SLR 43 : 27 Cr LJ 1249 : 98 Ind Cas 97 (DB).

——S. 476 — Forgery — Question pending in appeal — Proceedings under S. 476 are improper. AIR (V 12) 1925 Lah 323: 26 Cr LJ 1166: 7 LLJ 73 : 88 Ind Cas 526.

**——S. 476 — Pendency of the suit — Negotiations for compromise.**

Sanction may be granted in the course of suit, for statements made by a party during negotiations for compromise, without waiting for the case to be completed. Considerations for guiding such sanction discussed.

Where in the course of a civil suit before the Dt. Munsiff, the petitioner contradicted a previous statement made by him before the case was taken up and the Court proceeded against him under S. 476. Held per Sadasiva Iyer and Oldfield, JJ. (Seshagiri Iyer J. dissenting) that the Court need not wait till the conclusion of substantive proceedings before taking action under S. 476 and its failure to do so is not a material irregularity under S. 115, C.P.C. (Seshagiri Iyer, J.) Such action before a suit is closed is a material irregularity in the exercise of jurisdiction. Before a person is asked to stand his trial the sanctioning authority must be informed that there is a probability of conviction. AIR (V 4) 1917 Mad 971 : 31 MLJ 440 : 20 MLT 252 : 4 LW 383 : (1917) MWN 130 : 17 Cr LJ 515 : 36 Ind Cas 483 (FB).

——S. 476 — **Sanction to prosecute a hostile witness for perjury before conclusion of trial whether legal.**

Where a witness had turned hostile and was subjected to cross-examination, the Magistrate acting presumably under S. 476 C. P. C. directed his prosecution, for perjury upon the conclusion of his deposition under S. 193 I. P. Code.

Held, that the order for prosecution made before the conclusion of the trial was not justified. AIR (Vol 4) 1917 Pat 661 : 1 Pat LW 545 : 18 Cr LJ 626 : 39 Ind Cas 994.

——S. 476 — **Judicial proceedings, termination — Action by Court, if competent — Execution proceedings, if judicial.**

Where during the pendency of an execution case an offence under S. 186 I. P. C. was alleged to be committed and sanction to prosecute was given after the execution case was dismissed, the order under section 476 Cr. P. C. was illegal and should be set aside. 32 C. 367 diss. Execution proceedings are judicial proceedings. (1913) 25 MLJ 593: (1913) MWN 1002: 14 MLT 512: 14 Cr LJ 624: 21 Ind Cas 672 (DB).

——S. 476 — **Pending proceeding — Perjury.**

It is improper and undesirable to prosecute a witness for perjury, during the course of proceeding in which the offence of perjury is alleged to be made. 1 PWR 1910 Cr : 11 Cr LJ 171 : 5 Ind Cas 602.

——S. 476 — **Perjury — Prosecution for — Proceedings in which false evidence was given still pending.**

It is not competent to a Magistrate to order the prosecution of a witness for perjury while the proceedings in which the witness has given his deposition are pending before him. (1902) 4 Bom LR 778 (779) (DB).

### 23. Perjury.

——Ss. 476 and 236 — **Direction to make a complaint for giving false evidence — Witnesses making contradictory statements at different stages of the proceedings — Absence of finding as to which of them is false — Complaint, if vitiated.**

Where an order is made under S. 476, Cr. P. Code, to make a complaint in respect of contradictory statements made by witnesses at different stages of the proceedings, it is wrong to say that the complaint is vitiated by the absence of an express finding as to which of the two statements is false. This view of the law is contrary to the provisions of S. 236, Cr. P. Code, and the principle underlying prosecutions under S. 93, I. P. Code. Even if it cannot be proved which of the contradictory statements is false a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another. AIR (Vol 35) 1948 Mad 487 : 60 LW 196 : 1947 MWN 610 : 50 Cr LJ 30 : (1947) 1 MLJ 197.

——S. 476 — **Expediency of prosecution — Witness making contradictory depositions in committal Court and Sessions Court — Prosecution — If to be ordered.**

Where a witness, who was an eye-witness to a crime, makes a statement in the committal Court implicating the accused, but in the Sessions Court deliberately goes back upon his previous statement and gives evidence which is totally contrary to his prior statement, such false statements made on purpose in either of the Courts ought not to go unpunished; and it is therefore expedient in the interests of justice that such witnesses should be prosecuted for perjury, and the Court will order their prosecution under S. 476, Cr. P. Code. AIR (Vol 34) 1947 Bom 161 : ILR (1946) Bom 950 : 229 Ind Cas 621 : 48 Cr LJ 474 : 48 Bom LR 755 (DB).

——S. 476 — **Prosecution for perjury — Deposition not read over — Expediency.**

It is judicially inexpedient to prosecute a witness for perjury if his deposition has not been read over to him as the omission is not merely an irregularity but renders the record inadmissible in proof of the deposition. AIR (Vol 33) 1946 Nag 38 : 1945 NLJ 551 : ILR (1945) Nag 788.

——S. 476 — **Perjury by contradictory statements.**

The fact that a witness appears to have made contradictory statements at two different stages of a case is not by itself always sufficient to justify his prosecution for perjury. The fact that the evidence is given in a case of a grave nature should only make the Court the more careful to weigh all the circumstances before embarking on prosecutions for perjury on the basis of contradictions, for, it is in the interests of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the committing Magistrate. AIR (Vol 28) 1941 Pat 165 : 7 BR 563 : 42 Cr LJ 446 : 22 PLT 775 : 193 Ind Cas 569.

——Ss. 476, 195 — **Fabrication of evidence.**

Before action can be taken on an application under S. 476, read with S. 195, against a person for having fabricated evidence by making false entry, there must be some satisfactory evidence that the entry was fabricated for the purpose of being used in proceedings though the actual use is not necessary. AIR (Vol 25) 1938 Cal 677 : 40 Cr LJ 450 : 180 Ind Cas 586.

——S. 476 — **Witness making contradictory statements in committing Magistrate's Court and Sessions Court — Penal Code, S. 193.**

It should not be laid down as a general rule that a witness is exempt from prosecution with regard to a statement made in the Sessions Court, differing from a previous statement made by him before the committing Magistrate even though the subsequent statement is considered to be true. There may be good reasons for not prosecuting the witness in many cases, should the subsequent statement be held to be true; but where it is doubtful which of the two statements

is true and where it may be held with some degree of certainty that the subsequent statement is the false one, a complaint for giving false evidence should as a rule, be made. Other matters should, of course, be considered, such as any compulsion that may have been brought to bear upon the witness in making either of the statements; but where no compulsion has been shown, the Courts should not refrain from making a complaint except for good reasons.

Usually it would not be expedient to prosecute a witness who had made contradictory statements in the course of the same deposition, because the presumption is that the witness is trying to correct a false statement by his subsequent statement, and in such cases some locus paenitentiae should be given to the witness, but this does not apply where different depositions are recorded after an interval of time. AIR (Vol 22) 1935 Nag 145 : 36 Cr LJ 935 : 31 NLR 308 : 156 Ind Cas 257.

**——S. 476 — Fabricating evidence in case under S. 4, U. P. Adulteration Act — Proceedings for offence under S. 193, Penal Code.**

The accused was being tried under S. 4, U. P. Adulteration Act. The case against the accused was that he had exposed adulterated ghee for sale. In his defence, he produced a phial containing some ghee stating that it had been given to him by the Health Officer at the time he took a sample of the ghee. The Magistrate thought that the colour of the contents of the original phial was different from that of the contents of the phial produced by the accused and also thought that the seals purporting to be those of the Health Officer on the two phials were not the same. Accordingly, he took proceedings under S. 476, Criminal P. C.:

Held, that it was premature for the Magistrate to form an adverse opinion against the accused and to direct the prosecution of the accused without himself enquiring into the matter and recording a clear finding, whether the ghee actually exposed for sale was identical with the sample produced or with that produced by the Health Officer. AIR (Vol 21) 1934 All 1017 : 1934 ALJ 1064 : 36 Cr LJ 379 : 4 AWR 535 : 57 All 403 : 153 Ind Cas 619 (DB).

**——S. 476 — Contradictions in deposition of witness.**

Mere contradictions alone will not justify a prosecution for giving false evidence. An order under S. 476, Criminal P. C., should only be made if it is expedient in the interests of justice. AIR (Vol 21) 1934 Sind 155 : 36 Cr LJ 10 : 152 Ind Cas 254 (DB).

——S. 476 — Where the trial Court believes the statements of a witness but the Appellate Court disbelieves them, in considering the question of prosecuting the witness for perjury, the fact that the trial Judge has believed him should be taken in his favour. AIR (Vol 19) 1932 All 674 : 34 Cr LJ 105 : 141 Ind Cas 146 (2).

**——S. 476 — Evidence believed by Sessions Judge but disbelieved by trial Court and High Court — Complaint by successor of Sessions Judge.**

The evidence given by a witness in a criminal trial was disbelieved by the trial Court, was believed by the Sessions Judge, but was considered false by the High Court. An application for a complaint against him for perjury was made to the successor of the Sessions Judge and the Sessions Judge made a complaint :

Held, that in the circumstances, the Sessions Judge should not have initiated further proceedings against the witness. AIR (Vol 18) 1931 Lah 404 : 32 Cr LJ 652 : 131 Ind Cas 95 (DB).

**——S. 476 — Proper complaint.**

It is absolutely necessary to give the particular false statements in a complaint for the offence of giving false evidence and therefore a complaint merely quoting S. 193, Penal Code, alleging fabrication of false evidence without any allegations of having given false evidence can in no sense be deemed to be a complaint for an offence of intentionally giving false evidence. AIR (Vol 17) 1930 Rang 153 : 126 Ind Cas 530 : 31 Cr LJ 1060 : 1930 Cr C 585.

——S. 476 — Complaint not setting out precisely depositions said to be false — Complaint is not proper. AIR (Vol 16) 1929 Mad 74 : 28 MLW 774 : 2 M Cr C 35 : 30 Cr LJ 370 : 114 Ind Cas 834.

——S. 476 — Witness's false evidence in no way affecting the case — Complaint should not be lodged. AIR (Vol 14) 1927 Cal 515 : 28 Cr LJ 310 : 100 Ind Cas 534 : 8 AI Cr R 103 (DB).

——S. 476 — Complaint of perjury — Passages complained should be quoted. AIR (Vol 13) 1926 All 21 : 24 ALJ 122 : 26 Cr LJ 1506 : 6 LRA Civ 630 : 6 LRA Cr 213 : 90 Ind Cas 250.

**——S. 476 — Complaint — Contents of.**

A complaint of offence under S. 193, I. P. C. must state what was the false evidence given by the accused. It is not for the Magistrate to fish about in order to find out what statements the complaining Court may have considered to be false. The complaint itself must make it clear; otherwise a complaint under S. 193 cannot stand. AIR (Vol 12) 1925 Mad 609 : 86 Ind Cas 449 : 48 Mad 395 : 21 MLW 664 : 26 Cr LJ 801 : 48 MLJ 290 (DB).

**——S. 476 — Proceedings or perjury against a witness should be started after conclusion of the case in which the witness gives evidence.**

Proceedings under S. 476, Cr. P. Code, should not be taken until the case, in which the alleged false evidence was given, have been finally disposed of. Such a hasty proceeding, as placing a witness on a trial as an accused immediately after he has given his evidence, is bad because the obvious result of such a step would be to intimidate subsequent witnesses and defeat the object of the trial. The proper time to apply under S. 476 for the prosecution of witnesses for perjury is after the final disposal of the suit in which he was examined as a witness. AIR (Vol 12) 1925 Nag 412 : 89 Ind Cas 390 : 26 Cr LJ 1350.

**——S. 476—False evidence — Perjury — Power of High Court to direct prosecution when evidence given before the Committing Magistrate in the mofussil — Practice.**

If a witness examined during the trial of a prisoner at the original Criminal Sessions of the High Court has intentionally made false statements before the committing officer, the High Court under S. 476 can send the case for enquiry or trial to the District Magistrate as the nearest Magistrate of the first class. AIR (Vol 3) 1916 Cal 425 : 43 Cal 542 : 17 Cr LJ 475 : 36 Ind Cas 155.

**——S. 476 — False evidence — Penal Code S. 193.**

A prosecution under S. 193 Penal Code cannot be ordered when there is nothing to show a continuation of proceedings in which the evidence was given. (1910) 7 ALJ 918 : 7 Ind Cas 398 : 33 A 143 (DB).

**——S. 476 — Assistant Settlement Officer sitting in a preliminary enquiry under S. 476 — Perjury,**

Judicial proceeding is a proceeding in the course of which evidence is or may legally be taken on oath. All courts and persons having by law or consent of parties authority to receive evidence are entitled to administer oaths. An Assistant Settlement Officer, under Rule 40 of the Government Rules published under the Bengal Tenancy Act, is such a person, and he can receive evidence on oath, and that in a proceeding under S. 476, Cr. P. C., in a preliminary enquiry; and a person can be tried for perjury in such a proceeding under S. 123, I. P. C. (1910) 11 Cr LJ 45 : 5 Ind Cas 62 : 37 C 52 (55, 56) : 14 CWN 142 (DB).

——S. 476 — False deposition — **Penal Code S. 193 — Different statements at different stages of proceedings — Liability.**

A person making three different statements at three different stages of proceedings should not necessarily be prosecuted for perjury. All the circumstances of the case should be looked to. (1910) 3 Bur LT 119 : 11 Cr LJ 734 : 8 Ind Cas 947.

——Ss. 476, 477 — **False evidence — Further inquiry, necessity for — Section under which proceedings are taken.**

Where the evidence of a witness, which was in conflict with the evidence of other witnesses, was disbelieved by both the Magistrate and Sessions Judge, and the Sessions Judge committed the witness for trial on a charge of false evidence.

Held, that there was no ground to conclude that false evidence had been given, that he could not be committed without further inquiry and notice to the accused to show cause, and that proceedings should be taken not under S. 477, but under S. 476 of the Code of Criminal Procedure. (1901) 5 CWN 630 (633, 634) (DB).

## 24. Powers of Court.

(a) General.
(a-1) Cost.
(b) Second application.
(c) Successor.
(d) Compensation.

### (a) General.

——S. 476 — A Court has often to consider twice the same set of facts, and it does not necessarily follow that because it has passed an order on the matter at a prior stage, it is precluded from considering the matter at a later stage. AIR (V 29) 1942 Mad 753 : 1942 MWN 484 : 55 LW 536 : 44 Cr LJ 404 : 1943-1 MLJ 482 : 205 Ind Cas 384.

——Ss. 476, 195 (1) (a) — **Offence under S. 186, Penal Code — Proceedings dropped due to mistake — Complaint made under S. 195, Criminal P. C.**

A Munsif has a right under S. 195 (1) (a), Criminal P. C., to make a complaint against an accused for an offence under S. 186, Penal Code. He cannot, however, institute proceedings under S. 476, for such offence. Where a Munsif holds proceedings under S. 476 for an offence under S. 186, Penal Code, under a wrong impression that he can do so but subsequently drops the proceedings after the mistake is pointed out to him and makes a complaint against the accused under S. 186, Penal Code, the act committed by the Munsif must be attributed to his valid power of making a complaint under S. 195 (1) (a) even though he might have wrongly thought in the beginning that he could institute a proceeding under S. 476. The accused has therefore, no right of appeal from an order making a complaint. AIR (V 28) 1941 All 100 : 1940 ALJ 876 : 42 Cr LJ 323 : 1940 A W R 618 : 192 Ind Cas 860.

——S. 476 — **Appeal against the order.**

Where the Sub-Divisional Magistrate acts suo motu in calling on a witness to show cause why he should not be prosecuted for perjury, the opposite party has no right of appeal against the order of the Sub-Divisional Magistrate declining to take action and the order of the Additional Sessions Judge, on appeal under S. 476-B is without jurisdiction and must be set aside. AIR (Vol 28) 1941 Pat 591: 7 BR 944: 42 Cr LJ 757: 23 PLT 210: 195 Ind Cas 580.

——Ss. 476, 476-B — **Petition refused — Court, if can subsequently grant it.**

Whatever the powers of an Appellate Court are to remand a case when an appeal has been filed before it under S. 476-B, Criminal P. C., the powers of a Court to lay a complaint in respect of an offence committed before it remain unimpaired. A Court, after having declined to accede to a petition that it should lay a complaint, is not debarred from laying one suo motu if, on a further consideration, it finds, whether such conclusion is reached on a further study of the facts or on an elucidation by a higher tribunal, that there is really a case for making a complaint. AIR (Vol 25) 1938 Nag 487: 1938 NLJ 285: 40 Cr LJ 388: ILR (1939) Nag 388: 180 Ind Cas 577.

——S. 476 — Where the District Judge on appeal sets aside the order of the lower Court rejecting an application under S. 476 asking the Court to file a complaint against a person, and directs the lower Court to hold an inquiry and file complaint, if necessary, the lower Court is not debarred from filing complaint after inquiry, by its previous refusal to do so. AIR (Vol 25) 1938 Pat 99 : 16 Pat 650 : 19 PLT 21 : 39 Cr LJ 353 : 4 BR 332 : 173 Ind Cas 742 (DB).

——Ss. 476, 369 — **Complaint under, if can be altered or reviewed.**

A complaint cannot be a judgment even when the complaint is made by a Court under S. 476, Criminal P. C. Therefore, S. 369 cannot apply to a complaint and does not, therefore, amount to a bar against a Court altering or reviewing the complaint under S. 476, Criminal P. C. The Code does not bar a Court from altering or reviewing its complaint under S. 476, Criminal P. C.

Where, therefore, a Civil Court files complaint under S. 476 and the District Magistrate returns the same to it requesting it to make an order of commitment to the Sessions Court, the Civil Court is competent to pass that order. AIR (Vol 24) 1937 All 76 : 1936 ALJ 1199 : 38 Cr LJ 318 : 1936 AWR 1125 : 166 Ind Cas 915.

——S. 476 — **Penal Code, Ss. 209, 467, 471 — Necessity of thorough inquiry before filing complaint.**

The Court ought never to file a complaint in respect of the offences under Ss. 209, 467 and 471, I. P. C., when the matter had not been thoroughly sifted by it in the course of a regular judicial inquiry. ('37) 1936 OWN 268 : 37 Cr LJ 518 : 12 Luck 62 : 161 Ind Cas 602.

——S. 476 — **Magistrate, if can make complaint after refusal to do so.**

An order refusing to proceed under S. 476, Criminal P. C., is not a judgment, nor does it amount to an order of autrefois acquit, and, therefore, it does not debar the Magistrate from proceeding under that section later if he changes his mind in the matter. A Magistrate cannot be bound down for ever if, on the request of a particular individual, he does not feel inclined to proceed against a witness who has perjured himself. He may suo motu take action or another person may be able to induce him to take pro-

ceedings. AIR (Vol 22) 1935 Pesh 1 : 36 Cr LJ 470 : 153 Ind Cas 947 (DB).

——S. 476 — There is nothing in either S. 476 or S. 476-A, Criminal P. C., to warrant the suggestion that where a Subordinate Judge has asked for directions from the District Judge, he becomes functus officio and that any complaint subsequently filed by him under S. 476 is prohibited by the statute. AIR (Vol 20) 1933 Sind 37 : 26 SLR 105 : 34 Cr LJ 305 (2) : 142 Ind Cas 74 (DB).

**——Ss. 476, 476-B, 537 — Dismissal of application — Illegal remand by Appellate Court — Fresh complaint by Magistrate — Subsequent proceedings, validity of.**

Where a Magistrate dismissed an application under S. 476, Criminal P. C., for the prosecution of a person, but on appeal, the Appellate Court, purporting to act under S. 476-B, remanded the proceedings to the Magistrate for further inquiry which resulted in a complaint being filed by the Magistrate and in the conviction of the accused :

Held, that though the order of the Appellate Court was illegal, the order of the Magistrate making complaint and the subsequent proceedings were not illegal inasmuch as there is no provision in the Criminal P. C., which lays down that once a Magistrate declines, under S. 476 to file a complaint, he is functus officio, or that a complaint subsequently filed by him confers no jurisdiction on the trial Court to deal with the person complained against. AIR (Vol 17) 1930 Sind 315 : 24 SLR 446 : 32 Cr LJ 521 : 130 Ind Cas 442.

——S. 476 — Court complaining of fabricating false evidence but not of forgery also — Facts alleged disclosing forgery — Complaint is not unentertainable, and trying Magistrate can frame charge of forgery. AIR (Vol 16) 1929 Mad 74 : 28 MLW 774 : 2 M Cr C 35 : 30 Cr LJ 370 : 114 Ind Cas 834.

——S. 476 — Penal Code, Ss. 182 and 211 — Accused persons not taking action under S. 211 — Court has authority to complain against the false complainant. AIR (Vol 15) 1928 All 333 :30 Cr LJ 2 : 9 AI Cr R 475 : 9 AI Cr R 446 : 9 LRA Cr 78 : 9 LRA Cr 71 : 112 Ind Cas 770.

——S. 476 — Proceedings started under S. 476 — Court has option to commit the accused to Sessions under S. 478. AIR (Vol 14) 1927 All 571 : 25 ALJ 555 : 8 AI Cr R 85 : 8 LRA Cr I13 : 28 Cr LJ 668 : 49 All 898 : 103 Ind Cas 204.

**——S. 476 — Power to record a finding.**

Under S. 476, as amended, a Court has only authority to make a preliminary inquiry and record a finding in the case of an offence covered by the present S. 195, sub-s. (1), cls. (b) and (c) but not in cases covered by S. 195 (1) (a). AIR (Vol 14) 1927 Oudh 326 : 4 OWN 640 : 28 Cr LJ 681 : 8 AI Cr R 400 : 103 INd Cas 409 (DB).

——S. 476 — A Court is not justified in making a complaint of perjury regarding a statement which is literally and strictly speaking true. (1926) 7 LLJ 621 : 27 Cr LJ 330 : 92 Ind Cas 746.

**——S. 476 — Complaint by Magistrate to his own Court is not illegal.**

Petitioner gave evidence in a case tried by the Chief Presidency Magistrate. Part of his evidence was regarded as false & the Magistrate deemed it necessary to take proceedings under S. 476, Cr. P. Code. He accordingly drew up a complaint. This complaint he preferred in his own Court and then he transferred it to a Presidency Magistrate for disposal. The latter issued process, held an enquiry and committed the petitioner for trial. The petitioner was then tried and convicted.

Held : By Court (Rankin and Chakravarti JJ., dissenting) that, the procedure was not illegal.

Held, Per Walmsley, J. — The Magistrate committed nothing worse than an irregularity which may be disregarded.

Held, Per Rankin, J. — The proceedings have been had throughout in defiance of the express provisions of the Code and of fundamental principles of law. A document which is not addressed to a person other than the writer is not a complaint either in the ordinary sense or in the sense in which the word is used in S. 476 of the Cr. P. Code.

Held, Per Cuming, J. — There is nothing in the Code that prevents a Magistrate from taking cognizance of his own complaint.

Held, Per B. B. Ghose, J. — The complaint and the subsequent trial was not illegal and the irregularity was curable under S. 532 (1), Cr. P. Code. AIR (Vol 13) 1926 Cal 470 : 53 Cal 350 : 30 CWN 276 : 27 Cr LJ 385 : 43 CLJ 310 : 93 Ind Cas 33 (FB).

**——S. 476 — Trial begun on basis of sanction under old Code but not completed before the coming into force of amended Code can go on without fresh complaint under amended S. 476.**

When a criminal Court has taken cognizance of an offence for perjury, before the amendment of the Cr. P. Code, on a sanction order to a private individual granted before the Code was amended, but has not completed the trial before the amended Code came into force, the trial can go on without fresh complaint under the amended provisions of S. 476, Cr. P. Code.

Per Wallace, J. — In order to decide as to whether a trial founded on a sanction and properly begun on a procedure which has been altered by the amended Cr. P. Code can now go on it is essential not to confuse 'cognizance' with 'jurisdiction'. Once a Court is properly seized of a case, any amendment of law, except an amendment which takes away its jurisdiction to try the offence, cannot affect the Court's authority to proceed with the trial. To hold that an amendment of the procedure of trial under the Code automatically brings to an end all trials founded on the original procedure is not a conclusion which is justified either in law or in commonsense. The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force.

Per Madhavan Nair, J. — Sanction is required only to enable the Court to take cognizance of certain offences and, when once the case is launched and cognizance has been taken by the Magistrate of any offence, nothing short of an amendment which specifically takes away the jurisdiction of the Court to try the offence can affect the right of the Court to go on with the trial according to law. AIR (Vol 12) 1925 Mad 1122 : 27 Cr LJ 84 : 1925 MWN 668 : 22 MLW 554 : 49 MLJ 276 : 91 Ind Cas 388 (DB).

——S. 476 — Where the plaintiff is absent at the hearing but the Court takes evidence nevertheless for the purpose of taking action under S. 476, Cr. P. Code, the evidence cannot be said to have been illegally or improperly taken. AIR (V 10) 1923 Mad 228 : 16 MLW 925 : 1922 MWN 811 : 23 Cr LJ 712 : 44 MLJ 74 : 69 Ind Cas 440.

**——S. 476 — Perjury — Direction for prosecution — Specific details of statements.**

Where the Sub-Divisional Magistrate in his explanation to the High Court detailed the statements in respect of which he directed a prosecu-

tion under S. 476, Cr. P. Code. Held, that he ought to have done so in the order under S. 476 of the Cr. P. Code. The High Court directed that the statements should be detailed upon which the charge is proposed to be framed against the accused. When the order for sanction is made upon the very date or the day after the witnesses' cross examination had finished and upon a clear statement against the witnesses, and after an opportunity having been given to them to explain the inconsistencies in their statements in chief and in their cross examination it was not incumbent upon the Magistrate to institute a fresh enquiry or to give any notice to the accused. AIR (Vol 5) 1918 Pat 448 : (1918) Pat HCC 13 : 4 Pat LW 44 : 19 Cr LJ 169 : 43 Ind Cas 585.

——**S. 476 — Notice or opportunity to examine witnesses — Magistrate giving sanction — No opportunity given to accused to cross examine — If material irregularity.**

Where a Magistrate takes action under S. 476, it is not necessary for him to hold any inquiry and he is not acting with material irregularity if he refuses to allow an opportunity to the accused to examine the witnesses. (1912) 34 All 267 : 9 ALJ 231 : 13 Cr LJ 141 : 13 Ind Cas 829.

——S. 476 — It is only the individual officer presiding over a Court before whom the offence was committed that can initiate and conduct proceedings.

Such proceedings must not only be tried by the presiding Judge before whom the offence was committed, but must be completed by him and so if before the completion of the proceedings he is transferred his successor is not competent to continue them. 10 PLR 1911 : 4 PWR 1911 Cr : 12 Cr LJ 68 : 9 Ind Cas 389 (DB).

——**Ss. 476, 195 — Time for action under S. 476 — "Nearest Magistrate of the First Class".**

Per Full Bench. — Per Chief Justice and Wallis, Sankaran Nair and Pinhey JJ. (Miller J. dissenting): — The power conferred by S. 476, Cr. P. Code, can be exercised by the Court only in the course of the judicial proceedings in which the alleged offence is committed or brought to the notice of the court, or at its conclusion, or so immediately after as to make it really the continuation of the same proceeding in the course of which the offence was committed or brought to its notice.

Per Sankaran Nair J. — Obiter. — A Court may grant sanction under S. 195, Cr. P. C., at any time and to any person it considers fit to carry on the proscution and entitled to proceed under S. 190, Cr. P. C. Distinction between the nature and scope of Ss. 195 and 476, Cr. P. C., pointed out. An order under S. 476 is not a complaint under S. 195. A Court in Madras when acting under S. 476, Cr. P. C., has to send the case to a First Class Magistrate out of Madras to the exclusion of the Presidency Magistrate.

Pinhey J. — The decision does not mean that the final order under S. 476, Cr. P. C., must issue at once. It means only that the Court must commence to take action under S. 476, Cr. P. C., prompt. (1908) 9 Cr LJ 41 : 4 MLT 404 : 19 MLJ 42: 32 Mad 49 (53) (FB).

See also (1905) 15 MLJ 489: 3 Cr LJ 118.

——**S. 476 — Direction by Munsif for trial of offence under S. 500, Penal Code.**

The Munsif, as a judicial officer, cannot direct under S. 476 of the Code, a trial of the person who had committed an offence under S. 500 of the Indian Penal Code and ask the Magistrate to deal with his order directing the trial as a complaint. (1907) 6 CLJ 713 (714) : 6 Cr L J 405 (DB).

——**S. 476 — Order under, by Magistrate after transfer — Power of Magistrate after transfer.**

A Magistrate who after trying a case, has been transferred from the charge of the particular court in which the case was tried to some other duty in the same district is not competent to make an order under S. 476, Cr. P. C., in respect of a case which he tried as presiding officer of such Court. (1904) 1 ALJ 315 (316) : 1 Cr LJ 596.

——**S. 476 — Complaint — Police report that it is false — Inquiry by Magistrate — Jurisdiction to proceed under S. 476.**

Where upon a Police report that a complaint is false the complainant is called upon to show cause why he should not be prosecuted, he appears and the Magistrate examines him and his witnesses, and comes to the conclusion that the charge is false, he can proceed under S. 476, Cr. P. C., and direct a prosecution. (1901) 5 CWN 106 (107) (DB).

**(a-1) Cost.**

——**S. 476 — Civil Court cannot award costs.**

When a civil Court takes action under S. 476, it exercises powers conferred on it by the Criminal Procedure Code, and its proceedings are governed by the provisions of that Code. The civil Court has no inherent power to initiate a prosecution in respect of offences to which S. 476 applies. As the Criminal Procedure Code does not contemplate the award of costs in such cases, the civil Court has no power to make an order for costs. AIR (Vol 34) 1947 Pat 139: 12 BR 603 : 47 Cr LJ 707 : 225 Ind Cas 413.

——**S. 476 — Costs in proceedings for sanction — Civil Court acting under — Power to award costs — C. P. Code, S. 35 — Applicability.**

After a suit for recovery of possession of land had been decreed, the defendant in that suit made an application to the trial Court asking that certain of the plaintiffs who had given evidence in the suit should be prosecuted for perjury. The application was dismissed and an appeal against it was also dismissed and both the courts awarded costs against the defendant. On revision it was contended that being criminal proceedings the courts below had no jurisdiction to award costs.

Held : The Courts below were Civil Courts and therefore had jurisdiction under S. 35, C. P. Code, to award costs. The costs ordered were incident to the main suit being the costs of interlocutory applications made to the Court after the suit had been decreed. Though the procedure which the Courts had to follow may to some extent have been laid down in S. 476, Cr. P. Code, they were nevertheless sitting as Civil Courts and not as Criminal Courts and had jurisdiction to award costs. AIR (Vol 34) 1947 Pat 106 : 47 Cr LJ 741 : 12 BR 614 : 225 Ind Cas 550.

——S. 476 — Costs in proceedings for sanction — Competency of Court to award. See AIR (Vol 33) 1946 All 245.

——**Ss. 476, 476-B — Costs, if can be awarded.**

Proceedings under S. 476, Criminal P. C. and the following connected sections whether they originate in a Civil Court, or a Criminal Court or a Revenue Court are criminal proceedings and, therefore, a Court acting under any of these sections, e. g., S. 476-B, acts without jurisdiction in awarding costs. AIR (Vol 30) 1943 Lah 26 : 43 Cr LJ 904 : 44 PLR 510 : 202 Ind Cas 724.

——**S. 476 (as amended in 1923) — Costs, if can be awarded.**

Proceedings under S. 476 being of civil nature, Court would have jurisdiction to award costs. AIR

(Vol 27) 1940 Bom 131 : 42 Bom LR 231 : 41 Cr LJ 526 : ILR (1940) Bom 403 : 187 Ind Cas 867.

**——S. 476 — Costs — Jurisdiction to award.**

A District Magistrate suspecting forgery in a certain case informed the Court concerned of his suspicion by a petition with the permission of the Local Government. The Court concerned held an enquiry. Being doubtful of the forgery he refused prosecution. He dismissed the application of the District Magistrate and awarded costs against him.

Held, Court would have jurisdiction to award costs to one party or the other where parties are the same as in the civil litigation, that neither the King-Emperor nor the District Magistrate by himself was a party in the civil litigation, and, therefore, the Court had no jurisdiction to award costs against the District Magistrate. AIR (Vol 15) 1928 All 588 : 51 All 338 : 12 AI Cr R 206 : 10 LRA Cr 125 : 1929 ALJ 62 : 114 Ind Cas 741.

**(b) Second application.**

**——S. 476 — Second application, if can be made.**

There is no provision of law that a second application under S. 476, Criminal P. C., cannot be made where a first application has been dismissed for non-appearance of the applicant. The principle of nemo debet is not applicable where there has been no inquiry on the merits. AIR (Vol 27) 1940 Lah 526: 42 Cr LJ 324: 192 Ind Cas 863.

**——S. 476 — Magistrate refusing to act — Whether can act on subsequent application.**

A Magistrate who has passed an order refusing to start proceedings for perjury under S. 476, Criminal P. C., can act on a second application moving him to the same effect. Ordinarily, however, it would be undesirable to do so unless some fresh facts had emerged showing that the previous order was clearly wrong. AIR (Vol 23) 1936 Nag 156 : 37 Cr LJ 977 : ILR (1937) Nag 336 : 164 Ind Cas 713 (2).

——S. 476 — The dismissal of an application for making a complaint under S. 476, Criminal P. C., does not preclude the Magistrate from entertaining a second application for the same purpose. AIR (Vol 19) 1932 Mad 130 : 61 MLJ 636 : 1931 MWN 1048 : 34 MLW 629 : 33 Cr LJ 272 : 136 Ind Cas 313.

**(c) Successor.**

**——Ss. 476 and 195 — Successor if can sanction prosecution for an offence under S. 209, I. P. C.**

A successor of the officer who concluded the proceedings cannot proceed under S. 476. He may give sanction under S. 195, Cr. P. C. 1 Pat LW 772 : 18 Cr LJ 895 : (1918) Pat HCC 64 : 4 PLW 141: 41 Ind Cas 1007: AIR (Vol 4) 1917 Pat 35.

**——S. 476 — Succeeding Magistrate, if can order prosecution — Penal Code, S. 193.**

The succeeding Magistrate has no jurisdiction to initiate proceedings under S. 476 for offence under S. 193, I. P. C., where it is neither committed before him nor was brought to his notice in the course of any judicial proceeding. AIR (Vol 3) 1916 Oudh 125 : 2 OLJ 546 : 17 Cr LJ 40 : 32 Ind Cas 328.

**——S. 476 — Successor of a Judge who held trial.**

An order under this section may be made by a Judge who had not heard the evidence at the original trial. The power to direct prosecution is conferred on the Court and not on an individual officer. (1911) 15 CWN 691 : 14 CLJ 123 : 12 Cr LJ 209 : 10 Ind Cas 66 (DB).

**——S. 476 — Power of successor of presiding officer.**

Where a Magistrate commenced proceedings under S. 476, Code of Criminal Procedure immediately after the dismissal of a complaint, his successor in office has power to continue the proceedings initiated by him. (1910) 11 Cr LJ 438 : 7 ALJ 991 (933) : 7 Ind Cas 51.

**——S. 476 — "Court" — "Before" — Power of successors in office to sanction prosecution — Appeal.**

Where, four months after a criminal trial had concluded the successor in office of the Magistrate who had tried the case upon an application made to him, made an order under S. 476, Cr. P. C., directing the prosecution of a witness at that trial under S. 193 of the Penal Code.

Held that the order was made without jurisdiction. Maclean C. J. (Brett and Mitra JJ. concurring)—It is the Judge who tries the case who alone can exercise the summary powers conferred by S. 476, Cr. P. C., and such power is exercisable only at or immediately after the conclusion of the trial in which the offence is alleged to have been committed.

Harington J. — The responsibility of ordering a prosecution under S. 476, Cr. P. C., rests on the officer who has heard the witnesses and knows of his personal knowledge whether the circumstances call for a summary proceeding or not.

Geidt J. Section 476, Cr. P. C., contemplates that the desirability of prosecuting the offender must be present to the mind of the Court during the proceedings in the course of which the offence was committed or brought to the Court's notice — and not that it should be suggested to the Court by an application made after the proceedings had terminated and passed beyond its ken. The word "Court" in that section need not, however, necessarily mean the same judicial officer. (1907) 11 CWN 568 : 5 Cr LJ 398 : 2 MLT 298 : 5 CLJ 508 : 34 C 551 (555, 559). (FB).

**(d) Compensation.**

**——Ss. 476 and 250 — False complaint — Compensation, order for.**

A Magistrate before whom a false charge is brought can order compensation to be paid to the accused and also direct the prosecution of the complainant under S. 476.

Hayward, J. C. — It is doubtful whether a Magistrate can award compensation under S. 250 and at the same time direct a prosecution of the complainant under S. 476 as it amounts to convicting a man twice for the same offence. AIR (Vol 4) 1917 Sind 19 : 10 SLR 162 : 18 Cr LJ 414 : 38 Ind Cas 974 (DB).

**——S. 476 — Awarding compensation — Application under S. 476 is not complaint — Section 250 does not apply.**

An application under S. 476 is not a complaint. It is merely an application that a complaint be made and S. 250, therefore, has no application. AIR (Vol 30) 1943 Lah 26 : 43 Cr LJ 904 : 44 PLR 510 : 202 Ind Cas 724.

**25. Powers of Superior Court.**

See also Cr. P. C. Ss. 476-A and 476-B.

**(a) General.**
**(a-1) Collector under Bengal Tenancy Act.**
**(b) District Magistrate.**
**(c) District Court under Madras Village Courts Act 1889.**
**(d) District and Sessions Judge.**
**(e) High Court.**

**(a) General.**

——S 476 — Appellate Court can take additional evidence and direct prosecution under S. 476. AIR (Vol 9) 1922 Pat 52 : 71 Ind Cas 997 : 1922 PHCC 29 : 4 PLT 370 : 24 Cr LJ 277.

**(a-1) Collector under Bengal Tenancy Act.**

——S 476 — Bengal Tenancy Act, Ss. 60 and 70 — Order under — Disobedience — Collector can proceed under Cr. P. Code, S. 95 or S. 476 and direct prosecution under S. 188, I. P. C. AIR (Vol 8) 1921 Cal 260 : 66 Ind Cas 71 : 48 Cal 1036 : 25 CWN 617 (DB).

**(b) District Magistrate.**

——S. 476 — Petition to District Magistrate requesting further investigation — Enquiry by District Magistrate and prosecution under S. 211, Penal Code — Action of District Magistrate without jurisdiction as offence had no relation to any proceeding by District Magistrate functioning as Court. 1936 MWN 492 (1).

**——S. 476 — Penal Code, Ss. 211, 193 — Jurisdiction of District Magistrate.**

It is only the Court before whom offences of perjury and bringing a false complaint are committed that can take action under S. 476, Criminal P. C. When no application has been made under S. 476, Criminal P. C., in the Court before which offences under Ss. 211 and 193, Penal Code, are committed and that Court has, therefore, not made any inquiry or passed any order, and an application is made to the District Magistrate for making a complaint under S. 476, the District Magistrate has no authority to make the complaint in respect of the offences committed. AIR (Vol 21) 1934 Oudh 344 (2) : 8 Luck 638 : 35 Cr LJ 824 : 11 OWN 490 : 148 Ind Cas 1075.

——S. 476 — There is nothing to prevent a District Magistrate on reading the judgment or order of a Court under S. 476, from taking cognizance under S. 190 (1), Cl. (c), of offences alleged to have been committed by persons who were not parties to the proceedings before, and from transferring the case for trial to some Magistrate subordinate to him, provided he has been empowered to do so by the Local Government. AIR (Vol 15) 1928 Sind 69 : 22 SLR 201 : 9 AI Cr R 154 : 105 Ind Cas 802 : 28 Cr LJ 978 (DB).

**——S. 476 — Power to withdraw.**

District Magistrate cannot order the withdrawal of a complaint made by a Court under S. 476 in respect of an offence falling under S. 211, I. P. C. AIR (Vol 14) 1927 All 571 : 102 Ind Cas 351 : 49 All 752 : 25 ALJ 639 : 8 AI Cr R 49 : 8 LRA Cr 97 : 28 Cr LJ 543.

——S. 476 — Case heard by Honorary Magistrate — District Magistrate can take action. AIR (Vol 12) 1925 All 410 : 85 Ind Cas 710 : 26 Cr LJ 566 : 6 LRA Cr 44.

——S. 476 — Where an order has been passed under S. 476, the District Magistrate has no power to alter it. AIR (Vol 10) 1923 All 597 : 73 Ind Cas 690 : 24 Cr LJ 658.

**——S. 476 — District Magistrate cannot alter order passed by a Magistrate under S 476.**

If a Magistrate grants sanction under Section 195, Cr. P. Code, the District Magistrate, as the Court to which appeals would ordinarily lie can uphold or modify that sanction, but where an order has been passed under S. 476, the District Magistrate has no power to alter it. AIR (Vol 10) 1923 All 597 : 73 Ind Cas 690 : 24 Cr LJ 658

**——S. 476 — Order for enquiry — Civil Court — Dt. Magistrate's power to inquire under S. 202 — Investigation by another Magistrate.**

Where a case is submitted by a Civil Court for enquiry under S. 476, Cr. P. C., to a Magistrate who has no power to try the case, and he refers it to the Dt. Magistrate the latter has no power to order an investigation under S. 202 Cr. P. Code. The expression "proceed according to law" in S. 476 (2) Cr. P. Code requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code. AIR (Vol 7) 1920 Nag 64 : 21 Cr LJ 310 : 55 Ind Cas 470.

**——S. 476 — Action under — Complaint by Dt. Magistrate.**

Action cannot be taken under S. 476 of Cr. P. Code if the facts are not brought to the notice of the Court in the Course of Judicial proceeding. A Dt. Magistrate cannot delegate the right to file a complaint and so cannot authorise the Pub. Prosecutor to complain on his behalf. AIR (Vol 2) 1915 Lah 259 : 13 PR Cr (1915) : 184 PLR 1915 : 20 PWR (Cr) 1915 : 16 Cr LJ 251 : 28 Ind Cas 107.

——S. 476 — A Dt. Magistrate cannot proceed under the Section if the offence is brought to his notice by a Police Officer and not in the Course of a Judicial proceeding. The sanction order should be made during or shortly after the proceedings are over. AIR (Vol 4) 1917 Low Bur 86 : 18 Cr LJ 331 : 38 Ind Cas 443.

——S. 476 — District Magistrate cannot proceed under S. 476 afresh after his order granting sanction is set aside, by the High Court on the ground that no notice was issued to the accused before sanctioning prosecution. (1910) 11 Cr LJ 20 : 5 Ind Cas 17.

**(c) District Court under Madras Village Courts Act 1889.**

——S. 476 — Madras Village Courts Act, 1829, as amended in 1936 — Forged pro-note used in Panchayat Court — District Court and not Munsif's Court has jurisdiction under Ss. 476 and 195 to make complaint. AIR (Vol 30) 1943 Mad 419 : 56 MLW 156 : (1943) 1 MLJ 233 : 1943 MWN 162 : ILR (1944) Mad 26: 209 Ind Cas 565 (DB).

——S. 476 — Madras Village Courts Act, 1889 (as amended in 1937), Ss. 77, 73 — No complaint by Village Court under S. 476, Criminal P. C. — District Court can exercise powers under Ss. 476 and 195 (3), Criminal P. C. AIR (Vol 29) 1942 Mad 471 : 55 MLW 225 : 1942 MWN 218 : (1942) 1 MLJ 436 : 201 Ind Cas 713.

**(d) District and Sessions Judge.**

**——S. 476 — Offence committed before Special Judge under the Special Criminal Courts Ordinance — Sessions Judge's jurisdiction — District prosecution.**

The Court of a Special Judge constituted under the Special Criminal Courts Ordinance, 1942 and that of a Sessions Judge cannot be regarded as the same Court and the latter Court cannot, on the abolition of the former Court, transfer to its own Court any application pending in the former Court in respect of an offence said so have been committed in a proceeding before that Court and to direct the filing of a complaint. AIR (Vol 32) 1945 Pat 64 : 23 Pat 701 (DB).

——S. 476 — Complaint by District Munsif under S. 476 — District Judge dismissing appeal holding that there was sufficient material for laying complaint — Same case coming before District Judge as Sessions Judge.

Held, that the District Judge is not precluded from dealing with the case. AIR (Vol 29) 1942 Mad 753 : 1942 MWN 484 : 55 MLW 536 : 44 Cr LJ 404 : (1943) 1 MLJ 482 : 205 Ind Cas 384.

——Ss. 476 and 476-B — False statement made to the Sub-Divisional Magistrate — Complaint by Sub-Divisional Magistrate under S. 476 — Sessions Judge dismissing an appeal summarily — On revision:

Held, that the Sessions Judge had the power to dismiss the appeal summarily. AIR (Vol 20) 1933 Mad 767 : 1933 MWN 902 : 38 LW 564 : 65 MLJ 534 : 35 Cr LJ 503 : 147 Ind Cas 794 (DB).

——Ss. 476, 195 — **False statement under S. 164 during investigation of murder — Complaint.**

The Sessions Judge can make a complaint in a case where false statements are made in the course of investigation under S. 164, Criminal P. C., into an offence of murder even after the expiry of six months after the conclusion of the trial, when the sanction is applied for by the Public Prosecutor and not by a private person.

Prima facie, persons who give false evidence which may result in the conviction of an innocent person for murder ought to be tried for the offence they have committed. Their relationship to the accused, their age and the circumstances under which they came to give false evidence, are matters to be considered by the Magistrate before whom they will appear. AIR (Vol. 20) 1933 Mad 125 : 34 Cr LJ 92 : 1933 MWN 100 : 140 Ind Cas 756.

——S. 476 — **Jurisdiction of Sessions Judge.**

A statement made by a witness at the preliminary enquiry leading up to the trial in the Sessions Court is to be regarded as having been in relation to the subsequent proceedings in the Sessions Court. Consequently, the Sessions Judge has jurisdiction to direct the prosecution of the accused for contradictory statements made before himself and the committing Magistrate. It is not necessary for the committing Magistrate to direct their prosecution. The contradictory statements must however be sufficiently specified in the complaints and it should not be left to a Magistrate to ascertain what is being complained about. AIR (Vol 19) 1932 Mad 494 : 62 MLJ 717 : 33 Cr LJ 519 : 55 Mad 536 : 35 LW 803 : 1932 MWN 724 : 137 Ind Cas 761 (DB).

——S. 476 — S. 476-B — Additional District Magistrate refusing to take action under S. 476 — Appeal — Sessions Judge directing complaint — Revision — High Court cancelled the order of Sessions Judge as he could not direct but prefer complaint himself — Sessions Judge preferring complaint :

Held, that District Judge was functus officio when he passed this last order. 1931 MWN 1195.

——S. 476 — A Sessions Judge can take up at the instance of a private person any revision of a Magistrate's order under S. 476. AIR (Vol 14) 1927 All 38 : 49 All 230 : 7 LRA Cr 176 : 97 Ind Cas 650 : 25 ALJ 42 : 27 Cr LJ 1130.

——S. 476 — Sanction refused by Munsif under S. 195 — Sessions Judge agreeing with Munsif but examining witnesses himself and taking action under S. 476 — Proceedings are valid. AIR (Vol 9) 1922 All 292 : 77 Ind Cas 435 : 25 Cr LJ 387.

——S. 476 — **Fraudulent disposition of property — Charge under S. 421 — Complaint by successor of Judge.**

In the course of an insolvency proceedings the Judge found that certain alienations by the insolvent were fraudulent, and his order was confirmed by the High Court. The successor of the officer who had made the order wrote to the Dt. Magistrate to prosecute the transferees under sections 421—114 I. P. C.

Held that section 470 Cr. P. C. did not apply to a charge under section 421 I. P. C. and the District Judge could not make the report under that section. The report might be treated as a complaint and the Dt. Magistrate could take action on it. AIR (Vol 6) 1919 All 59 : 18 ALJ 50 : 1 UPLR (HC) 173 : 21 Cr LJ 56 : 54 Ind Cas 408.

——S. 476 — **Appellate Court — Powers of — Magistrate to take cognizance of case — Territorial jurisdiction if necessary.**

All that the S. 476 requires is that an offence mentioned or referred to in S. 195 should have been brought to the notice of the Court in the course of a judicial proceeding. Where an appeal is preferred to a District Judge he is fully competent to grant sanction under S. 476 in respect of any offence that may have been committed in the case, S. 476 vests the jurisdiction in a Magistrate to try a case if one is sent to him for trial by a Court mentioned in that section. All that is required to give jurisdiction to the Magistrate is that he should have been the nearest Magistrate. The section has nothing to do with local or territorial jurisdiction at all. AIR (Vol 6) 1919 Pat 189 : 20 Cr LJ 202 : 49 Ind Cas 650.

——S. 476 — **District Judge directing prosecution on basis of departmental inquiry, legality of.**

Where after the closing of a case in the Civil Court, in which a Patwari gave evidence to the District Magistrate, found on a departmental inquiry, that the Patwari had fabricated false evidence and asked the District Judge to grant sanction, held, that the District Judge had no jurisdiction to grant sanction, as the matter occurred in the Revenue Department and not in his Court and even supposing it was brought to his notice in a judicial inquiry, the record of departmental inquiry is not evidence in the matter of sanction asked for by the Magistrate. (1912) 13 Cr LJ 43 : 13 Ind Cas 283.

——S. 476 — **Interepretation — To be read with S. 195 — Police, false information given to — Failure of prosecution — Sessions Court, if may direct prosecution, under S. 211, Penal Code — Order, if may be made merely to test if offence has been committed — Order when to be made.**

S. 476, Cr. P. C., has to be read with S 195, Cr. P. C., and the words "any offence" referred to in S. 195 which occur in S. 476, mean offences under the particular sections of the Penal Code mentioned in S. 195, Cr. P. C., and committed under the qualifying circumstances described therein. Sanction for prosecution under S. 211, I. P. C., cannot be granted under S. 476, Cr. P. C., in respect of a false information lodged before the Police. No sanction under S. 476 or 195, Cr. P. C., should be granted unless there is a reasonable probability of conviction. It would be an abuse of the power vested in a court of justice, if sanction were given or upheld on the principle that though the conviction of the party complained against is a mere possibility it is desirable that the matter should be thrashed out so that it may be decided whether or not an offence has been committed. (1909) 4 Ind Cas 710 : 10 CLJ 564 : 14 CWN 330 (334, 335) : 37 C 250 : 11 Cr LJ 37 (DB).

**(e) High Court.**

——S. 476 — **Forum.**

Order under, by Revenue Court — It cannot be challenged by High Court under S. 439 of the Code. 1942 NLJ 242.

——Ss. 476. 195 — **High Court can direct preliminary inquiry.**

Under S. 476, Criminal P. C., the High Court can direct a preliminary enquiry on an application made to it under S. 476, read with S. 195. AIR (Vol 25) 1938 Cal 677 : 40 Cr LJ 450 : 180 Ind Cas 586.

**——S. 476 — High Court, if can direct the Registrar to make complaint for offences under Ss. 193 and 471, Penal Code.**

Where in a suit on a pro-note to support his contention, the promisor produces two receipts to pr ve repayments but on the report of the handwriting expert the trial Court holds these to be forgeries and against this order, the promisor files a revision in the High Court relying on those receipts, the High Court on further consideration of evidence can direct the Registrar to make a complaint under S. 476, Criminal P. C., for offence under Ss. 193 and 471, I. P. C., for these offences are also committed in the High Court, inasmuch as the promisor relied on the forged receipts in revision. Under S. 476, Criminal P. C., the High Court has jurisdiction to order proceedings thereunder when the application in revision comes before it. AIR (Vol 24) 1937 All 681 : 1937 ALJ 820 : 1937 AWR 690 : ILR (1937) All 774 : 38 Cr LJ 1080 : 171 Ind Cas 525 (DB).

——S. 476 — Section 476, Criminal P. C., is self-contained and does not stand in need of being supplemented by other provisions of the Criminal P. C. It is open to the Appellate Court when it finds that the Subordinate Court has not made a proper enquiry to report the matter to the High Court on its revisional side and in such special cases, the High Court can pass any orders that it considers just and fit. In such cases, the High Court would have before it, the opinion of the first Court as well as of the Appellate Court and would be able to decide whether fresh evidence should be taken or not and whether a fresh enquiry should or should not be ordered. AIR (Vol 24) 1937 All 305 : 1937 ALJ 192 : 1937 AWR 290 : 38 Cr LJ 561 : ILR (1937) All 517 : 168 Ind Cas 434 (FB).

**——Ss. 476, 195 — 'That Court', significance of.**

Although the words 'that Court' in S. 476, Criminal P. C., relate back to the Civil, Revenue or Criminal Court mentioned at the beginning of the section, once proceedings have been called for by a High Court in revision, and it is apparent that an offence referred to in S. 195, sub-s. (1), cl. (b) or cl. (c), Criminal P. C., has been committed in relation to the proceedings then before it, the High Court, as a Criminal Court, has power to make a complaint though the offence complained of was not committed in the course of proceedings in the High Court. AIR (Vol 24) 1937 Sind 193 : 38 Cr LJ 1002 : 170 Ind Cas 891 (DB).

**——S. 476 — High Court, whether can direct complaint after hearing appeal.**

It is no doubt objectionable that a Judge of the High Court should have to direct the filing of and sign a complaint under S. 476, Criminal P. C., after hearing the appeal but the law has to be administered and he may do so. AIR (Vol 22) 1935 Lah 677 : 37 PLR 762 : 36 Cr LJ 1485 : 158 Ind Cas 1005.

——S. 476 — Complaint of perjury containing sentences from accused's depositions besides on the real matter of charge — But order on sanction petition making clear which statement was to be real matter of charge in trial — High Court should declare to which sentence trial should be restricted. AIR (Vol 16) 1929 Mad 510: 2 M Cr C 164 : 118 Ind Cas 112 : 1929 Cr C 11 : 30 Cr LJ 866.

**——S. 476 — Complaint by Revision Court is not defective.**

Section 476 gives the High Court, as a superior Court full powers to lay a complaint in any and every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code by which that power and jurisdiction is taken away, because, in cases of a complaint or for refusal to lay a complaint by some subordinate Court, an appeal from that order is allowed. A complaint made when taking up proceeding from a subordinate Court in revision, is not defective. AIR (Vol 12) 1925 Rang 321 : 91 Ind Cas 36 : 27 Cr LJ 4 : 3 Rang 303 (FB).

**——S. 476 — Order under, in absence of accusation of perjury is bad.**

Order meant to be one under S. 476 is bad in law if there are no arraignments of perjury. The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of the charge under S. 199. The High Court has power to set aside an order under S. 476 passed by Dt. Magistrate. AIR (Vol 10) 1923 All 325 : 71 Ind Cas 661 : 21 ALJ 211 : 24 Cr LJ 197 : 4 LRA Cr 69.

**——Ss. 476 and 439 — High Court, power of as a Court of Revision.**

The High Court as a Court of Revision has power to grant sanction to the decreeholder to prosecute the judgment-debtor under S. 186 I. P. C. (1913) 25 MLJ 593 : (1913) MWN 1002 : 14 MLT 512 : 14 Cr LJ 624 : 21 Ind Cas 672 (DB).

**——S. 476 — High Courts Act, Ss. 14 and 15.**

Bench of the High Court cannot, as such, deal with these matters unless authorities by the Chief Justice under S. 14 of the High Court's Act. (1913) 40 Cal 477 : 17 CL 245 : 14 Cr LJ 197 : 17 CWN 647 : 19 Ind Cas 197 (FB).

**——S. 476 — Order under — If can be set aside.**

Per Sankaran Nair, J. An order passed under S. 476 either by a Civil or Criminal Court can be set aside by the High Court. (1909) 19 MLJ 42 : 4 MLT 404 : 32 Mad 49 : 9 Cr LJ 41 : 1 Ind Cas 597 (DB).

**——S. 476 — High Court of Calcutta — Criminal Bench, jurisdiction of — Action taken by civil Court — Practice — Per Curiam.**

The Criminal Bench of the High Court has no jurisdiction to interfere in proceedings taken by Civil Courts under S. 476, Criminal Procedure Code. Such proceedings should be dealt with under S. 622, Civil Procedure Code, by the Division court having jurisdiction over the Civil court concerned. (1905) 1 CLJ 161 (164) : 32 Cal 367 : 9 CWN 361 (DB).

**——S. 476 — Bond, genuineness of — Indian Penal Code, S. 193, prosecution under — Appellate Court, reversal by — Res judicata — Order under S. 476, set aside — High Court's power to set aside order under S. 476, Cr. P. C.**

In a suit for recovery of a sum of money due on a registered bond, the Munsif came to the conclusion that the bond was genuine, decreed the suit and directed the defendant under S. 476, Cr. P. C., to be prosecuted under S. 193 of the Indian Penal Code. On appeal the Subordinate Judge held that the bond was not genuine and dismissed the suit. In the meantime and before the decision of the Subordinate Judge was pro-

nounced, the proceedings in the criminal court had been taken, but when the Subordinate Judge pronounced his judgment, the case was still pending in the criminal court.

A copy of the judgment of the Subordinate Judge was filed before the criminal court but was not given weight to and the defendant was convicted under S. 193 of the Indian Penal Code. Held, that the judgment between parties as regards the genuineness of the bond is res judicata in all subsequent proceedings between the parties. The High Court has jurisdiction to set aside the orders passed by the criminal court in a proceeding based on an order under S. 476 of the Code of Criminal Procedure which ought to have been set aside as soon as the judgment of the Subordinate Judge was known. (1907) 6 CLJ 703 : 12 CWN 1 (2) (DB).

**26. Preliminary enquiry.**

——S. 476 — Section 476. Criminal P. C., does not make a preliminary enquiry essential in law, and the proceeding under S. 476 without such enquiry would not be illegal. AIR (V 28) 1941 Lah 52 : ILR (1940) Lah 669 : 42 Cr LJ 351 : 193 Ind Cas 170 (DB).

——S. 476 — The wording of S. 476 does not make it incumbent on the Court to hold any preliminary inquiry or to give accused notice. AIR (V 24) 1937 Pat 534 : 4 BR 141 : 39 Cr LJ 103 : 172 Ind Cas 237.

——S. 476 — It is not open to a Civil Court if it thinks that some preliminary enquiry is necessary to proceed upon the basis that an inquiry by the police and the police report is an inquiry contemplated by the section. The section contemplates that the inquiry is to be made by the Court itself. The inquiry must however be of such a character as is compatible with the ordinary procedure of the Court in question. The Judge can look at documents and take evidence but he can base his order on the police report. AIR (V 18) 1931 Cal 438 : 35 CWN 98 (DB).

**——S. 476 — When necessary.**

In each individual case the Court has to decide whether in the interests of justice a preliminary investigation is necessary. In a case where an offence has been committed outside the Court and not in the presence of the Judge it would certainly be judicious if not incumbent upon the Court to hold a preliminary enquiry in order to find out for itself whether such an offence was really committed. But where an offence is committed in the presence of the Court or from a perusal of the record, it is of opinion that it is necessary in the interests of justice that a further enquiry into the matter should be made in the criminal Court, it may make a complaint to that effect to the nearest Magistrate without making any preliminary enquiry. But it cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under S. 476. Each case must be judged on its own facts and there may be a case where the revising authority may think that an action under S. 476 was too hastily taken and that there should be further investigation in the matter. AIR 1930 Cal. 282, Diss. from. AIR (V 17) 1930 Cal 721: 34 CWN 914: 52 CLJ 87: 1930 Cr C 1129 (DB).

——S. 476 — Section 476 gives the discretion to the Court to hold or not to hold a preliminary enquiry. If the Court is of opinion that no preliminary enquiry is necessary it may at once make the complaint. If, on the other hand, it thinks that it is desirable to have a preliminary enquiry, it may adopt any course for the purpose of such an enquiry. The words "preliminary enquiry" under S. 476 may be co-extensive with, if not wider, than the words "enquiry into the case" in S. 202, Cr. P. Code. AIR (V 17) 1930 Cal 515 : 126 Ind Cas 553: 1930 Cr C 859 : 31 Cr LJ 1055 (DB).

**——S. 476 — If necessary.**

It is true that under the provisions of S. 476 a preliminary inquiry is not legally necessary. But it has been laid down ever since the enactment of the present section that although a preliminary inquiry may not be legally necessary, it should in common prudence be held by every Court before it passes an order under S. 476. AIR (V 17) 1930 Cal 282 : 127 Ind Cas 265 : 51 CLJ 45 : 1930 Cr C 362 (DB).

**——S. 476 — Failure to hold — Effect.**

Under S. 476, Cr. P. Code, it is not compulsory to hold a preliminary enquiry. Where in a complaint by the Income-tax Officer for an offence under S. 52 of the Income-tax Act the complainant was examined on oath before the District Magistrate, held, that the examination on oath was unnecessary and that it may be disregarded. Held also, that the omission to hold a preliminary enquiry was immaterial. AIR (V 17) 1930 Rang 201: 125 Ind Cas 266 : 8 Rang 25 : 1930 Cr C 661 : 31 Cr LJ 793.

**——S. 476 — The Judge desiring to take action under S. 476 must himself make an enquiry.**

If the Judge trying a case desires to take action under S. 476 he ought to make a proper inquiry himself, or through the police or through some Court subordinate to him, and after considering the report of such inquiry he ought to record a finding separately in the case of every person. AIR (V 15) 1928 All 21 : 8 AI Cr R 381 : 8 LRA Cr 147 : 105 Ind Cas 810 : 26 ALJ 46 : 28 Cr LJ 986.

——S. 476 — Enquiry need not be exhaustive. AIR (V 14) 1927 Cal 628 : 104 Ind Cas 111 : 31 CWN 823 : 8 A I Cr R 319 : 28 Cr LJ 783 (DB).

**——S. 476 — Persons affected cannot claim to cross-examine witnesses.**

What a Court has to decide under S. 476 is (a) whether an offence of the kind contemplated appears to have been committed, (b) whether it is expedient in the interests of justice that it should be further enquired into. In order to arrive at a decision the Court may, if it thinks fit, hold such preliminary enquiry, as it considers necessary. The nature, method and extent of the preliminary enquiry are, entirely at its discretion. The enquiry need not be such as to satisfy the Court that an offence actually has been committed but merely that an offience appears to have been committed. If therefore a Court holds such an enquiry, the persons against whom it is carried on, cannot claim to cross-examine the witnesses. AIR (V 13) 1926 Mad 1008 : 51 MLJ 331 : 97 Ind Cas 669 : 50 Mad 660 : 24 MLW 295 : 27 Cr LJ 1149 : 1927 M W N 63 (DB).

——S. 476 — Extent of preliminary enquiry is in Court's discretion — Grant of right of appeal does not extend the scope of the enquiry. AIR (V 12) 1925 Pat 677 : 92 Ind Cas 883 : 4 Pat 484 : 7 PLT 372 : 27 Cr LJ 371 (DB).

**——S. 476 — Enquiry should be made where perjury is suspected.**

False affidavits and false evidence are extremely common and where it seems probable that of two sworn statements one or the other must be false, it is expedient in the interests of justice that an enquiry should be made. AIR (V 11) 1924 Rang 374 : 3 Bur LJ 149 (DB).

——S. 476 — The holding of a preliminary enquiry under S. 476 Cr P. C. is discretionary, but it should be held, wherever necessary in the interests of justice. It must be a real enquiry and not merely

a formal one, ample opportunity being given to the accused to show cause why he should not be prosecuted. AIR (V 7) 1920 Pat 225 : (1920) Pat HCC 61 : 21 Cr LJ 29 : 54 Ind Cas 173.

——S. 476 — Section 476 Cr. P. C. does not provide for any preliminary enquiry before making the order, though in some cases such inquiry is desirable. But when an inquiry has been started whether it be a formal or informal one, it should be completed and full opportunity given to the person proceeded against to show cause against the order. AIR (V 7) 1920 Pat 165 : 1 Pat LT 342 : 21 Cr Cr L 718 : 58 Ind Cas 62.

**——S. 476 — Exercise of jurisdiction under.**

An inquiry into the circumstances of the alleged offence should be made before passing orders under S. 476 Cr. P. Code; otherwise the orders would be without jurisdiction unless the Court already knows the material facts from the evidence at the trial. When the incident took place out of Court and the Court has no knowledge of it, the Court must necessarily make the preliminary enquiry. AIR (V 5) 1918 Cal 967 : 21 CWN 125 : 18 Cr LJ 117 : 28 CLJ 209 : 37 Ind Cas 469 (DB).

**——S. 476 — Sanction to prosecute — Affidavit false filed before munsarim.**

An affidavit written in English but signed by the deponent in Urdu was presented to the munsarim of the Court. There was no proof that it was read or explained to him. The judge gave sanction for false statements in the affidavit. The case is one in which a preliminary inquiry should have been made before an order passed under S. 476. AIR (V 4) 1917 All 132 : 15 ALJ 517 : 18 Cr L J 883 : 41 Ind Cas 995.

——S. 476 — A preliminary inquiry is not obligatory under Section 476, Cr. P. C. Whether it is necessary for the ends of justice in a particular case depends upon the circumstances of that case. (1911) 15 CWN 691 : 14 CLJ 123 : 12 Cr LJ 209: 10 Ind Cas 66 (DB).

**——S. 476 — Enquiry.**

A court should make an enquiry under S. 476 before granting sanction, although there were strong probabilities for the prosecution ending in a conviction on the evidence as it stood at that time. (1907) 6 CLJ 531 (533, 534) : 34 Cal 848 : 11 CWN 712 (DB).

**——S. 476 — Preliminary enquiry — Necessity for — Duty of court to hold it.**

A court proceeding under S. 476, Cr. P. C., is not bound to hold a preliminary inquiry in all cases. (1902) 6 CWN 295 (297) (DB).

**27. Probability of conviction.**

**——S. 476 — Proceedings under, when should be instituted.**

No prosecution should be directed under S. 476, unless there is a reasonable probability of conviction though the Court taking action under S. 476 should not decide the question of guilt or innocence. Great care and caution are required before the criminal law is set in motion and there must be a reasonable foundation for the charge in respect of which a prosecution is directed. AIR (V 33) 1946 All 156 : 1945 OWN (HC) 280 : 1945 All L Jour 456 : ILR (1946) All 62 : 224 Ind Cas 13 (DB).

**——S. 476 — Absence of probability of success.**

No prosecution for perjury should be directed unless there is a reasonable probability of its success. AIR (V 31) 1944 Lah 54 : ILR (1943) Lah 760 : 45 Cr LJ 371 : 211 Ind Cas 299.

**——S. 476 — Case against legal practitioner under S. 193 or S. 199, Penal Code.**

When prosecution of a legal practitioner e. g., under S. 193 or S. 199, Penal Code, entirely depends upon circumstantial evidence, complaint should not be made against him under S. 476, Criminal P. C. unless there is a virtual certainty of guilt. AIR (V 31) 1944 Sind 155 : ILR (1944) Kar 133.

——S. 476 — When there is no reasonable probability of conviction, prosecution should not be sanctioned. (1939) 41 PLR 96.

**——Ss. 476, 195 — Necessary ingredients for taking action.**

In an application made under S. 476, read with S. 195, Criminal P. C., to the High Court for action against a person for having made contradictory statements in a case, every allowance should be made for forgetfulness and for confusion, but in a proper case, the Court should take action. There must be a reasonable or something more than a reasonable probability of conviction. High Court would not ordinarily take action unless it is really a bad case. AIR (Vol 25) 1938 Cal 677: 40 Cr LJ 450: 180 Ind Cas 586.

**——S. 476 — Perjury — Conviction should appear certain — Penal Code, S. 193.**

Every case of perjury need not necessarily result in the prosecution of the person who is guilty of the offence. The Court has to see whether it is in the interests of justice to direct the prosecution of the person concerned.

Ordinarily, the High Court is reluctant to interfere with orders in perjury cases where the Courts below, after a consideration of the entire material on the record, have come to the conclusion that an offence has been committed, which it is desirable, in the interest of justice, to send for inquiry to a Magistrate :

Held, that under the circumstances of the case, it was necessary for the Court to find that the conviction of the witness for perjury was practically certain before directing his prosecution. AIR (Vol 24) 1937 Lah 867: 39 PLR 812: 39 Cr LJ 237: 172 Ind Cas 942.

**——S. 476 — Matter in dispute one in which it is difficult to arrive at certainty — Penal Code, S. 193.**

Where the matter in dispute is one on which it would be very difficult to arrive at a certainty or to reach any conclusion which can be rated more highly than the most likely conclusion on the balance of probabilities, it is seldom desirable to launch criminal prosecution lightly against every witness who may be suspected of having departed from the truth in some particular. AIR (Vol 23) 1936 Pat 162: 37 Cr LJ 193: 2 BR 112: 159 Ind Cas 817.

——S. 476 — Where, in an appeal from an order passed under S. 476, Criminal P. C., the Judge came to the conclusion that the materials on the record did not justify the hope that prosecution would end in the conviction of the defendant in a civil suit, and set aside the order of the trial Court :

Held, that as the Judge came to the conclusion as he did, he was perfectly correct in setting aside the order and refusing to sanction the prosecution, and that he did not, therefore, act without jurisdiction or irregularly in the exercise of his jurisdiction and there was no ground for interference in revision :

Held, also that it was wrong to say that where the Appellate Court finds that a prosecution is bound to fail, it must nevertheless allow the prosecution to proceed merely because there was justification for an enquiry into the matter by the trial Court. AIR (Vol 21) 1934 All 1065: 1934 ALJ 870: 57 All 351: 4 AWR 342: 152 Ind Cas 34.

**——S. 476 — Judge suspecting pro-note to be forgery.**

Where a pro-note bore the undoubted thumb impression of the defendant and the Judge took the deed to be forged one, simply because he suspected that the plaintiff along with others entered into conspiracy to commit a forgery, and there were no materials on record from which it could be made to appear that it was expedient in the interesets of justice that an enquiry in the offence of forgery or of making use of a forged document should be made, nor any finding thereon was recorded by the Judge:

Held, that no useful purpose would be served by launching a prosecution, which must inevitably fail for want of proof of the alleged commission of the offences of forgery and of using as a genuine document known to be a forgery. AIR (Vol 21) 1934 Oudh 377: 11 OWN 1058: 35 Cr LJ 1277: 151 Ind Cas 290 (2).

**——S. 476 — Application of private persons.**

Proceedings under S. 476, Criminal P. C., regarding the institution of a complaint ought not to be undertaken on the application of private persons unless the prosecution is clearly in the interest of the State and is reasonably certain to result in a conviction. AIR (Vol 21) 1934 Oudh 272: 35 Cr LJ 908: 11 OWN 683: 10 Luck 14: 149 Ind Cas 201.

**——S. 476 — False statement before Committing Magistrate — Statement retracted before Sessions Court.**

Before making an order for prosecution under S. 476, Criminal P. C., the Court should consider whether it is expedient in the interest of justice to prosecute and whether there is reasonable probability of a conviction. It is not necessary to prosecute a witness merely because he gave false evidence before the committing Magistrate if he has retracted it and given true evidence before the Sessions Court. AIR (Vol 20) 1933 Nag 179: 34 Cr LJ 649 (2): 143 Ind Cas 747.

——S. 476 — Under the amended Code it is no longer the duty of the Court to see that there is a reasonable probability of the prosecution ending in a conviction, though the Court acting under S. 476 should not act capriciously or without proper grounds. AIR (Vol 13) 1926 Mad 238: 92 Ind Cas 456: 22 MLW 863: 27 Cr LJ 280 (DB).

——S. 476 — An order under S. 476 should not be passed unless there is a reasonable probability of conviction. AIR (Vol 11) 1924 Pat 436: 74 Ind Cas 855: 24 Cr LJ 823.

**28. Procedure.**

**(a) General.**
**(b) Evidence.**
**(c) Irregularity.**

**(a) General.**

——S. 476 — In an application under S. 476, the first thing to be considered is whether the circumstances are such as to warrant a finding that it is expedient in the interests of justice that the matter should be enquired into by a Magistrate. If so, a finding is recorded and a complaint made. If before the finding it is desired to make a preliminary enquiry, then a preliminary enquiry is first made and the form which the enquiry should take is a matter for the Judge to decide. But the procedure of mechanically "issuing notice to show cause" is quite unwarranted. AIR (Vol 31) 1944 Nag 359: 1944 NLJ 421.

**——Ss. 476, 476-B — Dismissal on non-appearance of applicant.**

It is manifestly most improper for the Court to shirk its obvious duty of applying its mind to the question whether, it would make a complaint or not merely because the applicant does not appear in support of his application. There is no provision of law making it necessary to examine the applicant on his application as there is in the case of a compiaint. Ss. 476-A and 476-B, Criminal P. C., do not talk about dismissing an application but in the one case of rejecting it and, in the other case of refusing to make a complaint upon an application. Therefore, the order dismissing the application on account of the non-appearance of the applicant is an improper order which there is no provision in law for making and, therefore, an order without jurisdiction. AIR (Vol 27) 1940 Lah 526: 42 Cr LJ 324: 192 Ind Cas 863.

——S. 476 — It would be violating the spirit underlying S. 196-A if a person were allowed to be convicted under S. 120-B, I. P. C., even though his prosecution under that section is neither sanctioned by the District Magistrate nor was within contemplation of the officer making the complaint under S. 476. AIR (Vol 21) 1934 Pat 561: 1 BR 29: 15 PLT 523: 36 Cr LJ 17: 13 Pat 729: 152 Ind Cas 282 (DB).

**——S. 476 — Not strictly conforming to the section.**

Section 476, Criminal P. C., contemplates the recording of a finding followed by the making of a complaint. But for the High Court to set aside the proceedings of the District Court merely by reason of the absence from his order of the exact words of the section would be an over-refinement of technicality and might lead to a failure of justice. AIR (Vol 20) 1933 Pat 713: 14 PLT 635: 35 Cr LJ 459: 147 Ind Cas 712 (2).

**——S. 476 — Omission to record finding that it is expedient to make enquiry.**

In directing a complaint under S. 476, Criminal P. C., the question whether there is a case against the person charged is not the sole question; the Court is bound to consider further whether it is expedient in the interest of justice that an enquiry should be made. But, in cases where the offence is of considerable gravity, it will be manifestly unreasonable to take the view that the Court can have directed the complaint without considering whether it is expedient in the interest of justice so to do, and to set aside an order directing a complaint merely because the Judge had not recorded a finding to the effect that it is expedient that an enquiry should be made. AIR (Vol 18) 1931 Cal 760: 32 Cr LJ 1236: 58 C 965: 134 Ind Cas 914 (2) (DB).

——S. 476 — The question whether a preliminary inquiry is necessary or not in the case of an application under S. 476, Criminal P. C., will depend upon the facts and circumstances of each case. Where the application is supported, not by oral evidence, but by documents, no further preliminary inquiry is necessary beyond that which the Court makes on the materials before it.

Where an application is made under S. 476, Criminal P. C., it is not necessary that the person against whom the order is sought should be given an opportunity of being heard upon the preliminary enquiry. AIR (Vol 18) 1931 Cal 436: 58 Cal 215: 32 Cr LJ 826: 132 Ind Cas 93.

——S. 476 — Although the provisions of S. 476, Criminal P. C., in this behalf are not mandatory but permissive, yet if the Court decides to make a complaint, it must record a finding that in its opinion, it is expedient in the interests of justice that an enquiry should be made. But the absence from the record of an express finding or a finding in the exact words of the section will not invalidate the complaint. It is sufficient if the record shows clearly that the Court has applied its mind to the question of expediency, and has come to the conclusion that an enquiry is expedient.

A finding merely that there is a prima facie case, or that statements were contradictory is not sufficient. But a finding that the evidence given was false, followed by a complaint, would probably be sufficient to raise the inference that the Judge found that an enquiry was expedient. AIR (Vol 18) 1931 Cal 190: 35 CWN 400: 53 CLJ 177: 32 Cr LJ 842: 58 Cal 1117: 132 Ind Cas 160 (DB).

——S. 476 — **Appeal.**

Where an appeal is pending under the provisions of S. 476-B it should be disposed of under the provisions of S. 476-B and reference to O. 41, R. 11, C. P. Code in the order dismissing the appeal is irrelevant. An appeal from order passed under S. 476 is an appeal in exercise of statutory right of appeal and the provisions of S. 476-B should be complied with. The Court should issue notices to both the parties concerned in the matter, it should send for the record, examine the case and should come to an independent finding whether, under the circumstances, the petitioners would be put in jeopardy by a complaint being lodged against them. 127 Ind Cas 265: 51 CLJ 45: 1930 Cr C 362: AIR (Vol 17) 1930 Cal 282 (DB).

——S. 476 — **Mere existence of contradiction in the evidence of a person is not sufficient to make enquiry.**

To prosecute a witness under S. 193, Penal Code, merely on the basis of contradiction in his evidence, is a very doubtful procedure. Mere existence of contradiction in the evidence of a witness is not sufficient for making an enquiry in the interest of justice. 113 Ind Cas 842: 30 Cr LJ 221: 12 AI Cr R 142: 55 Cal 1312: AIR (Vol 15) 1928 Cal 862 (DB).

——S. 476 — It is not customary to prosecute persons under S. 476 in mere matters of oath against oath, which may be a question of public policy rather than a question of law. Before complaining against a person under S. 476, the Judge must be convinced in his own mind that the trial will end in a conviction and he can hardly say that although the accused will probably ultimately be acquitted because there is no evidence that his statement is more than incredible, yet at the same time this is not a point to which he need direct his attention in framing a complaint. 26 MLW 479: 39 MLT 414: 28 Cr LJ 1007: 105 Ind Cas 831: 9 AI Cr R 183: AIR (Vol 14) 1927 Mad 996.

——S. 476 — **Proceedings — If should be part of the judgment.**

Although under the old S. 476, it may be necessary that the proceeding under S. 476 should be a part of the judgment proceeding before the Court or at least so soon after termination of the judgment proceeding, as to make the order under S. 476 a part of the judgment proceeding, it is no longer necessary in view of the changes made in the said section and the enhancement of two new Ss. 476 (A) and 476 (B). It is also necessary that all the reasons given in the judgment should be repeated in an order in which the Court comes to the conclusion that a complaint should be laid before the first class Magistrate. 22 MLW 863: 92 Ind Cas 456: 27 Cr LJ 280: AIR (Vol 13) 1926 Mad 238 (DB).

——S. 476 — Question as to forged nature of document is to be decided in prosecutions following complaint and not before making one. 5 Pat 262: 7 PLT 114: 1926 PHCC 89: 27 Cr LJ 641: 94 Ind Cas 593: AIR (Vol 13) 1926 Pat 81 (DB).

——S. 476 — Accused escaping from custody of peon of Civil Court — Procedure is that servant should file complaint in ordinary way. 86 Ind Cas 801: 26 Cr LJ 865: 47 All 409: 23 ALJ 189: AIR (Vol 12) 1925 All 318:

——S. 476 — **Court making complaint must hold preliminary enquiry and must make a written complaint.**

Section 476 contemplates that after making such inquiry as may be necessary the Court should make a complaint in writing. It is for the Court acting under S. 476 to make any inquiry that is necessary and then to make a complaint against the person or persons who, he is satisfied, have committed an offence. The section does not contemplate that the Court should send the case to a Magistrate for inquiry whether the offence it suspects has been really committed, and for prosecution, if the Magistrate is so satisfied. The Court must be satisfied that there is a prima facie case against each person sent to the Magistrate, and then it can lay a complaint under S. 476. 83 Ind Cas 730: 6 PLT 225: 4 Pat 24: 3 Pat LR Cr 51: 26 Cr LJ 170: AIR (Vol 12) 1925 Pat 330 (DB).

——S. 476 — **False complaint — Procedure — Report from interested party — Order for prosecution — Enquiry — Necessity for.**

The petitioners filed an application for proceedings under Ss. 144 and 107, Cr. P. C., against several servants of a factory. The Magistrate called for a report from the Manager of the factory and on receipt thereof required the petitioners to show cause against their prosecution under S. 182, I. P. C., and then after examining some witnesses of each side but without examining the petitioners themselves, made an order under S. 476, Cr. P. C., directing their prosecution under S. 182, I. P. C. The accused being the servants of the factory, the manager was an interested party and he ought not to have been asked to make a report in these judicial proceedings. Further enquiry should be made into the truth of the petitioner's complaints and they themselves should be examined if they chose to give evidence. 19 CWN 127: 16 Cr LJ 320: 28 Ind Cas 656: AIR (Vol 2) 1915 Cal 733 (DB).

——S. 476 — **Order for prosecution — Penal Code, S. 211 — False charge, laying of — Charge laid before the Police — Police report directing charge as false — Judicial enquiry, order directing — Procedure.**

A criminal prosecution was instituted by a person before the Police who reported the case to be false, and the matter coming on before a Magistrate empowered to dispose of Police reports, he made an order making over the case to another Magistrate for judicial enquiry. This Magistrate, after holding a judicial enquiry as directed, submitted a report, upon which the other Magistrate made an order to the following effect: "The complainant's charge has been established to be false and hence no process to be issued against the accused and the complaint shall be proceeded with under S. 211, I. P. C."; and upon prosecution of the complainant he was convicted under S. 211 of the Penal Code.

Held, that the offence of instituting a false complaint not having been committed before the Magistrate who ordered the prosecution of the petitioner, or brought to his notice in the course of judicial proceedings, the prosecution of the petitioner was bad and contrary to law and the proceedings must be quashed.

Held also, that the proper course in such a case should have been to direct the police to lodge a complaint. (1908) 7 CLJ 371 (372, 373) (DB).

——Ss. 476, 190, 195 — **Presidency Magistrate — Magistrate of the first class — Procedure.**

Presidency Magistrate is not a "Magistrate of the 1st Class" within the meaning of S. 476, Cr. P.

C. The proper course for a Presidency Magistrate to adopt is either to commit the case to the Sessions or have the complaint filed under S. 190 read with S. 195, Cr. P. C. (1907) 9 Bom LR 1160 (1163) (DB).

**——S. 476 — Applicability to Presidency Towns — Presidency Magistrate not Magistrate of the first class — Practice — Procedure.**

Section 476 does not appear to provide for the case of an offence before the court in a presidency town. It empowers a court to send a case for enquiry or trial to the nearest Magistrate of the first class. The nearest Magistrate, namely, the Presidency Magistrate, is not a Magistrate of the first class. The practice on the Original Side of the High Court is to lay the papers before the Government Solicitor for him to take action thereon if he thinks fit. An analogous course, viz., of laying the papers before the legal Remembrancer was adopted. (1906) 3 CLJ 357 (359).

**——S. 476 — Penal Code, S. 193 — Proceedings before final orders — Propriety — Revision.**

Proceedings under S. 476, Cr. P. C., should not be taken against a person for giving false evidence or fabricating false document under S. 193, I. P. C., until the case in which the said evidence was given or such document was used has been finally decided. (1906) 3 CLJ 302 (303) (DB).

**——S. 476 — Perjury — Penal Code, S. 193 — Prosecution for perjury — Propriety of order for, by Appellate Court.**

It is an unusual and not a proper procedure for an appellate court, which did not hear the evidence, to order the prosecution for perjury of a witness for making false statements in his deposition in the lower court on materials in support of the prosecution which were not before the lower court and which the witness had no opportunity of explaining while in the box. (1906) 10 CWN 1091 (1093) (DB).

**——S. 476 — Procedure — Fabrication of evidence — Arrest.**

Where in the course of a judicial proceeding a judicial officer is of opinion that a person is guilty of an offence referred to in S. 195, Cr. P. C., and requires to be prosecuted, he ought to follow the procedure prescribed by S. 476. The offender should be sent to the nearest Magistrate of the first class and ought not to be arrested with a view to a committal to the Court of Sessions. (1901) 3 Bom LR 185 (186, 187) (DB).

**(b) Evidence.**

**——S. 476 — Complaint — Material — If should be legally admissible evidence.**

The wording of S. 476, Cr. P. Code, does not make it compulsory that all the materials upon which a Magistrate acts in making a complaint under the section should be legally admissible evidence taken on oath. AIR (Vol 33) 1946 Oudh 227: 223 Ind Cas 527: 1946 OA (CC) 92 (1): 1946 AWR (CC) 92 (1): 1946 OWN 135: 47 Cr LJ 531: 1946 A Cr C 26.

**——S. 476 — Evidence — Judgment in civil proceedings, how far admissible.**

In proceedings under S. 476, the judgment in Civil Court is admissible to show the parties to the proceedings, the points raised and the decisions thereon. The reasons given are, of course, irrelevant. When the arguments in S. 476 proceedings and the civil suit were necessarily much the same as in the criminal trial, one would expect a similarity in the reasons given in the Criminal Court and in the Civil Court but that does not mean that the Criminal Court was influenced by the decisions in the Civil Court. Still less does it mean that the Criminal Court considered that it was in any way bound by them. AIR (Vol 29) 1942 Mad 753: 1942 MWN 484: 55 LW 536: 44 Cr LJ 404: (1943) 1 MLJ 482: 205 Ind Cas 384.

**——S. 476 — Evidence outside record of proceedings.**

In deciding whether it is in the interests of justice that an inquiry should be made the Court is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. The applicant is entitled to adduce evidence outside the record of the proceedings out of which the application arises to show that evidence given in those proceedings was false. AIR (Vol 27) 1940 Bom 131: 42 Bom LR 231: 41 Cr LJ 526: ILR (1944) Bom 403: 187 Ind Cas 867.

**(c) Irregularity.**

——S. 476 — Munsif holding that he had no jurisdiction to direct a complaint to be made under S. 476, Cr. P. Code — Appellate Court not deciding the question of jurisdiction but itself acting under S. 476-B — Procedure is irregular. AIR (Vol 15) 1928 Cal 237: 109 Ind Cas 211: 47 CLJ 277: 10 AI Cr R 167: 55 Cal 836: 29 Cr LJ 483 (DB).

——S. 476 — Failure to record order for sanction is an irregularity curable by Cr. P. Code, S. 537. AIR (Vol 14) 1927 Lah 379: 101 Ind Cas 186: 28 Cr LJ 410.

——S. 476 — District Magistrate directing enquiry to be made by Sub-Divisional Magistrate and then himself ordering prosecution — Procedure is irregular. AIR (Vol 8) 1921 Oudh 159: 64 Ind Cas 143: 24 OC 258: 8 OLJ 634: 22 Cr LJ 751 (DB).

**——Ss. 476 and 537 — Irregular procedure cured by S. 537.**

The Irregularity of Procedure if any in a Magistrate's sending a case to another Magistrate for enquiry instead of himself holding an enquiry is cured by S. 537. AIR (Vol 4) 1917 Pat 15: 1 PLJ 553: 18 Cr LJ 52: (1918) Pat HCC 30: 37 Ind Cas 36 (DB).

**29. Prosecution upon complaint under.**

**——S. 476 — Trial of persons not party to proceeding.**

Courts (trial as well as superior) exercising powers under S. 476 can only take action against parties to the proceeding before them. But where a complaint under S. 476, Criminal P. C., has been made against certain persons and there is evidence to show that other persons who were not parties to the proceeding before the Court making the complaint were also concerned in the offence, the Magistrate is entitled to proceed against such persons. AIR (Vol 32) 1945 Sind 1: ILR (1944) Kar 300 (DB).

**——S. 476 — Magistrate if can proceed against any person concerned in offence.**

Magistrate taking cognizance of a case upon a complaint under S. 476 can try any person concerned in offence though not specially named in the complaint. AIR (Vol 31) 1944 Sind 155: ILR (1944) Kar 133.

**——S. 476 — Magistrate must proceed under S. 476 (2).**

It is for the Magistrate making the complaint to consider whether it is in the interests of justice to make a complaint and not the Magistrate to whom the complaint is made. When once the complaint is sent to the Magistrate having jurisdiction, he must proceed under S. 476 (2), which says that such Magistrate shall thereupon proceed according to law as if upon complaint made under S. 200. Hence an order by the Magistrate, to whom the complaint was made, directing the Magistrate

who had made the complaint to make further enquiry into the matter is illegal. AIR (Vol 30) 1943 Mad 50: 55 MLW 591: (1942) 2 MLJ 381: 1942 MWN 594: 44 Cr LJ 177: ILR (1943) Mad 303: 204 Ind Cas 289.

——S. 476 — **Magistrate, if can proceed against other persons.**

The Magistrate to whom a complaint is made under S. 476, against certain person, would be entitled to proceed in the same trial against any other persons considered by him to have been concerned in or party to the offence alleged to have been committed by the person. AIR (Vol 27) 1940 Sind 209: ILR (1940) Kar 414: 42 Cr LJ 141: 191 Ind Cas 325 (DB).

——S. 476 — Section 476 does not debar the Magistrate to whom the complaint was presented from issuing process under other sections of the Penal Code, if from the facts alleged, offences under other sections appeared to have been committed. AIR (Vol 27) 1940 Sind 133: 41 Cr LJ 821: ILR (1940) Kar 500: 190 Ind Cas 119 (DB).

——**Ss. 476, 190 (1) (c) — District Judge forwarding complaint to District Magistrate in circumstances in which S. 476 is inapplicable.**

When a complaint under S. 476, Criminal P. C., is forwarded to the District Magistrate by the District Judge, under circumstances in which S. 476 is inapplicable, the complaint ceases to be a valid complaint. But there is nothing to prevent the District Magistrate from proceeding under cl. (c) of sub-s. (1) of S. 190, Criminal P. C., as on "information received from any person other than a Police Officer." AIR (Vol 25) 1938 Pat 83: 16 Pat 571: 19 PLT 51: 39 Cr LJ 314: 4 BR 274: 173 Ind Cas 432 (DB).

——**S. 476 — Jurisdiction to proceed against any one proved to be concerned in offence, whether named in order or not.**

The Criminal Procedure Code provides for taking cognizance of offences and not of offenders, and the Magistrate who had legally taken cognizance of an offence under S. 476, has jurisdiction to proceed against any one who might be proved by the evidence to be concerned in that offence, whether he was mentioned in the order under S. 476 or not. AIR (Vol 23) 1936 Cal 147: 63 Cal 819: 40 CWN 573: 37 Cr L J 521: 162 Ind Cas 102 (DB).

——**S. 476 — Objection to initiation of proceedings.**

In a case triable by the Sessions Court and initiated by a complaint by the Magistrate under S. 476, Criminal P. C., once a commitment is made, it is too late for the accused to take objection against the initiation of proceedings for want of jurisdiction in the Magistrate. The intention of the Legislature is to prevent innocent persons being put on trial at the instance of persons likely to be moved by motives of revenge and not to protect guilty persons from the penalty of their crimes. AIR (Vol 23) 1936 Pat 346: 15 Pat 26: 17 PLT 234: 2 BR 702: 37 Cr LJ 893: 164 Ind Cas 86 (DB).

——S. 476 — Where the accused has failed to place on record sufficient material to satisfy the Court that the preliminaries laid down by S. 476 had not been complied with before the complaint is filed, the presumption is that all legal formalities had been properly complied with. If the accused desires to raise at any stage the contention that no finding has been recorded under S. 476 or that the finding is not a proper one, it is for him to prove the contention in the trial Court. AIR (Vol 20) 1933 Sind 37: 26 SLR 105: 34 Cr LJ 305 (2): 142 Ind Cas 74 (DB).

## 30. Revision.

See also Ns. 8 and 12 and Cr. P. C. Ss. 195 and 439.

**(a) Whether revision can lie.**
**(b) Under S. 115 C. P. Code.**
**(c) Under S. 439 Cr. P. C.**
**(d) Small Cause Court.**
**(e) N. W. F. P. Courts Regulation, 1931.**

### (a) Whether revision can lie.

——**Ss. 476, 439 — Interference in revision, when proper.**

In proceedings under S. 476, Criminal P. C., the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made, but the absence of such a finding does not mean that the point has not been considered and when it is clear that the Court has considered that an inquiry was necessary in the interests of justice and that a prima facie case had been made out, the High Court should not necessarily interfere in revision merely because the words of S. 476, have not been copied out. AIR (Vol 27) 1940 Nag 227 : 1940 NLJ 108 : 41 Cr LJ 466 : 187 Ind Cas 521.

——**Ss. 476, 423 (d), 561-A — High Court in revision calling for proceedings.**

Sitting in revision, the High Court has jurisdiction to inquire under S. 476, Criminal P. C., and to make complaint if it thinks it is expedient in the interests of justice. It has the power, if it does not wish to enquire itself, to order the trial Court to enquire either under the prvisions of S. 423 (d), Criminal P. C., as an 'incidental order' or under S. 561-A of the Code. The objection that S. 195, Criminal P. C., no longer finds a place in S. 439 of the Code, has no force. AIR (Vol 24) 1937 Sind 193 : 38 Cr LJ 1002 : 170 Ind Cas 891 (DB).

——**S. 476 — Interference in revision.**

The High Court will not interfere with an order under S. 476, Criminal P. C., if the lower Appellate Court has power to act under that section even if the High Court takes another view of the matter. The High Court will interfere in revision only where the final Court of Appeal acts on fanciful grounds or bases its order on obviously wrong or worthless grounds or without forming a judicial opinion. But where it comes to the finding that the success of the prosecution for perjury is problematical, and this view is based on fact, the High Court will not interfere. (1935) 158 Ind Cas 984 : 18 NLJ 40 : 37 Cr LJ 16.

——S. 476 — Order under — High Court in revision will satisfy itself that there has been no delay and that order is not vexatious. AIR (Vol 9) 1922 All 233 : 68 Ind Cas 827 : 20 ALJ 666 : 23 Cr LJ 603.

——S. 476 — An application for Revision of an order under Section 476 is not entertainable under the provisions of Sections 435 and 438, Criminal Procedure Code. AIR (Vol 9) 1922 Oudh 220 : 66 Ind Cas 68 : 23 Cr LJ 228 : 24 OC 367.

——S. 476 — Order under S. 476 if perverse — High Court will interfere in revision. AIR (Vol 8) 1921 Nag 91 : 59 Ind Cas 855 : 22 Cr LJ 151.

——**S. 476 — Revision.**

The only way in which the validity of an order under S. 476 Cr. P. C., can be challenged is by invoking the revisional jurisdiction of the High Court. A person against whom an order under S. 476 is made is not precluded from challenging the validity of the order in the subsequent trial or in an appeal from the conviction obtained in

the subsequent trial. AIR (Vol 7) 1920 Pat 225 : (1920) Pat HCC 61 : 21 Cr LJ 29 : 54 Ind Cas 173.

**——Ss. 476 and 439 — Valid order — Interference in revision.**

The mere fact that the High Court would, if dealing with the matter, have come to a conclusion different from that of the lower Courts, is no ground for setting aside in revision an order for prosecution which is not illegal. AIR (Vol 6) 1919 Pat 321 : 20 Cr LJ 321 : 53 Ind Cas 821.

**——S. 476 — Order for prosecution — No evidence.**

Where there is no evidence to show that an accused person is guilty of the offence with which he is charged, an order for his prosecution under S. 476 is bad in law and must be set aside. AIR (Vol 6) 1919 Pat 143 : 53 Ind Cas 818 : 20 Cr LJ 818.

**——Ss. 476 and 195 — Revision.**

When a Magistrate of his own motion directs prosecution, he acts under S. 476 and the order is revisable by chief court. 158 PLR 1911 : 12 Cr LJ 216 : 38 PWR 1911 Cr : 10 Ind Cas 121.

——S. 476 — The High Court can revise an order directing prosecution under S. 476, Cr. P. C. (1911) 4 Bur LT 246 : 12 Cr LJ 521 : 12 Ind Cas 289.

**——Ss. 476, 439 — Powers of High Court — Criminal Procedure Code, Ss. 161, 162 — Statements made to Police officers — "Stage of a judicial proceeding".**

The High Court has jurisdiction to interfere in revision with an order passed under S. 476 of the Code of Criminal Procedure. A statement made to an investigating Police officer under S. 161 and recorded by him under the provisions of S. 162 of the Code cannot be made the foundation or an order for the prosecution under S. 193 of the Indian Penal Code of the person making it. 1908 AWN 22 (22) : 4 ALJ 811.

**——Ss. 476, 439 — Order for prosecution — Revisional powers of High Court and Sessions Judge — Penal Code, S. 211.**

A Sessions Judge has no jurisdiction to revise an order of a Magistrate passed under S. 476, Cr. P. C. It is only the High Court which has power to revise such order either under S. 439, Cr. P. C., or under its general powers of superintendence. A proceeding under S. 476 (1) is a judicial proceeding and is covered by S. 439 of the Code, 26 M 98 dissented from. It is not in every case that a Magistrate considers to be false that he should direct a prosecution under S. 211 of the Penal Code. (1907) 11 CWN 125 :34 C 42 (45) (DB).

**——Ss. 476, 435, 439 — Revision when judicial proceeding.**

The High Court is competent to interfere in revision with an order under S. 476, if the court had acted entirely without jurisdiction. A Magistrate detained a person and asked him to execute a recognizance for his appearance before him in a departmental inquiry. The order was illegal and void. As a consequence, a certain pleader on behalf of the said person presented a petition to the very same Magistrate praying for the cancelment of the recognizance and release of the person. The petition of the pleader contained imputations of malice on the part of the Magistrate, who thereupon ordered the prosecution of the pleader under S. 476.

Held, that the presentation of the petition was neither in the course of a judicial proceeding, nor the offence was one which was brought to the court's notice in the course of such proceeding, the detention by the Magistrate and the taking of recognizance being entirely illegal. (1906) 29 M 100 (102) (DB).

**——Ss. 476, 435 — No revision of order under S. 476.**

Obiter: — The High Court cannot interfere in revision with an order under S. 476 unless, indeed, the jurisdiction of the Court has been exceeded. (1905) 7 Bom LR 84 (85) (DB).

**——S. 476 — Order transferring case sent for inquiry or trial under S. 476 (1) — Jurisdiction.**

A Revenue Court in a proceeding under the Northern India Canal and Drainage Act, 1878, had occasion to pass an order under S. 476 of the Code of Criminal Procedure, sending a case for inquiry or trial to the District Magistrate. The District Magistrate, acting under Cl. (1) of S. 476, transferred the case to a Magistrate subordinate to him. Application was made to the Sessions Judge for revision of the order of the District Magistrate 'sanctioning the prosecution of the applicant,' and his application being dismissed, a further application for revision of the order of the Sessions Judge confirming the order of the District Magistrate 'sanctioning the prosecution of the petitioner' was made to the High Court.

Held, that neither the Sessions Judge nor the High Court had any jurisdiction to interfere in revision. The only order passed by the District Magistrate was a perfectly legal order passed under S. 476, Cl. (2), of the Code of Criminal Procedure. If the object was to question the original order of the Revenue Court, Appellate or revisional jurisdiction was in the superior Revenue Court and not in the Criminal Court. 1902 AWN 202 (202).

**——S. 476 — Order for prosecution — No action taken on such order for more than a year — Revision — Order set aside.**

Where an order under S. 476 of the Code of Criminal Procedure was made apparently on very insufficient grounds and no further action was taken in respect thereof by the Court making it for more than a year, it was held that this was a case in which the revisional powers of the court might properly be exercised and the order set aside. (1901) AWN 177 (177) : 24 All 112.

**(b) Under S. 115, C. P. Code.**

**——S. 476 — Interference by High Court under Civil P. C., S. 115.**

Before a prosecution can be launched, either the first or the Appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute but the opinion has to be their opinion and not the opinion of the High Court in revision. Also, if they take up those questions or either of them and deal with them judicially and reach a conclusion, then the High Court has no jurisdiction whatever to interfere in revision under S. 115, Civil P. C., however wrong or erroneous the High Court may consider that conclusion to be. AIR (V 28) 1941 Nag 155: 1941 NLJ 91 : ILR (1942) Nag 388 : 194 Ind Cas 583.

——S. 476 — Proceedings under S. 476, Criminal P. C., when the Court enquiring is a Civil Court, are proceedings subject to the High Court's revisional orders under S. 439, Criminal P. C. The power to enquire is given under the Criminal P. C., the proceedings are in the nature of criminal proceedings, and an order of the Court under this section of the Criminal P. C., even when made by a Civil Court

is not a "case decided" within the meaning of S. 115, Civil P. C., and the powers of interference are not limited by the provisions of the section. AIR (V 28) 1941 Sind 217 : ILR (1941) Kar 422 : 43 Cr LJ 259 : 197 Ind Cas 774 (DB).

——S. 476 — Where a Civil or Revenue Court has initiated proceedings under S. 476, Criminal P. C., the High Court can, in revision, interfere with an order of the Appellate Court in such proceedings only under S. 115, Civil P. C. and where a Criminal Court takes proceedings under S. 476, Criminal P. C., the appellate order of the Sessions Judge can only be revised under S. 439, Criminal P. C. AIR (V 22) 1935 Oudh 59 : 11 OWN 1469 : 36 Cr L J 254 : 10 Luck 335 : 153 Ind Cas 104 (DB).

——S. 476 — An order passed by a Revenue or Civil Court under S. 476, Criminal P. C., cannot be revised under S. 439, Criminal P. C., but under S. 115, Civil P. C., or S. 107, Government of India Act. AIR (V 18) 1931 Pat 411 : 12 PLT 671 : 33 Cr LJ 147 : 135 Ind Cas 513.

——S. 476—Where a Civil Court refused to make a complaint under Cr. P. Code, S. 476, but the Appellate Court directs the complaint to be filed, the order of the appellate Court is revisable only when it is brought within Civil P. C., S. 115. AIR (V 14) 1927 All 334 : 49 All 536 : 28 Cr LJ 296 : 25 ALJ 569 : 100 Ind Cas 376.

——S. 476 — An appellate order by a civil Court confirming refusal to lodge a complaint by its subordinate Court is not open to revision by High Court under S. 439, Cr. P. C., as the order is not of a criminal Court. It is also not revisable under S. 115 if conditions of S. 115 are not fulfilled. AIR (V 14) 1927 Oudh 14 : 99 Ind Cas 48 : 3 OWN 905 : 28 Cr LJ 16 : 7 AI Cr R 240.

——S. 476 — An order passed in exercise of jurisdiction under S. 476, Cr. P. C., by a civil Court cannot be revised under S. 115, C. P. C. AIR (V 13) 1926 Sind 215 : 95 Ind Cas 316 : 20 SLR 90 : 27 Cr LJ 780.

——S. 476 — An order of the District Judge taking proceedings under S. 476, Cr. P. Code is revisable only under S. 115 C. P. C. AIR (V 9) 1922 All 438: 66 Ind Cas 515 : 23 Cr LJ 291.

**(c) Under S. 439, Cr. P. C.**

——S. 476 — Where the order complained of is passed by a civil appellate Court no revision lies to the High Court under S. 439. AIR (V 13) 1926 All 577 : 7 LRA Cr 130 : 27 Cr LJ 1021 : 96 Ind Cas 877.

**——S. 476 — Revenue Court's order.**

An order under S. 476 passed by a Revenue Court cannot be interfered with by High Court under S. 439. AIR (V 8) 1921 Pat 94 : 61 Ind Cas 643: 2 PLT 609 : 6 PLJ 178 : 1921 PHCC 240 : 22 Cr LJ 403 (DB).

**——S. 476 — Revision — Conversion of application under S. 439, Cr. P. C. into one under S. 622, C. P. C.**

In this case the Court entertained as an application under S. 622 of the C. P. C., an application purporting to be one presented in accordance with the provisions of S. 439 of the Cr. P. C. for revision of an order passed by a Civil Court under S. 476, Cr. P. C. 1904 AWN 170 : 1 ALJ 481 (482).

**(d) Small Cause Court.**

**——S. 476 — Revision — Small Cause Court — Refusal to institute Criminal Proceedings — Decree-holder's right to question the order.**

A decree-holder cannot apply for revision of an order of the Judge of Small Cause Court refusing to invoke the aid of Criminal Court for an alleged assault upon process-servers while executing the decree, by attachment of the judgment-debtor's property. AIR (V 3) 1916 Oudh 121 : 19 OC 91 : 18 Cr LJ 3 : 36 Ind Cas 835.

**——S. 476 — Revision — Small Cause Court — Direction to prosecute.**

An order of the Small Cause Court under S. 476 Cr. P. C. is open to revision under S. 25 of the Prov. Sm. C. C. Act. (1913) 6 Bur LT 144, 14 Cr LJ 496 : 7 LBR 76 : 20 Ind Cas 752.

**(e) N. W. F. P. Courts Regulation, 1931.**

**——S. 476, 476-A, 476-B — Revision, if lies to Civil Court — N. W. F. P. Courts Regulation, 1931, S. 34.**

Where a Civil Court exercises the special jurisdiction granted by Ss. 476, 476-A or 476-B, Criminal P. C., it does so as a Civil Court and not as a Criminal Court. Consequently, a petition in revision against an order in such proceedings lies to the Civil Court and not to a Criminal Court and can be brought only under S. 34, N. W. F. P. Courts Regulation. AIR (V 23) 1936 Pesh 87 : 161 Ind Cas 270.

**31. Right of accused.**

**——S. 476 — Accused whether can contend after trial that Court had no jurisdiction to make complaint.**

Where a person against whom a complaint under S. 476, Criminal P. C., is made, failed to avail himself of the remedies which were open to him before his trial began, he is not entitled, when once the Magistrate has tried the case, to argue that there was a lack of jurisdiction by reason of the incompetence of the Judge to make complaint. AIR (V 25) 1938 Nag 487 : 1938 NLJ 285 : 40 Cri LJ 388 : ILR (1939) Nag 338 : 180 Ind Cas 577.

**——S. 476 — Accused should be given opportunity to cross-examine witnesses.**

Before an order directing the filing of a complaint against a person is made, that person must be heard and must be given full opportunity of showing cause against the making of such an order. When the order depends upon matters already on record, no preliminary inquiry is necessary; but when it depends upon evidence of other facts which are not to be found on the record, in fairness to the person accused, a preliminary inquiry must be held, and in that preliminary inquiry, he must be made aware of the allegations which are made against him and of the materials upon which those allegations are based. If the order is to depend upon additional evidence, then he must be made aware of what that additional evidence is, and although in some cases, it may not be necessary that the evidence should be recorded in his presence or that he should be given an opportunity of cross-examining the witnesses who give that evidence, yet when the additional evidence is procured as a result of an application by a private party, it is essential that if justice is to be done, the evidence should be recorded in his presence and he should be given an opportunity of cross-examining the witnesses: otherwise, he cannot be in a position to rebut the allegations which are made against him in the application. AIR (V 24) 1937 Rang 62 : 38 Cr LJ 615 : 1937 Rang LR 276 : 168 Ind Cas 632.

**——Ss. 476, 476-B — No appeal — Complaint, if can be challenged before Magistrate.**

Where a Court makes a complaint under S. 476, Criminal P. C., and no appeal is filed against it under S. 476-B, the accused cannot challenge the complaint itself before the Magistrate. AIR (V 23) 1936 Rang 369 : 37 Cr LJ 1008 : 164 Ind Cas 769.

——S. 476 — The withdrawal of an application under S. 476 and the fact that it formed part of the con-

sideration for the reference executed by the parties, held was not sufficient to vitiate the reference and award of the arbitrators. AIR (V 22) 1935 Sind 10 : 156 Ind Cas 383.

——S. 476 — Omission to inform accused of his right to be tried by another Magistrate vitiates the trial instituted and carried on by the Magistrate under S. 476, Cr. P. Code. AIR (V 11) 1924 Oudh 448 : 82 Ind Cas 152 : 11 OLJ 532 : 25 Cr LJ 1224: 28 OC 1.

**——S. 476 — Accused is entitled to cross-examine witnesses.**

Where the accused under S. 476 was no party to the previous proceedings and the evidence was taken behind his back, he should be given an opportunity to cross-examine the witnesses. AIR (V 8) 1921 All 98 : 59 Ind Cas 655 : 19 ALJ 56 : 22 Cr L J 143.

——S. 476 — In proceeding under S. 476 the accused is entitled to cross-examine the witnesses produced by the opposite party. AIR (V 8) 1921 Pat 121 : 61 Ind Cas 842 : 2 PLT 552 : 6 PLJ 146 : 1921 PH CC 176 : 22 Cr LJ 458 (DB).

**——Ss. 476 and 477 — Accused — Right to cross-examine.**

The persons against whom proceedings have been instituted under S. 476, Cr. P. Code has no right to cross-examine witnesses during the enquiry thereunder. Therefore if a witness in that inquiry is not forthcoming at the trial instituted on the result of such inquiry, his previous statement is not admissible under S. 33 of the Evidence Act. AIR (V 3) 1916 Bom 218 : 18 Bom LR 284 : 17 Cr LJ 249 : 34 Ind Cas 969 (DB).

**——S. 476 — Waiver.**

It is very important that an application to commit a person for contempt of High Court's order, must be served upon him personally. If a man appears before Court in obedience to an invalid order, he cannot be said to have waived his objections relating to the validity of the order. (1909) 33 Bom 630 : 11 Bom LR 360 : 2 Ind Cas 485.

**32. Sanction.**

——S. 476 — No sanction under S. 197, Criminal P. C., is required for the prosecution of a Member of Legislative Assembly under S. 476. AIR (Vol 28) 1941 Sind 39: 42 Cr LJ 437: 193 Ind Cas 557.

——S. 476 — In cases of oath against oath the better course is not to give sanction for prosecution generally. 1933 MWN 1257.

——S. 476 — In sanctioning a prosecution under S. 476., the Court is not only to consider whether there is a prima facie case, but also whether it is expedient in the interests of justice to sanction prosecution. AIR (Vol 16) 1929 Lah 676: 116 Ind Cas 711: 11 LLJ 103: 30 PLR 392: 30 Cr LJ 666: 13 AI Cr R 99.

——S. 476 — Sanction is improper where a prosecution must fail. AIR (Vol 14) 1927 Lah 352: 28 Cr LJ 293: 100 Ind Cas 373.

**——S. 476 — Sanction should not be granted where object to get exemption from payment of decretal amount.**

It is not expedient that sanction to prosecute should be given to a debtor to use against his creditor, where the object is not to further the ends of justice but to put pressure upon the decree holder to give up his claim under the decree. AIR (Vol 11) 1924 Lah 680: 77 Ind Cas 1008: 25 Cr LJ 544 (DB).

**——S. 476 — Evidence recorded under S. 202, Cr. P. C. can be the basis of sanction.**

The wording of S. 476 is wide enough to cover the consideration of other than strictly legal evidence and there is nothing illegal in granting a sanction under S. 195 based solely on an investigation conducted under S. 202 whether by a police officer or by the Magistrate himself. AIR (Vol 11) 1924 Pat 138: 74 Ind Cas 1054: 24 Cr LJ 862.

——S. 476 — Sanction granted at the instance of private person — Prosecution thereon is valid. AIR (Vol 10) 1923 Nag 180: 68 Ind Cas 45.

——S. 476 — Sanction against witness for offence under S. 465, I. P. C. can be granted. AIR (Vol 9) 1922 Oudh 220: 66 Ind Cas 68: 23 Cr LJ 228: 24 OC 367.

——S. 476 — Difference of opinion between two different tribunals — Action under S. 476 is not justifiable. AIR (Vol 9) 1922 Pat 160: 66 Ind Cas 336: 3 Pat LT 93: 1922 PHCC 26: 23 Cr LJ 272.

**——S. 476 — Sanction to prosecute cannot be given to a private person.**

A Court before whom a perjury is committed should itself under S. 476 of the Code order the prosecution of the guilty person, and should not give sanction of the private individual to prosecute him. 61 Ind Cas 521: 22 Cr LJ 393: 2 LRA (Cr) 94.

——S. 476 — Sanction for prosecution under S. 188 for disobeying order of Magistrate passed under S. 144 Cr. P. C. should not be given unless it is proved that the disobedience caused or tended to cause a riot or affray or a breach of peace. AIR (Vol 7) 1920 Cal 520: 21 Cr LJ 675: 57 Ind Cas 915 (DB).

**——Ss. 476 and 195 — proceedings under — Subsequent application by private persons — Effect of.**

Proceedings instituted under S. 476 should not be dropped on account of subsequent application by a private person to prosecute the accused. It is not always advisable to grant sanction to prosecute to a private person. AIR (Vol 6) 1919 All 356: 17 ALJ 431: 20 Cr LJ 368: 50 Ind Cas 848.

**——S. 476 — Execution proceedings — Resistance to attachment — Prosecution.**

Resistance offered during the course of an attachment in execution of a d cree is offered in the course of a judicial proceeding pending before the executing court and that court is competent to sanction a prosecution under S. 476. AIR (Vol 4) 1917 Pat 101: 19 Cr LJ 153: 43 Ind Cas 441.

**——S. 476 — Who can grant sanction.**

Though S. 476 authorises Civil, Criminal or Revenue Court to send the case for trial yet it gives no power to the Deputy Commissioner. The court informed, and not the court injured can grant sanction under S. 195. AIR (Vol 3) 1916 UB 15: 2 UBR 91: 17 Cr LJ 59: 32 Ind Cas 651.

——S. 476 — A transfer Application was made to a subdivisional magistrate who transferred the case. But after the transfer he took some evidence in that connection and ordered a prosecution under S. 476. Held, that the sanction was illegal as the magistrate was not acting judicially and had no power to administer an oath. (1911) 12 Cr LJ 326: 10 Ind Cas 622 (DB).

**——S. 476 — Sanction to prosecute — False statements — Affidavit sworn by accused.**

No one can be prosecuted in respect of false statements contained in an affidavit sworn by him in which he was an accused person. (1906) 3 ALJ 98 (100): 28 All 331 : 1906 AWN 42.

**——Ss. 476, 195 — Resistance to public servant — Order for prosecution by Civil Court — Sanction— Penal Code, Ss. 183, 352, 353.**

Where a Munsif, on the report of a peon duly authorised to attach some property of the judgment-debtors, that he was resisted by the judgment-debtors and assaulted by them, took action and sent the cases to the District Magistrate for the prosecution of the persons who had caused the resistance and assault, under Ss. 183 and 352, and the case coming on before a Deputy Magistrate, he held that the proceedings were void 'ab initio' for want of sanction under S. 195, Cr. P. C.

Held — That charges under Ss. 352, 353 required no sanction for initiation of proceedings.

Held also — That the proceedings were instituted under S. 476, Cr. P. C., and that the Magistrate should have proceeded under Clause (2) of that section and treated the case as if upon a complaint made and recorded under S. 200 of the Code. (1904) 8 CWN 586: 31 C 664 (666) (DB).

**33. Stay of proceedings.**

**——S. 476 — Stay of prosecution till disposal of appeal.**

Where a document produced in a case is found by the trial Court to be a forged one and a complaint is made under S. 476, Criminal P. C., against the party who had produced it, the question whether his prosecution should be stayed or not till the disposal of an appeal from the decision of the Court of first instance depends on the circumstances of each particular case.

If there is any likelihood of any important evidence vanishing or the inquiry being stifled, the prosecution may be allowed to proceed and the evidence may be recorded in it but final orders may be delayed till the disposal of the civil appeal. AIR (Vol 18) 1931 Lah 49: 32 Cr LJ 584: 32 PLR 303: 130 Ind Cas 651.

**——S. 476 — Pendancy of appeal — No bar.**

Where in a civil suit a Judge of experience directs a party or witness to stand his trial under S. 476, Cr. P. Code, the matter should be dealt with promptly. The fact that an appeal is pending does not matter and the decision of the Magistrate will not be relevant evidence in the civil appeal. LR 3 A 11 (Cr) : 23 Cr LJ 84 : 65 Ind Cas 436.

**——S. 476 — Pending decision in Civil Court — Jurisdiction of High Court.**

An application for stay of proceedings under S. 476 of the Cr. P. Code arising out of a suit from which an appeal is pending in the High Court in exercise of its general powers of superintendence over the proceedings of all the Courts subordinate to it can direct the subordinate Court to adjourn the proceedings when they are initiated by such presiding officer. Where criminal proceedings on the face of them raise a question of fact which is still under adjudication in a civil Court, the criminal Courts wherever possible, generally stay the proceedings until a final adjudication by the civil Court but the High Court will not interfere with a proceeding under S. 476 merely on the ground that an appeal on the facts is pending before the High Court. AIR (Vol 8) 1921 All 365: 18 ALJ 1011.

**——S. 476 — Criminal proceeding — Appeal — Findings against.**

When criminal proceedings are instituted in consequence of an order of a Court under S. 476 Cr. P. C., these proceedings should be stayed during the pendency of an appeal preferred against any order or decree respecting which the order under S. 476 was passed. In deciding the question of the postponement of the prosecution, the court petitioned to stay, should not pre-judge the appeal, but should leave the decision in the appeal to the Appellate Court in charge of the appeal. AIR (Vol 3) 1916 Pat 7: 20 CWN 1116: 18 Cr LJ 125: 37 Ind Cas 477 (DB).

**——S. 476 — Grounds.**

The mere pendency of a civil appeal is not in itself sufficient to stay criminal proceedings under S. 476. (1912) 14 Bom LR 968: 13 Cr LJ 848: 17 Ind Cas 720 (DB).

**——S. 476 — Order for prosecution under S. 195 — Immediate action — Stay of criminal proceedings pending civil appeal.**

Their Lordships refused to stay criminal proceedings initiated under S. 193, I. P. C., in virtue of an order under S. 476, Cr. P. C., pending a civil appeal on the ground that immediate action was necessary in the interests of the parties' justice. (1908) 35 C 909 (913, 914) (DB).

**——S. 476-A.**

**——Ss. 476-A and 476-B — Procedure explained.**

If the original Court records a finding and makes a complaint or refuses to make a complaint under S. 476, Criminal P. C., an appeal lies under S. 476-B; a dismissal in default does not amount to a refusal. If there is such a dismissal, the Court concerned under S. 476-A on application or on its own motion may make a complaint or refuse to make it, in which case an appeal lies to the High Court if the order is made by a Sessions Court. A dismissal in default under S. 476-A does not amount to a refusal and in the event of such dismissal by a Sessions Court, an application in revision lies to the High Court. AIR (Vol 31) 1944 All 40: 1943 AWR 286 (1): 1943 ALJ 566: 45 Cr LJ 403: ILR (1944) All 18: 211 Ind Cas 481.

——S. 476-A — Before prosecution can be launched, either the first or Appellate Court must be of opinion both that offence appears to have been committed and that it is expedient to prosecute. AIR (Vol 28) 1941 Nag 155: 1941 NLJ 91: ILR (1942) Nag 388: 194 Ind Cas 583.

**——Ss. 476-A, 195(3) — Small Cause Court not filing complaint for offences under S. 471, Penal Code — Additional District Judge, if can file it under S. 476-A.**

The Court of the Additional District Judge is not a Court to which the Subordinate Judge is subordinate within the meaning of S. 195, sub-s. (3). Where, therefore, the Small Cause Court has not thought fit to file a complaint for offences under S. 471, I. P. C., the Additional District Judge cannot file it under S. 476-A, Criminal P. C. AIR (Vol 28) 1941 Pat 592: 42 Cr LJ 748: 7 BR 943: 23 PLT 234: 195 Ind Cas 497.

——S. 476-A — Civil or Revenue Court acting under S. 476-A cannot be treated as Criminal Court. AIR (Vol 28) 1941 Rang 163: 1941 Rang LR 90: 42 Cr LJ 735: 195 Ind Cas 444 (DB).

——S. 476-A — Sections 476-A and 476-B, Criminal P. C., do not talk about dismissing an application but in the one case of rejecting it and in the other of refusing to make complaint on application. AIR

(Vol 27) 1940 Laih 526 : 42 Cr LJ 324 : 192 Ind Cas 863.

——S. 476-A — Suit, during trial of which Subordinate Judge was alleged to have abetted offence under S. 193, I. P. C., transferred by District Judge to Senior Subordinate Judge, reserving to himself proceedings under S. 476 — An order passed by the Senior Subordinate Judge in such a case that he has no jurisdiction to make a complaint is correct. AIR (Vol 27) 1940 Lah 292: 41 Cr LJ 843: 190 Ind Cas 178 (DB).

**——Ss. 476-A, 476 — "Rejection" in S. 476-A, whether includes rejection on default.**

An application to a Court to make a complaint under S. 476, Criminal P. C. was dismissed for default. The applicant neither asked the Court to set aside the 'ex parte' order, nor to restore his application, nor went in appeal to the District Judge under S. 476-B. Instead of doing so, he put in application before the District Judge. This application was not within limitation for an appeal. Notwithstanding the fact that the lower Court's order of dismissal was still in force, the District Judge accepted the application and made a complaint:

Held, that the order of the District Judge was without jurisdiction. Under the provisions of S. 476-A, he could take action only if the lower Court had neither made a complaint itself nor rejected an application for the making of one. The District Judge entertained this application on the ground that the dismissal in default was not a rejection of the application. He was not concerned with the reasons for which the application was dismissed (so long as the procedure was regular) and had it been the intention of the legislation that 'rejection' in S. 476-A should not include rejection on the ground that the complainant did not appear to prosecute the application as he ought to have done it would presumably have made this clear. AIR (Vol 25) 1938 Lah 429: 40 PLR 136 : 39 Cr LJ 698 : 176 Ind Cas 116.

——S. 476-A — Where a Civil Court exercises the special jurisdiction granted by Ss. 476, 476-A and 476-B, Criminal P. C., it does so as a Civil Court and not a Criminal Court. AIR (Vol 23) 1936 Pesh 87: 161 Ind Cas 270.

**——S. 476-A — Power-of-attorney, whether necessary.**

No power-of-attorney is necessary for an appeal from an order on a petition under S. 476-A, Criminal P. C. AIR (Vol 22) 1935 Lah 677: 36 Cr LJ 1485: 37 PLR 762: 158 Ind Cas 1005.

**——Ss. 476-A, 476 — Offence in mutation proceedings in Tahsildar's Court — Power of Deputy Commissioner to direct complaint.**

The Deputy Commissioner, in the exercise of his power as a superior Court under S. 476-A, Criminal P. C. has authority to direct a complaint being made in respect of an offence committed in course of mutation proceedings in a Court subordinate to him. AIR (Vol 22) 1935 Oudh 113: 36 Cr LJ 319(2): 1935 OWN 28: 10 Luck 503: 153 Ind Cas 346.

**——S. 476-A — Subordinate Judge in appeal is not authorised to order prosecution.**

In a rent suit, the defendant sought to administer a special oath to the plaintiff, and a summons was accordingly issued for the personal appearance of the plaintiff. The serving peon reported that he had met the plaintiff, who was identified by one F, but that the plaintiff having refused to accept the service of summons, it was affixed to his house. Later, an affidavit was sworn on behalf of the plaintiff and filed in the rent suit, stating that the plaintiff had left his home previous to the alleged service of this summons and was not at home on the day of the service. F, who had acted as identifier, was then called upon to show cause why he should not be prosecuted for false identification and for false personation. The Munsif held an enquiry and came to the conclusion that the case was not one in which the prosecution of the identifier should be lodged. An appeal against this order was preferred to the District Judge who transferred it to the Subordinate Judge. In appeal, the Judge decided, in the circumstances of the case, to take action 'suo motu' under S. 476-A, Criminal P. C.

Held, that the Judge was not the Court to which appeals from orders of the Munsif ordinarily lay, and, therefore, he was not authorised under S. 476-A to make a complaint. AIR (Vol 21) 1934 Pat 366: 15 PLT 303: 35 Cr LJ 1061: 150 Ind Cas 239.

——S. 476-A — Applications under Ss. 476, 476-A and 476-B originating in Civil Courts must be dealt with according to provisions of Civil P. C. AIR (Vol 18) 1931 Cal 604: 35 CWN 775: 33 Cr LJ 38: 59 Cal 68: 134 Ind Cas 1063 (DB).

**——S. 476-A — 'Rejected.'**

The word "rejected" in S. 476-A means rejected after consideration on the merits. Where, therefore, the lower Court has merely allowed the application to be withdrawn without consideration of its merits, it cannot be said that the application is for the purposes of S. 476-A rejected. AIR (Vol 16) 1929 Sind 50: 23 SLR 37: 29 Cr LJ 1051: 11 AI Cr R 360: 112 Ind Cas 475 (DB).

**——S. 476-A — Mistake.**

False statements in affidavit — District Magistrate directing trying Magistrate to report — Report confined to statement in para. 8 of affidavit — District Magistrate filing complaint about statement in para. 2 — Sessions Judge on appeal substituting statement in para. 8 — District Magistrate must be taken to have meant that complaint should relate to matter in report of Magistrate — Sessions Judge must be taken to have withdrawn complaint in respect of statement in para. 2 and to have filed complaint for statement in para. 8, which was open to him to do. AIR (Vol 15) 1928 All 706: 10 AI Cr R 269: 9 LRA Cr 121: 29 Cr LJ 794: 111 Ind Cas 122.

**——S. 476-A — Invalid complaint.**

Invalid complaint by Magistrate — Appeal to S.J. —S. J. can make complaint. AIR (Vol 12) 1925 All 667: 26 Cr LJ 923: 6 LRA Cr 79: 86 Ind Cas 987.

**——S. 476-A — Intention — A superior Court cannot suo motu take action where subordinate Court has refused to complain.**

The scheme of the Ss. 476-A and 476-B is that, if the Subordinate Court has neither made a complaint under S. 476 nor rejected an application for the making of a complaint then the Superior Court may take action and make a complaint. But where the Subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code is by way of an appeal to the superior Court. Appeal Judge should consider whether the appeal is filed within the time specified. AIR (Vol 12) 1925 Cal 1228: 42 CLJ

120: 29 CWN 1035: 52 Cal 1009: 26 Cr LJ 1569: 90 Ind Cas 529 (DB).

——S. 476-A — **Sanction before amendment — Procedure.**

Where, before the amendment of the Cr. P. Code a Subordinate Court granted sanction under S. 195 of the Code but the sanction lapsed owing to the subsequent amendment of the Code,

Held, that the remedy of the complainant was to move the Subordinate Court to make a complaint under the amended S. 476 and not to move a superior Court under S. 476-A of the Code to make a complaint. AIR (Vol 12) 1925 Mad 1181: 26 Cr LJ 1125: 88 Ind Cas 357 (DB).

——S. 476-A — **Transfer of case — Powers of a transferee Court.**

S. 526 of the Cr. P. Code, which clothes the High Court with power to transfer any case from any file to any other file, controls S. 195 (3) and Ss. 476-A and 476-B of the Code.

The Court to which an appeal against an order refusing or granting a sanction for prosecution is transferred is invested with all the powers of the ordinary Court of Appeal or revision for hearing the paticular appeal or revision against the order under S. 195 of the Code and can grant or refuse sanction or proceed under S. 476. AIR (Vol 12) 1925 Nag 358: 26 Cr LJ 796: 86 Ind Cas 428.

——S. 476-A — **Powers of superior Court.**

There is no objection to the superior Court granting sanction under S. 476 during the pendency of an application for sanction to the subordinate Court. AIR (Vol 11) 1924 Bom 511: 26 Bom LR 713: 25 Cr LJ 1287: 82 Ind Cas 359 (DB).

——S. 476-B.

1. **Duty of Court.**
2. **Effect of order under.**
3. **Forum.**
4. **Limitation.**
5. **Powers of Appellate Court.**
   See also, Criminal P. C., S. 476.
6. **Procedure.**
7. **Revision.**
   See also, Criminal P. C., S. 439 — and Ss. 195 and 476; Civil P. C., S. 115.
8. **Right of appeal.**
9. **Scope.**
10. **Second appeal.**

### 1. Duty of Court.

——S. 476-B — In reversing a judgment, S. 476-B requires the Appellate Court to say that the prosecution is expedient in the interests of justice. 1933 MWN 1257.

——S. 476-B — The conditions laid down by S. 476 that before ordering a prosecution, the Court should apply its mind to the question whether or not it is expedient in the interests of justice that an inquiry should be made into the offence complained of, and that it should record its finding in writing on that point as a preliminary to the filing of the complaint equally apply to the Appellate Court when acting under S. 476-B. AIR (Vol 18) 1931 Sind 115 : 25 SLR 68 : 33 Cr LJ 43 : 134 Ind Cas 1007 (DB).

——S. 476-B — An appellate Court in cases of appeals under S. 476-B should re-consider the entire matter on its merits. AIR (Vol 16) 1929 Cal 480 : 124 Ind Cas 68 : 57 Cal 500 : 33 CWN 945 : 1929 Cr C 94 : 31 Cr LJ 612 (DB).

——S. 476-B — **Appellate Court should reconsider entire matter on merits.**

The appellate Court, in case of appeals under S. 476-B should reconsider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the appellate Court is not satisfied that a prima facie case has been made out the order appealed against must be set aside. AIR (Vol 12) 1925 All 544 : 88 Ind Cas 358 : 23 ALJ 515 : 26 Cr LJ 1126.

——S. 476-B — Trial Court refusing to proceed under S. 476 — Sufficient reasons must be given before reversing order. AIR (Vol 12) 1925 Cal 721 : 89 Ind Cas 251 : 52 Cal 478 : 26 Cr LJ 1307 (DB).

——S. 476-B — Where a Court quashes the direction to prosecute, it should order withdrawal of the complaint. A mere order that sanction granted by the Court of first instance should be withdrawn is not sufficient. AIR (Vol 11) 1924 Bom 347 : 81 Ind Cas 947 : 48 Bom 401 : 26 Bom LR 289 : 25 Cr LJ 1123 (DB).

### 2. Effect of order under.

——S. 476-B — **Order set aside on appeal terminates proceedings.**

Where after the release of the person arrested, the Court on appeal sets aside the order of the Court sanctioning prosecution, there is a termination of proceedings in favour of that person. AIR (Vol 20) 1933 Cal 909 : 60 Cal 1022 : 35 Cr LJ 925 : 148 Ind Cas 1129.

### 3. Forum.

——S. 476-B — **"Subordinate" — Assistant Sessions Judge — Appeal from order — Forum — Jurisdiction of Additional Sessions Judge to hear.**

According to S. 195 (3), Cr. P. Code, and proviso (a), read with S. 408 an Assistant Sessions Judge who passes a sentence of four years or less shall be deemed to be subordinate to the Court of Session; where he passes a sentence exceeding four years, he shall be deemed subordinate to the High Court. But for the purpose of S. 476-B, Cr. P. Code, it is the Court of Session which will be deemed to be the Court to which the Assistant Sessions Judge is subordinate. An appeal from an order of the Assistant Sessions Judge can be heard by an Additional Sessions Judge who is a member of the Court of Session. AIR (Vol 33) 1946 Pat 435 : 223 Ind Cas 223 : 12 BR 336 : 47 Cr LJ 385 : 1947 PWN 20.

——S. 476-B — Single Judge of High Court sitting on Civil Revisional Side is subordinate to Division Bench within S. 195, Criminal P. C. — Appeal lies from order of Single Judge directing complaint under S. 476. AIR (Vol 31) 1944 Mad 181 : 45 Cr LJ 464 : 57 LW 168 : (1943) 2 MLJ 668 : 1944 MWN 26 : ILR (1944) Mad 643 : 212 Ind Cas 39 (DB).

——Ss. 476-B, 476, 195 — **First Class Magistrate refusing to make complaint under S. 182, Penal Code—Appeal lies to District Magistrate and not to Sessions Judge.**

Reading Ss. 195, 476 and 476-B, Criminal P. C., together, it is clear that in case any offence under Ss. 172 to 188, Penal Code, is committed, the public servant concerned or the public servant to whom he is subordinate can make a complaint. Where a public servant is a Court he is subordinate to the Appellate Court as defined in cl. (3) of S. 195, Cri-

minal P.C., only when the offences are those mentioned in cls. (b) and (c) but not in respect of offences mentioned in cl. (a). Hence an appeal from an order of First Class Magistrate appointed under S. 12, Criminal P.C., refusing to make a complaint under S. 182, Penal Code, lies to the District Magistrate and not to the Sessions Judge. AIR (V 29) 1942 Oudh 50: 1941 AWR 313: 1941 OWN 1130: 43 Cr LJ 50: 196 Ind Cas 664.

——S. 476B — An appeal from an order made by Subordinate Judge under S. 476, Criminal P.C., lies to the District Court even though that order arose from proceedings under the Guardians and Wards Act. AIR (V 29) 1942 Snd 98: 43 Cr LJ 720: ILR (1942) Kar 64: 200 Ind Cas 814 (DB).

——S. 476-B — N.W.F.P. Courts Regulation of 1931, S 30—Appeals under S. 476-B, Criminal P.C., from orders by Subordinate Judges lie to District Judge and not to Senior Sub-Judge. AIR (V 28) 1941 Pesh 80: 196 Ind Cas 760.

**——Ss. 476-B, 195 (3) — Special Judge making complaint for offence committed in case under U. P. Encumbered Estates Act — Forum of appeal.**

Where a person commits perjury in the Court of a Special Judge in a case under the U.P. Encumbered Estates Act, and the Judge makes a complaint against him under S. 476, Criminal P.C., the Special Judge acts only as a Civil Court irrespective of the fact that the Court is further invested with special powers under the Encumbered Estates Act. The Special Judge is primarily Civil Judge and if he takes any action under S. 476, Criminal P.C. in an ordinary civil case, whatever its valuation, his order would be appealable to the District Judge and not to the High Court. AIR (V 27) 1940 All 7: 1939 ALJ 962: 1939 AWR 783: 41 CrLJ 227: ILR (1939) All 975: 185 Ind Cas 700.

**——S. 476-B — Prosecution sanctioned by joint Magistrate — If he can hear appeal.**

Where the prosecution was sanctioned by the Joint Magistrate, an appeal cannot be heard by the Joint Magistrate except with the permission of the Court to which an appeal lies from his Court. AIR (V 27) 1940 Mad 945: 1940 MWN 805 (1): 52 LW 345 (2): 42 Cr LJ 55: 190 Ind Cas 640.

**——S. 476-B — Appeal from decision of Civil Judge whether to District Court or High Court.**

A person who has made no application for action being taken under S. 476, Criminal P.C., has no right of appeal under S. 476-B.

An appeal from the decision of a Civil Judge rejecting an application made under S. 476, Criminal P.C., for initiating proceedings lies to the District Court and not to the High Court, though appeals from the decrees passed by the Civil Judge may lie both to the District Court and to the High Court, as the District Court is the inferior Court within the meaning of S. 195 (3), Criminal P.C. AIR (V 26) 1939 All. 79: 1938 AWR 747: 1938 ALJ 1196: 179 Ind Cas 673.

——S. 476-B — Process-server attaching property on behalf of decree-holder obstructed — Application for prosecution by decree-holder — Held, the application being by decree-holder and not by process-server under S. 195, Criminal P.C., was not proper. Also that the District Judge had no jurisdiction to entertain an appeal under S 476-B Criminal P.C. AIR (V 24) 1937 Pat 31: 38 Cr LJ 292 (2): 3 BR 226: 166 Ind Cas 870.

**——S. 476-B — Where lies.**

The Court of the Subordinate Judge is a Court from whose orders appeals ordinarily lie to two Courts, that of the District Judge and the High Court. The Appellate Court of inferior jurisdiction, namely the District Judge's Court is to be the Court to which the Court of the Subordinate Judge must be deemed to be subordinate within the meaning of S. 195, sub-s. (3), Criminal P. C. The appeal, therefore, under S. 476-B, Criminal P.C., lies to the District Judge. That was held to be the position under the Code as it stood before the amendments made in 1923; and the amendments introduced in that year have not changed the law in this respect. AIR (V 23) 1936 Pat 122: 14 PLT 66: 2 BR 312: 37 Cr LJ 413: 161 Ind Cas 20.

**——Ss. 476-B and 195 (3)—Small Cause Court directing prosecution — Appeal lies to District Judge and not to Subordinate Judge.**

An appeal under S. 476-B, Criminal P.C., lies to the Court to which the Court making the complaint is subordinate. Hence, where a Judge of a Small Cause Court passes an order directing prosecution, an appeal lies to the District Judge and the Subordinate Judge has no such jurisdiction, even though in disposing of the appeal, he signs as Additional Sessions Judge. AIR (V 22) 1935 All. 573: 1935 ALJ 671: 1935 AWR 690: 36 Cr LJ 950: 156 Ind Cas 593.

**——S. 476-B — Held, District Judge alone could entertain appeal.**

An order embodying a complaint under S. 193, I.P.C., was signed by the presiding officer as Munsif and not as Judge of the Small Cause Court in which capacity the officer was acting. As a consequence of this, the appeal which should have been disposed of by the District Judge was transferred by him to the Subordinate Judge who had no jurisdiction:

Held, that since the Subordinate Judge had no jurisdiction to dispose of the appeal, there had been substantial injustice, and that the appeal must be re-admitted by the District Judge. AIR (V 22) 1935 All 446: 1935 ALJ 476: 1935 AWR 386: 36 Cr LJ 1302: 158 Ind Cas 101 (DB).

**——S. 476-B — Order by Collector — Jurisdiction of District Judge to entertain — Agra Tenancy Act, Sch. IV, Group A.**

If the Collector passes any appealable decree in matters relating to arrears of rent case, appeals from the Collector's decree would lie to the Civil Court and, therefore, the Court of the Collector under S. 476-B, Criminal P.C., would be subordinate to the District Judge when a complaint is filed in any suit of this nature, whether the actual decree in that particular suit be appealable or not. An appellate decree of the Collector is never appealable to a superior Revenue Court but is appealable to the District Judge alone in certain specified cases

Even if it be held that the order of the Collector directing the filing of a complaint is passed as an original Court order, then appeals from his decrees would lie both to the Civil and to the Revenue Courts according to the nature of the case or the proceeding. When the case is one of arrears of rent, it is included in Group A of the Fourth Schedule of the Agra Ten. Act and appeals from the appealable decrees of a Collector sitting as an original Court in suits included in Group A of the Fourth Schedule lie only to the District Judge and never to a superior Revenue Court and the District Judge has jurisdiction to decide the appeal. AIR (V 21) 1934 All. 886: 35 Cr LJ 1136: 4 AWR 241: 1934 ALJ 867: 18 RD 409: 150 Ind Cas 775.

——S. 476-B—An appeal from an order of the Court of Small Causes, Saugor, under S. 476, Criminal

P.C., lies to the Additional District Judge, Saugor, and not to the District Judge. Jubbulpore. AIR (V 21) 1934 Nag 236: 31 NLR 90: 36 Cr LJ 851: 155 Ind Cas 863.

**——S 476-B. — Appeal from order of Assistant Sessions Judge.**

An appeal under S. 476-B, Criminal P.C., from the order of an Assistant Sessions Judge refusing to lodge a complaint, lies to the Court of Session and not to the High Court. AIR (V 20) 1933 Cal 192: 37 CWN 192: 34 Cr LJ 628: 60 Cal 596: 143 Ind Cas 703 (DB).

——S. 476-B — Under S. 195 (3), Criminal P.C., the District Judge's Court is the Court to which the Munsif's Court is subordinate and hence an appeal under S. 476-B can be heard only by the District Judge. AIR (V 20) 1933 Pat 179: 14 PLT 131: 34 Cr LJ 410: 142 Ind Cas 621.

**——S. 476-B — Order by District Magistrate under S. 476-A — Appeal.**

An appeal, therefore, under S. 476-B lies to the Court of the Sessions Judge, from an order passed by the District Magistrate under S. 476-A and not to the High Court. AIR (V 16) 1929 Nag 97: 116 Ind Cas 77: 25 NLR 1: 30 Cr LJ 550: 12 AI Cr R 345 (FB).

### 4. Limitation.

**——S. 476-B — Appeal — Time for, runs when complaint is signed.**

The making of the complaint by the Court within the meaning of the words in S. 476-B is something antecedent to its despatch to the Magistrate, and cannot, therefore, be taken later than its signature by the presiding officer of the Court. Time, under Art. 154 or Art. 155 of the Limitation Act, runs from the date when the complaint is signed and not when the complaint reaches the Magistrate concerned. AIR (V 30) 1943 Sind 157: 45 Cr LJ 76: ILR (1943) Kar 122: 209 Ind Cas 119 (DB).

**——S. 476-B — S. 211, Penal Code — Delay in filing appeal to High Court, held should be condoned.**

A charge was made against a complainant under S. 211, Penal Code, without giving him any opportunity of showing cause why the complaint should not be made. Till the time he received summons to appear and answer a charge on a complaint made by the Magistrate, he did not know anything about the matter. Soon after he knew of this, he applied for a copy of the order of the Magistrate and by that time, his appeal to the High Court was out of time, more than thirty days having elapsed:

Held hat the delay must be condoned. AIR (V 26) 1939 Sind 78: 40 Cr LJ 449: ILR (1939) Kar 648: 180 Ind Cas 436.

**——S. 476-B — Limitation, when commences.**

Although the order of the Magistrate in which reasons are given for the filing of a complaint is the order appealed against, S. 476-B, Criminal P. C., only gives a right of appeal to a person against whom a complaint has actually been made. An appeal then cannot be filed until a complaint has actually been made. The person against whom a finding in respect of the application to the Court has been made is only affected by that finding when it is acted on and a complaint lodged in a Magistrate's Court. Without such a complaint, the finding is inoperative.

Limitation can run only from the date on which the complaint is made, the date on which the finding becomes operative to the prejudice of the party concerned. AIR (V 22) 1935 Nag 199: 36 Cr LJ 1371: 31 NLR 370: 158 Ind Cas 496.

**——S. 476-B — Limitation for appeal under, runs from date of actual filing of complaint.** AIR (V 15) 1928 Bom 64: 108 Ind Cas 26: 52 Bom 164: 30 Bom LR 76: 29 Cr LJ 315: 9 AI Cr R 435 (DB).

**——S. 476-B — Appeal to High Court.**

An appeal preferred under S. 476-B against an order of the lower Court to the High Court is governed by Art. 155 Limitation Act. AIR V 14) 1927 Cal 718: 104 Ind Cas 456: 46 CLJ 40: 8 AI Cr R 433: 28 Cr LJ 840 (DB)

——S. 476-B — Appeal against order directing complaint to be made— Time begins from the date of filing the complaint and not from the date of the order. AIR (V 14) 1927 Lah 54: 98 Ind Cas 393: 7 Lah 77: 27 Cr LJ 1321: 28 PLR 232.

——S. 476-B — The limitation for an appeal under S. 476-B against an order refusing to file a complaint under S. 195 is the one provided by Art. 155 and not Art. 156. AIR (V 13) 1926 All 211: 93 Ind Cas 851: 24 ALJ 368: 7 LRA Cr 80.

### 5. Powers of Appellate Court

See also Criminal P.C. Sec. 476

**(a) General.**
**(a-1) To take evidence.**
**(b) Transfer of case.**
**(c) Power of remand.**
**(d) Summary disposal.**
**(e) Stay of criminal proceedings.**

#### (a) General

**——S. 476-B — Powers of Appellate Court —Order of remand.**

It is plain from the words of S. 476-B, Cr. P. Code, that the only powers which an Appellate Court has in an appeal from an order under that section are to withdraw a complaint, or to make a complaint or to direct the Court from whose order the appeal had been preferred to make a complaint. The only other provision which applies to an appeal under S. 476-B is S. 423, Cr. P. Code. That section does not entitle the Appellate Court to pass an order of remand. AIR 1933 Mad 767 and AIR 1931 Mad 52 (FB) dissented from, AIR (V 36) 1949 Nag 34:3 1949 NLJ 97.

**——S. 476-B — Appeal under S. 476-B in civil Court — No costs can be awarded.**

A Court has no power to direct payment of costs in proceedings connected with an application under S. 476 even if such proceedings are taken in a civil Court. Hence no costs can be awarded in an appeal under S. 476-B by the civil Court. No doubt an appellate order under S. 476-B if passed by a civil Court can be challenged in revision only under the Civil Procedure Code or S. 25, Small Cause Courts Act, and if passed by a Criminal Court, only under the Criminal Procedure Code but that is no reason for holding that while costs cannot be awarded in the latter case they can be awarded in the former. AIR (V 33) 1946 All 245: 1945 ALJ 536: 1945 OWN (HC) 348.

——S. 476-B — Magistrate calling upon witness suo motu why he should not be prosecuted for perjury — Subsequent order declining to take action — Opposite party, if can go in appeal against order — Additional District Judge acting under S. 476-B — His order is without jurisdiction. AIR (V 28) 1941 Pat 591: 7 BR 944: 42 Cr LJ 757: 23 PLT 210: 195 Ind Cas 580.

**——S. 476-B — Power to direct withdrawal of complaint.**

When the trial Court has directed prosecution of a party to a suit under S. 476, Criminal P.C., for using a forged document in evidence, in appeal, the Appellate Court has jurisdiction to direct withdrawal of the complaint if it is not satisfied with

the case for the prosecution; and it would not be proper for the High Court to interfere with this order under S. 115, Civil P.C. AIR (V 23) 1936 Pat 382: 17 PLT 276: 2 BR 609: 37 Cr LJ 838: 163 Ind Cas 451.

**——S. 476-B — When can act.**

The jurisdiction of the Court of Session only arises under S. 476-B when a Court subordinate to it has directed the filing of a complaint or refused to make a complaint under S. 476 or S. 476-A, Criminal P.C. AIR (V 21) 1934 Oudh 344: 8 Luck 638: 35 Cr LJ 824: 11 OWN 490: 148 Ind Cas 1075.

**——S. 476-B — Power to direct lower Court to make complaint.**

There is no provision of law by which the Sessions Judge can direct a District Magistrate to make a complaint under S. 476-B, Criminal P. C., though the Sessions Judge himself may make the complaint. AIR (V 18) 1931 Mad 768: 1931 MWN 713 (2): 33 Cr LJ 51 (1): 134 Ind Cas 1216.

——S. 476-B — Lower Court wrongfully dismissed an application under S. 476, Criminal P. C., and District Judge ordered, on appeal, to proceed with the application: Held, that under this section appellate Court can either hear the parties and direct withdrawal of the complaint or make the complaint himself as the case may be and can do nothing else. 1931 MWN 1051.

——S. 476-B — The High Court will not interfere in appeal under S. 476-B unless extraordinary circumstances are visible. AIR (V 14) 1927 Pat 87: 98 Ind Cas 111: 8 PLT 104: 27 Cr LJ 1263 (DB).

**(a-1) To take evidence.**

——S. 476-B — Power of appellate Court to take evidence. See AIR (V 31) 1944 Nag 359: 46 CrLJ 766.

**——Ss. 476-B, 476 — Power to take evidence.**

A Court hearing an appeal under S. 476-B, Criminal P.C., can take evidence for a proper decision of the appeal before it and it cannot set aside the order of the Court of first instance making a complaint or refusing to make one, and remand the case to that Court for further evidence being taken and the case being decided afresh. AIR (V 24) 1937 All 305: 1937 ALJ 192: 1937 AWR 290: 38 Cr LJ 561: ILR (1937) All 517: 168 Ind Cas 434 (FB).

**——Ss. 476-B, 476 — Civil P. C. O. 41, R. 27 — Whether can take additional evidence.**

Although an appeal from an order of a Subordinate Judge dismissing an application under S. 476, Criminal P. C., itself is one which is allowed by Criminal Procedure Code, the appeal must be heard by the District Judge to whom the Judge is subordinate, i. e., by an Appellate Court exercising civil appellate jurisdiction. It follows, therefore, that the procedure governing an appeal of this description is one which is to be sought for within the four corners of the Civil Procedure Code. The Additional District Judge, therefore, has powers conferred on him by O. 41, Civil P. C., and under R. 27 of that order, he is entitled to take further evidence if he requires that evidence in order to enable him to decide the case. AIR (V 24) 1937 Nag 91: ILR (1938) Nag 298: 169 Ind Cas 816.

——S. 476-B — A Court acting under S. 476-B, Criminal P.C., has inherent jurisdiction to take additional evidence. AIR (V 18) 1931 Sind 115: 25 SLR 68: 33 Cr LJ 143: 134 Ind Cas 1007 (DB).

**——S. 476-B — Additional evidence — Appellate Court — Jurisdiction of.**

A superior criminal Court acting under S. 195, Cr. P. Code, against the order by a inferior criminal Court granting sanction, has no power to take or call for further evidence. S. 195 has been amended and S. 476 empowers a Court, civil, revenue or criminal to forward a complaint to a 1st Class Magistrate for enquiry into an offence which it has reason to hold has been committed before it. Under S. 476-B an appellate Court has power to withdraw the complaint or to direct a complaint to be filed when the lower Court declines to prefer a complaint, but has no jurisdiction to take additional evidence in a matter coming up under the section. AIR (V 15) 1928 Mad 391: 55 MLJ 213: 10 AI Cr R 55: 29 Cr LJ 445: 51 Mad 603: 108 Ind Cas 638: 1928 MWN 73: 27 MLW 265.

**(b) Transfer of case.**

**——Ss. 476-B, 407 (1) — Transfer.**

Where the appeal to the District Magistrate is under S. 476-B and not under S. 407 (1), the District Magistrate has no power to send the appeal to the Sub-Divisional Magistrate for disposal. AIR (Vol 30) 1943 Mad 50: 55 LW 591: (1942) 2 MLJ 381: 1942 MWN 594: 44 Cr LJ 177: ILR (1943) Mad 303: 204 Ind Cas 289.

**——S. 476-B — Hearing of appeal assigned to Additional Judge.**

There is nothing in the Criminal Procedure Code or in the Civil Courts Act which suggests that the hearing of an appeal under S. 476-B is not one of the functions which the District Judge may assign to the Additional Judge by general or special order in his distribution of business; and when the appeal has in that way been assigned to the Additional Judge, the Additional Judge exercises the same powers as the District Judge. He should be regarded as another officer exercising the functions of the Court of the District Judge in the same manner as an Additional Judge of the High Court exercises the functions of a High Court Judge. AIR (Vol 23) 1936 Pat 382: 17 PLT 276: 2 BR 609: 37 Cr LJ 838: 163 Ind Cas 451.

**——S. 476-B — Transfer.**

It is not open to a District Judge in whose Court an appeal under S. 476-B, Criminal P. C., is pending to transfer that appeal to the Court of a Subordinate Judge as the Subordinate Judge has no jurisdiction to hear such an appeal either under Criminal Procedure Code or under the Civil Courts Act. AIR (Vol 22) 1935 All 440: 57 All 785: 36 Cr LJ 1231: 1935 AWR 385: 1935 ALJ 473: 157 Ind Cas 901.

——S. 476-B — Transfer of appeal — District Judge hearing appeal under S. 476-B has power to transfer appeal to competent Court and transferee Court can make necessary complaint. AIR (Vol 17) 1930 Cal 361: 125 Ind Cas 748: 57 Cal 831: 34 CWN 80: 31 Cr LJ 921: 1930 Cr C 537 (DB).

——S. 476-B — A District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders before him. But an order of a Munsif under S. 476 refusing to prosecute a person under S. 193, Penal Code, is not an order of a Munsif within the meaning of S. 40, and the District Judge to whom the appeal from that order is preferred has no jurisdiction to transfer it, to be decided by a Subordinate Judge. AIR (Vol 15) 1928 Oudh 494: 114 Ind Cas 812: 5 OWN 882: 4 Luck 155: 30 Cr LJ 382 (DB).

——S. 476-B — Section 526 of the Cr. P. Code, which clothes the High Court with power to transfer any case from any file to any other file, controls S. 195 (3) and Ss. 476-A and 476-B of the Code. The Court to which an appeal against an order refusing or granting a sanction for prosecution is transferred is invested with all the powers of the ordinary Court of Appeal or revision for

hearing the particular appeal or revision against the order under S. 195, of the Code and can grant or refuse sanction or proceed under S. 476. AIR (Vol 12) 1925 Nag 358: 86 Ind Cas 428: 26 Cr LJ 796.

**(c) Power of remand.**

——S. 476-B — The only other provision which applies to an appeal under S. 476-B is S. 423, Cr. P. Code. That section does not entitle the Appellate Court to pass an order of remand. AIR 1933 Mad 767 and AIR 1931 Mad 52 (FB) dissented from. AIR (Vol 36) 1949 Nag 343: 1949 NLJ 97: 51 Cr LJ 176.

——S. 476-B—In an appeal under S. 476-B, the Appellate Court can take evidence if it wishes to do so. But a remand is not warranted by the terms of the section. AIR (Vol 31) 1944 Nag 359: 1944 NLJ 421: 46 Cr LJ 760.

——Ss. 476-B, 476 — **Power to direct Court of first instance to file complaint.**

In an appeal under S. 476-B, Criminal P. C., the Appellate Court has no jurisdiction to remand the case directing the Court of first instance to file a complaint, but must do so itself. AIR (Vol 29) 1942 Rang 64 (1): 1941 Rang LR 764: 43 Cr LJ 569: 199 Ind Cas 613.

——S. 476-B — **Remand.**

Obiter. — Where a Court refuses to file a complaint under S. 476, and an appeal is filed under S. 476-B, against this order, the Appellate Court can, under S. 476-B, remand the case to the lower Court for the purpose of filing a complaint. AIR (Vol 25) 1938 Nag 487: 1938 NLJ 285: 40 Cr LJ 388: ILR (1939) Nag 338: 180 Ind Cas 577.

——S. 476-B — **Remand.**

The Appellate Court can, under S. 476-B, remand a case to the lower Court for purposes of inquiry. The powers of the Appellate Court under S. 476-B, Criminal P. C., are not exhaustive and the Appellate Court can exercise all the powers contemplated by the Criminal P. C., except those which are expressly excluded. AIR (Vol 25) 1938 Pat 99: 16 Pat 650: 19 PLT 21: 39 Cr LJ 353: 4 BR 332: 173 Ind Cas 742 (DB).

——S. 476-B — **Remand.**

An Appellate Court, when acting under S. 476-B, cannot invoke the inherent powers when hearing an appeal from acquittal or appeal from conviction or appeal from any other order and has not got ample powers to remand the case for further enquiry. AIR (Vol 24) 1937 All 305: 1937 ALJ 192: 1937 AWR 290: ILR (1937) All 517: 38 Cr LJ 561: 168 Ind Cas 434 (FB).

——S. 476-B — **Remand.**

The Criminal Procedure Code provides for no remand in appeal under S. 476-B, Criminal P. C., and the Appellate Court cannot make a remand to the trial Court, but the Appellate Court may itself make an enquiry in a case where it comes to the conclusion either that the trial Court has made no preliminary enquiry at all or has made a defective enquiry. AIR (Vol 24) 1937 Rang 526: 173 Ind Cas 810.

——S. 476-B — **Remand.**

The procedure on appeal under S. 476-B, Criminal P. C., is procedure on an appeal under the Code, and as the Criminal Procedure Code provides for no remand, the Appellate Court cannot make a remand to the trial Court, but the Appellate Court may itself make an enquiry in a case where it comes to the conclusion either that the trial Court had made no preliminary enquiry at all or had made a defective enquiry.

Where, therefore, once the Judge accepts the appeal of the accused under S. 476-B, Criminal P. C., he is functus officio, and his order directing the Magistrate to make a further enquiry into the alleged commission of the offence under S. 193, I. P. C., is ultra vires and absolutely void. AIR (Vol 22) 1935 Oudh 59: 11 OWN 1469: 36 Cr LJ 254: 10 Luck 335: 153 Ind Cas 104 (DB).

——Ss. 476-B, 423 (c) (d) — **Power to remand.**

In an appeal under S. 476-B, Criminal P. C., in a civil proceeding, the Appellate Court has power to remand the matter back to the lower Court for disposal, under Cls. (c) and (d) of S. 423, Criminal P. C. AIR (Vol 21) 1934 Mad 52: 38 LW 940: 35 Cr LJ 392: 1933 MWN 1476: 65 MLJ 873: 57 Mad 177: 147 Ind Cas 351 (FB).

——S. 476-B — Section 476-B, Criminal P. C., is not exhaustive of the powers of the Appellate Court. In the case of complaints made under S. 476, the Appellate Court has power of remand and also of summary dismissal in such cases. AIR (Vol 20) 1933 Mad 767: 1933 MWN 902: 38 LW 564: 65 MLJ 534: 35 Cr LJ 503: 147 Ind Cas 794 (DB).

——Ss. 476-B and 439 — **Remand.**

High Court ought to be very reluctant to interfere with an order under S. 476-B where the Court which makes the order seems to be fully conversant with all the facts of the case; and if the High Court is satisfied from materials before it that the case is one where there ought to be a prosecution it does not seem necessary or even desirable that the High Court should send back the case which heard the matter on appeal merely because there has been some irregularity. 34 CWN 923: 1931 Cr C 35: 32 Cr LJ 325: AIR (Vol 18) 1931 Cal 3 (DB).

——S. 476-B — **Remand.**

In dealing with an appeal under S. 476-B, the appellate Court is governed not by S. 424, Cr. P. Code, but by O. 41, C. P. Code, and so it has power to remand a case if it acts in accordance with the rules of O. 41. 124 Ind Cas 827: 49 CLJ 374: 1929 Cr C 54: 31 Cr LJ 750: AIR (Vol 16) 1929 Cal 428 (DB).

**(d) Summary disposal.**

——S. 476-B and C. P. Code (V of 1908), O. 41, R. 11 — **Appeal under S. 476-B — High Court if can dismiss it summarily.**

An appeal under S. 476-B of Cr. P. Code against the refusal by a Civil Court to make a complaint under S. 476, Cr. P. Code, can be summarily rejected by the High Court. AIR (Vol 34) 1947 All 176: ILR (1947) All 401: 1947 AWR (HC) 5: 1947 ALW 26: 1947 OWN (HC) 12: 1947 ALJ 4: 1947 A Cr C 21 (1): 231 Ind Cas 364 (DB).

——S. 476-B — An appeal against the complaint itself necessarily includes an appeal against the order finding that the complaint should be made. Before the Court can come to a proper decision as to what order should be passed under S. 476-B, Criminal P. C., it must necessarily have before it the order of the Court under S. 476, Criminal P. C., recording the finding in pursuance of which the complaint is made, and while S. 476-B of the Code would also make it appear necessary that a copy of the complaint itself should be upon the record it does not justify a Court in summarily dismissing an appeal when no certified copy of the complaint is on the record, without giving the appellant a reasonable opportunity for making good this defect, when there is already on the record a certified copy of the order finding that it was expedient in the interest of justice that a complaint should be made. AIR (Vol 30) 1943 Sind 96: ILR (1942) Kar 371: 44 Cr LJ 521: 206 Ind Cas 437 (DB).

——S. 476-B — Powers of superior Courts.

Appeals under S. 476-B are subject to all the provisions applicable to criminal appeals as laid down in S. 419 and the following sections. Held, that such an appeal can be disposed of summarily by the District Magistrate under S. 421, Cr. P. Code. AIR (Vol 18) 1931 Cal 3: 34 CWN 923: 32 Cr LJ 325 (DB).

——S. 476-B — Section 421 applies to appeals under S. 476-B. AIR (Vol 18) 1931 Pat 339: 32 Cr LJ 736: 12 PLT 516: 131 Ind Cas 536 (DB).

**(e) Stay of criminal proceedings.**

——S. 476B — Stay of criminal proceedings.

In his revenue capacity, the Deputy Commissioner has no authority to stay criminal proceedings pending before a Sub-Divisional Magistrate. Whether a Deputy Commissioner acts in his revenue or magisterial capacity. S. 476-B, Criminal P. C., only empowers him as a superior Court to direct the withdrawal of a complaint or, as the case may be, itself make the complaint which the Subordinate Court might have made under S. 476. He has no power to stay criminal proceedings until the disposal of a civil suit. AIR (Vol 18) 1931 Pat 411: 12 PLT 671: 33 Cr LJ 147: 135 Ind Cas 513.

**6. Procedure.**

——Ss. 476-B, 476, 476-A — Chap. XXXI, Criminal P. C., applies to appeals under S. 476-B.

Sections 476, 476-A, 476-B are not self-contained and the provisions of Chap. XXXI, Criminal P. C., can be applied to the hearing of an appeal under S. 476-B. AIR (Vol 21) 1934 Mad 52: 38 LW 940: 35 Cr LJ 392: 1933 MWN 1476: 65 MLJ 873: 57 Mad 177: 147 Ind Cas 351 (FB).

——S. 476-B — Irregularity.

Disposing of appeal summarily not on material before Court but in light of Court's knowledge in connexion with appeal in other case amounts to irregularity. AIR (Vol 18) 1931 Cal 3: 1931 Cr C 35: 34 CWN 923 (DB).

——S. 476-B — Reversal of order — Appellate Court must file complaint when appeal is allowed and not the lower Court.

In an appeal under S. 476-B, the District Judge found that there was sufficient justification for placing a party on trial for forgery and directed the lower Court to file a complaint.

Held, that the only person who was competent to make the complaint was the District Judge himself and the order directing the lower Court to file the complaint was without jurisdiction and must be set aside. AIR (Vol 16) 1929 Cal 195: 55 Cal 1277: 115 Ind Cas 36 (DB).

——S. 476-B — Notice.

According to S. 476-B, notice is to be sent to the parties concerned. In an appeal against a refusal to make a complaint the parties entitled to receive notice will be the accused persons. But if the appeal were by the person against whom a complaint has been made, the opposite a party is the Crown, as in all other criminal cases, and no notice to the complainant is necessary. (1928) 106 Ind Cas 584: 9 AI Cr R 395: 29 PLR 128: 29 Cr LJ 72.

——S. 476-B — Irregularity.

Order by Collector as appellate Court on appeal to him described as District Magistrate is not invalid. AIR (Vol 13) 1926 All 402: 93 Ind Cas 987: 7 LRA Cr 118: 27 Cr LJ 523.

**7. Revision.**

See also Cr. P. C. Secs. 195, 439 and 476 and Civil P. C. Sec. 115.

——S. 476-B — A Revenue Court deciding an appeal under S. 476-B, Criminal P. C., is not a Court subordinate to the High Court and, therefore, an order passed under the section by such Court is not open to revision under S. 115, Civil P. C. AIR (Vol 31) 1944 Oudh 23: 1943 OWN 176: 44 Cr LJ 757: 1943 AWR 41: 19 Luck 245: 208 Ind Cas 247 (DB).

——S. 476-B — Where the applicant, who was party to a civil suit, had filed a false written statement and had given evidence to substantiate the defence therein set out and was not a mere witness who, under stress of cross-examination, made false statements which later, in the same deposition, he withdrew and admitted to be false, and the Appellate Court ordered his prosecution for perjury, it must be deemed that the Appellate Court has exercised its discretion judicially and the High Court will not interfere in revision. AIR (Vol 31) 1944 Sind 170: 45 Cr LJ 813: ILR (1944) Kar 7: 215 Ind Cas 149 (DB).

——S. 476-B — Section 476-B, Criminal P. C., is not exhaustive so that High Court's powers in revision are not limited by the powers of appeal conferred by that section. AIR (Vol 28) 1941 Sind 217: ILR (1941) Kar 422: 43 Cr LJ 259: 197 Ind Cas 774 (DB).

——S. 476-B — District Judge overlooking right of appeal under S. 476-B — Revision by High Court.

When a Court of District and Sessions Judge has overlooked the alternative of an appeal before him under S. 476-B, Criminal P. C., it would be quite within the powers of the High Court to revise the order of such a Court on the ground that he had refused to exercise the jurisdiction which was vested in him by law, and the High Court can then make a complaint itself, or send to the Sessions Judge for disposal of the appeal. AIR (Vol 27) 1940 Lah 292: 41 Cr LJ 843: 190 Ind Cas 178 (DB).

——S. 476-B — No appeal but revision lies from appellate order of Sessions Judge.

No appeal but only revision lies from an appellate order of Sessions Judge upon an application under S. 476, Criminal P. C., ordering prosecution under S. 211, I. P. C. AIR (Vol 26) 1939 Pat 178: 5 BR 203: 40 Cr LJ 157: 179 Ind Cas 167.

——Ss. 476-B, 439 —Revision, whether under S. 439, Criminal P. C., or S. 115 Civil P. C.

Applications in revision from an order under S. 476-B Criminal P. C., by a Civil Court to the High Court should be heard nad decided in accordance with the provisions of S. 439, Criminal P. C. It is not essential to determine whether the Court which passes an order under S. 476-B is technically a Criminal Court or not. It is certainly a Court which is exercising jurisdiction in a criminal matter, and orders passed by it can be revised by the High Court under S. 439. Not only does the procedure relating to criminal appeals apply to a proceeding under S. 476-B, but any order made under the setion can be revised by the High Court under S. 439 and the provisions of S. 115, Civil P. C., do not apply to such a case. Once the matter has been brought to the attention of the High Court, the High

Court can act in revision under S. 439 whatever the method adopted in bringing the matter to its attention. AIR (Vol 25) 1938 Bom 225: 40 Bom LR 297: 39 Cr LJ 495: ILR (1938) Bom 381: 174 Ind Cas 780 (FB).

——S. 476-B — Order of Munsif refusing under S. 476 to file a complaint is an order as referred to in S. 22, Bengal Agra and Assam Civil Courts Act, XII of 1887. AIR (Vol 25) 1938 Cal 463: 42 CWN 586: 68 CLJ 86: ILR (1938) 2 Cal 287: 176 Ind Cas 823 (DB).

——S. 476-B — Where a Civil Court exercises the special jurisdiction granted by Ss. 476, 476-A and 476-B Criminal P. C., it does so as a Civil Court and not as a Criminal Court. AIR (Vol 23) 1936 Pesh 87: 161 Ind Cas 270.

——S. 476-B — Complaint by Munsif under S. 476 is not an order within the meaning of S. 22, Beng., Agra and Assam Civil Courts Act. AIR (Vol 22) 1935 All 696: 58 All 85: 1935 ALJ 943: 1935 AWR 259: 161 Ind Cas 322 (DB).

**——S. 476-B — Revision under S. 115, Civil P. C.**

The High Court can revise under S. 115, Civil P. C., the proceedings of a Civil Court taken under S. 476-B, Criminal P. C. But it does not follow from this that the procedure of a Civil Court in hearing an appeal under S. 476-B must be taken to be that allowed by the Civil P. C. Proceedings under S. 476-B are more of a criminal than of a civil nature. AIR (Vol 21) 1934 Mad 52: 38 LW 940: 35 Cr LJ 392: 1933 MWN 1476: 65 MLJ 873: 57 Mad 177: 147 Ind Cas 351 (FB).

**——S. 476-B — Under S. 115, Civil P. C.**

Where the District Judge considering it undesirable that proceedings under S. 476, Criminal P. C., should be initiated at the instance of a private party, makes an order withdrawing the complaint, an application for revision against the order is governed by S. 115, Civil P. C., and cannot be interefered with unless he had no jurisdiction to pass the order or that he had acted in excess of his jurisdiction. AIR (Vol 21) 1934 Pat 55 (1): 35 Cr LJ 432 (2): 147 Ind Cas 535.

——S. 476-B — Applications under Ss. 476, 476-A and 476-B, Criminal P. C., originating in Civil Courts must be dealt with according to provisions of Civil P. C. AIR (Vol 18) 1931 Cal 604: 35 CWN 775: 33 Cr LJ 38: 59 Cal 68: 134 Ind Cas 1063 (DB).

——S. 476-B — Where an order is passed under S. 476-B the High Court can interfere with the same only if it falls within one of the grounds mentioned in S. 115, C. P. Code. AIR (V 17) 1930 Cal 721: 34 CWN 914: 52 CLJ 87: 1930 Cr C 1129 (DB).

**——S. 476-B — "Sanction" can be altered into "a complaint" in revision.**

The form of order containing words "Sanction the prosecution of accused" can be altered by High Court in revision into "make a complaint against accused." AIR (Vol 13) 1926 All 402: 93 Ind Cas 987: 7 LRA Cr 118: 27 Cr LJ 523.

——S. 476-B — Order under S. 476-B, though under extraordinary cases could be revised are not ordinarily speaking revisable where the lower appellate Court withdraws the complaint laid under S. 476, Cr. P. Code. AIR (Vol 11) 1924 Bom 347: 81 Ind Cas 947: 48 Bom 401: 26 Bom LR 289: 25 Cr LJ 1123 (DB).

**8. Right of appeal.**

**(a) General.**
**(b) Abatement.**

**(a) General.**

——S. 476-B — An appeal under S. 476-B can only be filed from an order containing a complaint or from an order refusing to make a complaint giving reasons i.e., from an order equivalent to a judgment. AIR (Vol 31) 1944 All 40: 1943 AWR 286(1): 1943 ALJ 566: 45 Cr LJ 403: ILR (1944) All 18: 211 Ind Cas 481.

**——S. 476-B—Appeal against dismissal in default.**

Section 476-B gives an appeal against a refusal to make a complaint, not against a dismissal in default. AIR (Vol 27) 1940 Lah 526: 42 Cr LJ 324: 192 Ind Cas 863.

——S. 476-B—Provincial Insolvency Act, 1920, Ss. 69, 70, 75 (3) — Order of District Judge sitting in insolvency under S. 70 — Appeal under S. 476-B is incompetent — Appeal lies under S. 75 (3) of the Act only by leave of District Judge or High Court. AIR (Vol 26) 1939 Cal 264: 42 CWN 787: 40 Cr LJ 335: ILR (1939) 2 Cal 478: 180 Ind Cas 237 (DB).

——S. 476-B — An appeal lies under S. 476-B Criminal P. C., when a complaint has been filed and prosecution has been ordered by the trying Magistrate. AIR (Vol 23) 1936 Lah 828: 38 PLR 16: 37 Cr LJ 1043: 164 Ind Cas 1057.

——S. 476-B — When complaints under S. 476 are made against several persons, though by a single order, the persons complained against must prefer separate appeals under S. 476-B. AIR (Vol 20) 1933 Mad 125: 34 Cr LJ 92: 1933 MWN 100: 140 Ind Cas 756.

——S. 476-B — The remedy open to a person aggrieved by a complaint under S. 476, Criminal P. C. should be limited to an appeal under S. 476-B and it is not permissible to call the complaint in question in the course of an appeal against conviction. AIR (Vol 19) 1932 Cal 545: 34 Cr LJ 39 (2): 55 CLJ 336: 140 Ind Cas 544 (DB).

——S. 476-B — Appeals under S. 476-B are subject to all the provisions applicable to criminal appeals as laid down in S. 419, and the following section. That being so the provisions of S. 421 apply to them just as to ordinary criminal appeals. AIR (Vol 18) 1931 Cal 3: 34 CWN 923: 1931 Cr C 35: 32 Cr LJ 325 (DB).

——S. 476-B — The terms of S. 476-B provide for an appeal even where a complaint is filed by a Judge not at the instance of an appellant, but suo motu. 30 Cr. L. J. 163, Not Appr. AIR (Vol 18) 1931 Mad 16: 32 Cr LJ 200: 1930 MWN 991: 32 MLW 513 (DB).

**——S. 476-B — Action undertaken by Court suo motu — Appealability.**

Held, that an appeal under S. 476-B lies even if action under S. 476 has been taken by the Court suo motu and not on the complaint filed by a private person. (1930) 31 Punj LR 153: 12 Lah LJ 29: 127 Ind Cas 711: 32 Cr LJ 20 (1).

**——S. 476-B—Finding of expediency—Omission to record finding — Party not prejudiced — Proceeding if vitiated.**

Under S. 476-B it is not necessary for an appeal to be filed that there should be a finding recorded in writing that further enquiry is expedient in the interest of justice. Under that section the mere fact that a complaint has been made opens the way to an appeal. Where it appeared that the accused could have appealed against a complaint filed by an Income-tax Officer though there was no finding, and it also appeared that the appeal would have been of no value even if it had been preferred, because the appellate In-

come-tax Officer was really the person who ordered the filing of the complaint, held, that the proceeding was not vitiated. Effect of the use of word 'may' in S. 476-B considered. AIR (Vol 17) 1930 Rang 201: 125 Ind Cas 266: 8 Rang 25: 1930 Cr C 661: 31 Cr LJ 793.

**——S. 476-B — Court taking action under S. 476 not being moved by any party — Appeal.**

Where a Court takes action under S. 476 not being moved by a party, an appeal under S. 476-B lies. The word "such" before the word "complaint" in the third line of the authorized edition of the Code refers to a complaint "under Ss. 476 or 476-A." The word "such" has no reference to the case of a complaint being filed at the instance of a party. AIR 1929 Lah 9 Diss. from. AIR (Vol 16) 1929 All 899: 120 Ind Cas 113: 1930 ALJ 203: 1929 Cr C 491: 52 All 79 (DB).

**——S. 476-B — No appeal lies from complaint made by appellate Court under S. 476-B.**

No appeal is allowed from a complaint made by an appellate Court under S. 476-B. An appeal can only lie if the appellate Court takes action under S. 476-A. It is open to a person interested to move the appellate Court direct and if the trial Court has not passed any order in the matter, the appellate Court may make the complaint without the intervention of the trial Court. In such a case an appeal would lie to the High Court. AIR (Vol 16) 1929 All 898: 120 Ind Cas 116: 10 LRA Cr 147: 30 Cr LJ 1148: 13 AI Cr R 1: 1929 Cr C 490.

**——S. 476-B — Right of appeal is given whether Court acts suo motu or on application.**

Section 476-B gives a right of appeal to two different persons against two separate judicial acts of a Court, first to an applicant whose application to have a complaint lodged under S. 476 or S. 476-A, has been refused and second to the person against whom a complaint under S. 476 or S. 476-A has been lodged. The provisions give right of appeal to any person against whom a complaint has been made by Court acting under the provisions of S. 476 or S. 476-A and it is immaterial whether the Court acts suo motu or on an application made to it by some interested person. AIR (Vol 16) 1929 Lah 641: 119 Ind Cas 265: 30 Cr LJ 1019: 1929 Cr C 205: 31 PLR 464: 11 Lah 55 (DB).

——S. 476-B — The words: "such a complaint," in S. 476-B mean a complaint made on an application. No appeal therefore lies from a complaint made by a Magistrate at his own instance and not on somebody's application. AIR (Vol 16) 1929 Lah 9: 113 Ind Cas 537: 30 Cr LJ 163: 12 AI Cr R 108.

——S. 476-B — The right of appeal given by S. 476-B, Cr. P. Code, is restricted to offences referred to in S. 195, sub-S. (1), cl. (b) or (c) and no right of appeal is given by S. 476-B in respect of any offence referred to in S. 195, sub-S. (1) cl. (a). AIR (Vol 14) 1927 All 828: 8 AI Cr R 55: 8 LRA Cr 101: 102 Ind Cas 483: 28 Cr LJ 547.

——S. 476-B — Where Election Commissioners passed an order purporting to act as a Civil Court under S. 476, Cr. P. Code.

Held, that appeal lay from their order, although passed without jurisdiction. AIR (Vol 12) 1925 All 737: 89 Ind Cas 630: 47 All 934: 23 ALJ 845 (DB).

**(b) Abatement.**

**——S. 476-B — Death of appellant — Appeal abates.**

The language of S. 476-B does not indicate that any legal representative of the deceased appellant may file an appeal, or support it on the death of the appellant. Hence on the death of the appellant the appeal abates. But S. 404 has no application to the case. AIR (Vol 12) 1925 All 620: 87 Ind Cas 608: 47 All 359: 26 Cr LJ 1008: 6 LRA Cr 85.

**9. Scope.**

——S. 476-B — Civil Revenue Court acting under S. 476-B cannot be treated as a Criminal Court. AIR (Vol 28) 1941 Rang 163: 1941 Rang LR 90: 42 Cr LJ 735: 195 Ind Cas 444 (DB).

——S. 476-B — Sections 476-A and 476-B do not talk about dismissing an application but in the one case of rejecting it and in the other of refusing to make a complaint on application. AIR (Vol 27) 1940 Lah 526: 42 Cr LJ 324: 192 Ind Cas 863.

**——S. 476-B — Proceedings are of criminal character.**

The proceedings under S. 476-B are of a criminal character and not of a civil character irrespective of wether the order was passed by a Civil, Criminal or Revenue Court. AIR (Vol 24) 1937 Rang 526: 173 Ind Cas 810.

——S. 476-B — Section 476-B is not exhaustive but provides powers supplementary to those given by Chap. XXXI, Criminal P. C. AIR (Vol 18) 1931 Cal 604: 35 CWN 775: 33 Cr LJ 38: 59 Cal 68: 134 Ind Cas 1063 (DB).

**——S. 476-B — Interpretation — "Or against whom such a complaint has been made" — Meaning indicated.**

The phrase "or against whom such a complaint has been made" means that the right of appeal is given to any person against whom a complaint has actually been made. The nature of the complaint is referred to or defined by the use of the word "such" which relates back to the words "complaint under S. 476 or S. 476-A." AIR (Vol 16) 1929 Lah 641: 119 Ind Cas 265: 30 Cr LJ 1019: 1929 Cr C 205: 31 Punj LR 464: 11 Lah 55 (DB).

**——S. 476-B — Meaning of words "and if it makes such complaint, the provisions of that section shall apply accordingly".**

The words "and if it makes such complaint, the provisions of that section shall apply accordingly" refer to the procedure laid down in S. 476 about the filing of such complaints and not to the act of making the complaint. AIR (Vol 16) 1929 Nag 281: 119 Ind Cas 703: 25 NLR 192: 30 Cr LJ 1098: 1929 Cr C 458.

**10. Second appeal.**

**——Ss. 476-B, 476 — Appeal from order.**

Where the Sub-Deputy Magistrate refuses to direct prosecution of a witness under S. 476, Criminal P. C., for an offence under S. 193, I. P. C., but the District Magistrate under S.476-B, directs the prosecution, there is no right of appeal against this order. AIR (Vol 25) 1938 Pat 19: 18 PLT 917: 39 Cr LJ 181: 4 BR 186: 17 Pat 9: 172 Ind Cas 899 (FB).

**(Overrules AIR (Vol 13) 1926 Pat 81: 27 Cr LJ 641: 94 Ind Cas 593 and AIR (Vol 18) 1931 Pat 343: 10 Pat 446: 133 Ind Cas 683).**

**——Ss. 476-B, 476, 476-A — From order of District Judge, under S. 476-B no second appeal lies to High Court.**

Under S. 476-B, Criminal P. C., a right of appeal is given to the person against whom such a complaint has been made, and such a complaint means in the context, a complaint under S. 476 or S. 476-A, and the section does not, in terms, give a right of appeal against a complaint made under the section itself, that is to say, under S. 476-B. Where the Subordinate Judge refuses to prosecute and the District Judge sets aside the order and files a complaint under S. 476-B, Criminal P. C., no second appeal lies to the High Court. AIR (Vol 22) 1935 Bom 157: 37 Bom LR 106: 59 Bom 340: 36 Cr LJ 981: 156 Ind Cas 713 (DB).

——S. 476-B — No appeal lies to the High Court against an order made by an Appellate Court in the exercise of its authority under S. 195 (1) (a), Criminal P. C., directing the institution of a complaint under S. 186, I. P. C. AIR (Vol 18) 1931 All 630 (1): 1931 ALJ 366: 53 All 594: 132 Ind Cas 419 (DB).

——S. 476-B — **Complaint by Appellate Court — Second appeal, competency of.**

Where an Appellate Court has made a complaint under S. 476-B, Criminal P. C., or refused to make a complaint, no further appeal lies to the High Court.

Where certain proceedings under S. 476-B, Criminal P. C., were wrongly headed as "In the Court of the Sessions Judge of Meerut" and were given a number as "Criminal Appeal No. 403 of 1929" but were signed by the presiding officer as District Judge:

Held, that the officer must be held to have acted as District Judge and the mistake in the heading did not vitiate the proceedings. AIR (Vol 18) 1931 All 305: 32 Cr LJ 367: 1931 ALJ 117: 53 All 416: 129 Ind Cas 264 (DB).

——S. 476-B — **Second appeal.**

Order under S. 476-B is not appealable. 116 Ind Cas 638: 33 CWN 285: 49 CLJ 342: 30 Cr LJ 658: 56 Cal 824: 13 AI Cr R 103: AIR (Vol 16) 1929 Cal 172 (DB).

——S. 476-B — The policy of the Code is not to allow two appeals in criminal matters and no appeal lies under the provisions of the Code against an order made by an appellate Court under S. 476-B. AIR 1926 Pat 81, Not Foll. 119 Ind Cas 703: 25 NLR 192: 30 Cr LJ 1098: 1929 Cr C 458: AIR (Vol 16) 1929 Nag 281.

——S. 476-B — The view that an appeal lies under S. 476-B from an order of the appellate Court making a complaint after a Subordinate Court has refused to do so requires re-examination by Patna High Court. 117 Ind Cas 878: 8 Pat 428: 30 Cr LJ 834: 1929 Cr C 158: AIR (Vol 16) 1929 Pat 367 (DB).

——S. 476-B — **There is only one appeal from the decision on an application for making complaint.**

The policy of the law, as laid down in S. 476-B is this that, whenever there is a decision by a Court upon an application that a complaint shall be made, whether that decision be one way or another, there is no appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first time ordered to be prosecuted by the superior Court, his remedy after that is to take his defence before a jury or Magistrate, according to the nature of the case. Two Courts, and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not. 106 Ind Cas 711: 55 Cal 765: 32 CWN 164: 29 Cr LJ 119: AIR (Vol 15) 1928 Cal 281 (DB).

——S. 476-B — No appeal lies under S. 476-B to the High Court from an appellate order of the District Judge making a complaint on appeal from the refusal of the District Munsif to make complaint on an application made to him under S. 476. The policy of the legislature seems to be to allow only one appeal against orders that may be passed under S 476 and not to allow an appeal and a second appeal against such orders. AIR 1926 Pat 81, Diss. 111 Ind Cas 114: 51 Mad 777: 28 MLW 134: 10 AI Cr R 480: 1 M Cr C 152: 29 Cr LJ 786: AIR (Vol 15) 1928 Mad 506: 55 MLJ 444 (DB).

——S. 476-B — Where a Court of first instance consents or refuses to prosecute, whether the appellate Court upholds or reverses its order, there is only one appeal and no second appeal lies. AIR 1926 Pat 81, Diss. 114 Ind Cas 812: 5 OWN 882: 4 Luck 155: 30 Cr LJ 382: AIR (Vol 15) 1928 Oudh 494 (DB).

——S. 476-B — Order of lower appellate Court, directing complaint under S. 476 on appeal from trial Court's refusal to make a complaint, is not appealable — It may be revised. AIR 1926 Pat 25, Diss. from; 105 Ind Cas 457: 5 Rang 523: 28 Cr LJ 937: AIR (Vol 14) 1927 Rang 313.

——S. 476-B — **First Court refusing to make complaint — Appellate Court allowing appeal and itself making a complaint — Appeal lies to High Court.**

An appeal lies under S. 476-B of the Cr. P. Code to the High Court from an appellate order of the District Judge making a complaint which the first Court might himself have made but refused to make. (6 Lah 56, Diss.; Cr. Rev. 5 of 1925, Affirmed.) Upon a proper construction of Ss. 476, 476-A and 476-B taking for the sake of illustration the three ascending Courts as Munsif, District Judge and High Court there would lie an appeal from the District Judge to the High Court (a) where the Munsif has refused on application made to him under S. 476 to make a complaint, where there has been an appeal to the District Judge and where the District Judge disagreeing with the Munsif, has made a complaint, (b) where under S. 476-A the Munsif has taken no action suo motu and has not been asked to take any action the District Judge has (a) on application to him made a complaint, (b) on application to him has refused to make a complaint. The same reasoning would apply to any other chain of three Courts (contemplated by S. 476) of ascending jurisdiction. 94 Ind Cas 593: 5 Pat 262: 7 Pat LT 114: 1926 PHCC 89: 27 Cr LJ 641: AIR (Vol 13) 1926 Pat 81 (DB).

——S. 476-B — **Party prejudicially affected has a right of appeal.**

Section 476-B appears to contemplate that if an appellate Court sets aside the order of the original Court the party prejudicially affected has a right of appeal to the Court to which appeals from that appellate Court ordinarily lie. 90 Ind Cas 445: 7 Pat LT 199: 26 Cr LJ 1565: AIR (Vol 13) 1926 Pat 25.

——S. 476-B — Appellate order making complaint — No appeal lies to High Court. 88 Ind Cas 528: 6 Lah 56: 7 LLJ 584: 26 Cr LJ 1168: 26 PLR 199: AIR (Vol 12) 1925 Lah 322 (DB).

——S. 477.

——S. 477 — **False evidence — Proceedings under that section when taken.**

Section 477 of the Code of Criminal Procedure deals with cases which transpire before the Court of Session itself and in which the Sessions Judge is in a position to declare without any further inquiry that the person against whom action is necessary under that section has in fact committed an offence mentioned in S. 195, Cr. P. C. (1901) 5 CWN 630 (633) (DB).

——S. 477 — **False evidence — Charge — Arrest — Bail.**

There is no warrant in law for an order by a Sessions Judge directing a witness alleged to have given false evidence in a judicial proceeding before him to give security to appear before him when called upon to answer charges yet to be framed under S. 193 of the Indian Penal Code. (1901) 5 CWN 630 (630) (DB).

——S. 477 — **Charge — Commitment — Penal Code, S. 123 — False evidence — Specific charge.**

Section 477 of the Code of Criminal Procedure contemplates that there should be a charge upon which the commitment is based; in other words, the person accused of having committed the offence

should know the specific nature of the accusation against him so as to be able to answer it. Where an order was made directing a witness to give bail before a Court of Session and to appear when called upon before such court to answer charges under S. 193, I. P. C., without any reference to the specific false statement alleged to have been made by the witness in the course of a judicial proceeding, it was held that the order could not be regarded as a commitment under S. 477, Cr. P. C. Such an order is not warranted by law and is without jurisdiction. (1901) 5 CWN 615 (616, 617) (DB).

——S. 477 — **'May commit'.**

Section 477 of the Code of Criminal Procedure is an empowering section and authorises a Court of Session when an offence referred to in S. 195 of the code has been committed before it or brought under its notice as mentioned in the section, to charge the offender and to commit or admit to bail and try him upon its own charge. The word 'may' in S. 477 ought not to be read as meaning 'must'. There is no warrant for the view that it should be so read. (1901) 5 CWN 609 (612): 28 Cal 434 (DB).

——S. 477 — **Procedure — Charge, framing of, condition precedent — Prima facie inquiry.**

Having regard to the phraseology of the law, if a Court of Session proceeds to take action under S. 477, it must, in the first instance, frame a charge so as to enable the accused to know the exact nature of the offence he is alleged to have committed; the Court of Session may then either commit the accused for trial before itself upon the charge so framed or admit him to bail for the same purpose.

Where there is no prima facie case against the person accused and a preliminary enquiry is necessary to determine whether there is any such prima facie case, it is improper and illegal for a Sessions Judge to have a person arrested and committed to jail in view of such inquiry before a charge is framed or a commitment made. (1901) 5 CWN 609 (612): 28 Cal 434 (DB).

——S. 478.

——Ss. 478, 213, 215 — **Commitment can be quashed only on a point of law.**

Under S. 215, Criminal P. C., a commitment once made under S. 213 by a competent Magistrate or by a Civil or Revenue Court under S. 478, can be quashed by the High Court and only on a point of law. AIR (Vol 21) 1934 Oudh 185 (2): 11 OWN 556: 148 Ind Cas 653 (1).

——S. 478 — **Revenue Court.**

Revenue Court is not barred from proceeding under S. 478 with regard to offence committed in mutation proceedings. 5 Luck 435: 124 Ind Cas 364: 31 Cr LJ 679: 1930 Cr C 154: 6 OWN 953: AIR (Vol 17) 1930 Oudh 58.

——S. 478 — **Appeal.**

The Code permits no appeal against an order under S. 478. The powers of the District Magistrate under S. 435 and the following sections are confined to interference with criminal Courts subordinate to himself. When, therefore, a Magistrate does not pass an order as a Criminal Court but as a revenue Court the District Magistrate has no jurisdiction to revise his order. 5 Luck 435: 124 Ind Cas 364: 31 Cr LJ 679: 1930 Cr C 154: 6 OWN 953: AIR (Vol 17) 1930 Oudh 58.

——S. 478 — **Civil Court — Proceedings started under S. 476 — Court has option to commit the accused to Sessions Court under S. 478.**

Under S. 478 the civil Court before whom proceedings are started has the option either of sending the case to a Magistrate under S. 476 or of committing it direct to the Court of Session, and he is not debarred from the exercise of that option because by passing an order under S. 478 he would deprive the person accused of the offences of a right of appeal as there is no appeal against an order passed under S. 478. 49 All 898: 25 ALJ 555: 8 AI Cr R 85: 103 Ind Cas 204: 8 LRA Cr 113: 28 Cr LJ 668: AIR (Vol 14) 1927 All 571.

——Ss. 478, 190, 195 — **Penal Code, S. 193 — Prosecution for perjury — Deposition before Assistant Judge — Trial by the same officer as District Magistrate.**

An Assistant Judge before whom a witness gave a false deposition, took cognizance of the case as a District Magistrate under S. 190 (c) of the Code of Criminal Procedure on the statement in the deposition. To this course an objection was taken that sanction was required under S. 195 of the Code and that action taken by the officer as District Magistrate was not tantamount to a sanction by him as a Civil Judge.

Held, that the action taken by the officer was in effect action which as a Civil Judge he was perfectly competent to take under S. 478 of the code as the offence was brought to his notice as a civil court in the course of a judicial proceeding. As Civil Judge he could either transfer the case to himself as a Magistrate for inquiry or complete the inquiry as a Civil Judge and commit the accused. (1907) 9 Bom LR 212 (220): 5 Cr LJ 202 (DB).

——S. 480.

——S. 480 — **Applicability — Contempt committed out of Court's view — Procedure for trial.**

The special provisions of S. 480, Cr. P. Code, come into operation only where the contempt is committed in the view of or in the presence of the Court. If the contempt is committed out of the view and not in the presence of the Court, the trial will have to take place in accordance with the usual procedure laid down for the trial of other offences. ILR (1948) 2 Cal 50: 52 CWN 336.

——Ss. 480 and 482 — **Scope — Proceedings started by notice to show cause against committal for contempt — Judge having no intention of proceeding further in normal way or sending complaint to first class Magistrate — Effect on proceedings.**

The normal procedure in the case of a contempt of Court, committed in the presence of the Court, is prescribed by Ss. 480 and 482, Cr. P. Code. Where the Judge starts by serving a notice to show cause against committal for contempt, but has no intention of proceeding further in any of the ways prescribed by the Code for dealing with a contempt committed in the presence of the Court, or to make a complaint to a magistrate of the first class, the record that he makes cannot be the foundation for an order against the accused in relation to the alleged contempt of Court. 13 BR 358: 48 Cr LJ 327: AIR (Vol 35) 1948 Pat 74: 220 Ind Cas 234.

——Ss. 480 and 482 — **Procedure — Court not taking cognizance of offence before rising on same day — Subsequent forwarding of case to Magistrate — Legality — Jurisdiction of Court to try.**

Section 482, Cr. P. Code, is employed by a Court only when offences mentioned in S. 480 are committed in its view or presence. The words "disposed of" in the section presuppose that cognizance has been taken under S. 480 of one of the offences mentioned therein. When cognizance has not been taken by the Court before it has risen for the day, it cannot act under S. 482, Cr. P. Code. The Court is not, of course, bound to forward the case to a Magistrate on the same day on which the offence is committed, under S. 482. But cognizance of the offence must be taken on the same day before the Court rises, if resort is had to S. 482. If such cognizance is not taken, and if the Court still

wishes to take proceedings it can do so under S. 476, but not under S. 482. The failure to take cognizance on the same day is fatal to his taking subsequent action under S. 482. Taking cognizance in accordance with S. 480, being a condition precedent to the application of S. 482, an order forwarding the case to another magistrate for trial without complying with the condition precedent is contrary to law; a trial had upon a case so forwarded is therefore without jurisdiction, notwithstanding committal to a Court of Session. AIR (Vol 35) 1948 Sind 97: 49 Cr LJ 327 (DB).

——Ss. 480, 486 (2) and 413 — **No appeal lies.**

Sentence of fine of Rs. 10 inflicted under S. 480 by the Sub-Divisional Magistrate having first class powers, is not appealable in view of S. 413. Section 413 applies to the appeal in view of S. 486 (2). AIR (Vol 31) 1944 Cal 382: ILR (1944) 1 Cal 31: 46 Cr LJ 17: 215 Ind Cas 132 (DB).

——S. 480 — **Sentence on subsequent day.**

The Magistrate cannot fine a person offering an insult to him without a trial, and the only power conferred upon the Court by that section is to take cognizance and impose a sentence on the same day. AIR (Vol 29) 1942 Bom 206 (1): 44 Bom LR 439: 43 Cr LJ 769: 201 Ind Cas 606 (DB).

——Ss. 480, 486 (1), 407 (2) and (1) — **Appeal, where lies.**

An appeal lies against a sentence imposed under S. 480 only under S. 486 (1) to the Court to which decrees or orders made in such Court are ordinarily appealable.

Section 407 (2) cannot properly apply to appeal under S. 486 (1). The District Magistrate must himself dispose of the appeal according to law. AIR (Vol 29) 1942 Mad 181: 54 LW 633: (1941) 2 MLJ 852: 1941 MWN 1073 (1): 43 Cr LJ 397: ILR (1942) Mad 587: 198 Ind Cas 549.

——Ss. 480 to 482 — The provisions of S. 482, Criminal P. C., can only be employed where cognizance has already been taken under S. 480, Criminal P. C. In a case of contempt committed coram judice Court has option to proceed under Ss. 480 to 842 or S. 476, Criminal P. C. AIR (Vol 27) 1940 Lah 233: 42 PLR 505: 41 Cr LJ 766: ILR (1941) Lah 145: 189 Ind Cas 628.

——S. 480 — **Debt Conciliation Board under Punjab Relief of Indebtedness Act, 1934, if can take action.**

Under S. 16, Punjab Relief of Indebtedness Act, the Conciliation Board has the powers of a Civil Court and proceedings before it are judicial proceedings. The Board, therefore, has jurisdiction to take action against a party appearing before it for contempt of Court under S. 480, Criminal P. C., and fine him under S. 228, Penal Code. AIR (Vol 25) 1938 Lah 366: 40 PLR 218: 39 Cr LJ 658: 175 Ind Cas 797.

——S. 480 — Where the Magistrate finds that the complainant who has been examined as prosecution witness, is guilty of refusing to answer questions touching a subject on which he was bound to state the truth, and takes proceedings against him under S. 480, Criminal P. C., and convicts him under S. 179, Penal Code, the conviction should be upheld. AIR (Vol 22) 1935 All 267: 36 Cr LJ 446: 1935 ALJ 299: 1935 AWR 123: 153 Ind Cas 907.

——S. 480 — In order to bring a case within S. 228, Penal Code and S. 480, Criminal P. C., it must be shown that the assessor intentionally offered an insult to the Court. AIR (Vol 20) 1933 Bom 478: 35 Bom LR 1025: 35 Cr LJ 107 (2): 146 Ind Cas 550 (2) (DB).

——S. 480 — **Sub-Registrar — If a Court.**

In the absence of a direction by the Local Government as regards the Sub-Registrar being a Civil Court within the meaning of Ss. 480 and 482, Cr. P. Code, an offence under S. 228, Penal Code, if committed before a Sub-Registrar cannot be dealt with under Ss. 480 and 482, Cr. P. Code. 57 Cal 1007: 34 CWN 56: 125 Ind Cas 853: 31 Cr LJ 942: 1930 Cr C 542: AIR (Vol 17) 1930 Cal 366 (DB).

——S. 480 — **Validity of proceedings.**

Nature and stage of proceeding and also of interruption not indicated — Conviction is not justified. 12 AI Cr R 50: 30 Cr LJ 118: 113 Ind Cas 278: AIR (Vol 15) 1928 Rang 280.

——S. 480 — **Action under S. 482, Cr. P. Code.**

Where a Court chooses to act under S. 482 instead of S. 480 in respect of an offence under S. 179, I. P. C., it must give reasons for not taking cognizance under S. 480 itself. 81 Ind Cas 951: 11 OLJ 358: 21 Cr LJ 1127: AIR (Vol 11) 1924 Oudh 402.

——S. 480 — **Contempt what is — Penal Code (1860), S. 228 — Imputation of prejudice to presiding Judge, made in accused's statement is contempt.**

The accused, tried for rioting when asked to make a statement under S. 342, Cr. P. Code called the trial Judge, "a prejudiced Judge." When he was asked to withdraw the statement he refused to do so. The Judge then held a proceeding under S. 480, Cr. P. Code, and the accused was convicted of an offence punishable under S. 228 of the I. P. C. On appeal.

Held, (Shah J., dissenting) that, the accused was guilty of the offence charged, for his intention to offer an insult to the Judge was made out first by the words themselves, and, secondly, by the conduct of the accused.

Per Macleod C. J.:—No system of justice can tolerate unbridled license on the part of a person defending himself or accept, as an excuse for an insult to a Judge that it was necessary for the conduct of the defence or for the establishment of his innocence.

Per Shah J.— It is impossible to hold that in saying what the accused did say his intention was to offer an insult to the Judge. His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was couched in improper language and not to offer an insult to the Judge.

Per Pratt J.— "The only question is whether the insult was intentional, and on this point it is clear that this intention is an inference attaching to the words themselves, and this inference is not rebutted by any excuse as to the motive with which the accused used the words or the object that he thought would be attained by so doing. 66 Ind Cas 821: 46 Bom 973: 24 Bom LR 386: 23 Cr LJ 325: AIR (Vol 9) 1922 Bom 261 (DB).

——S. 480 — **Facts constituting offence — Words used by accused must be recorded with precision — Question is whether insult was intended, not whether Court felt insulted.**

Court must record the facts constituting the offence, and the record must also show the nature of the interruption or insult attributed to the accused. When the guilt or innocence of a person depends upon the exact words used by him, it is obviously the duty of the Magistrate to record them with a reasonable degree of precision, and his omission to record the nature of the insult constitutes a grave defect in the procedure. The question is not whether the Court felt insulted but whether any insult was offered and intended. A

judicial officer has no doubt to maintain the dignity of his Court, but he must not be too sensitive, especially when his own action is not altogether justified. 64 Ind Cas 377: 2 Lah 308: 23 Cr LJ 9: 24 PLR 1922: AIR (Vol 8) 1921 Lah 102.

**——S. 480 — Powers of Court — Contempt.**

The power given by S. 480 does not extend to contempt committed outside the Court, but only to offences committed in the presence of the Court or in its precincts or offices. 23 CWN 389: 20 Cr LJ 373: 50 Ind Cas 981: AIR (Vol 6) 1919 Cal 44 (DB).

**——S. 480 — Walking with creaking shoes.**

Walking into a Court with creaking shoes by a person will not constitute an act of contempt and cannot be punished under S. 480. (1909) 5 MLT 286: 1 Ind Cas 560: 9 Cr LJ 309.

**——Ss. 480, 481 — Contempt — Procedure.**

The directions contained in S. 481 of the Code are mandatory and the omission to record the particulars mentioned in that section in any proceedings taken under S. 480 is fatal to such proceedings. L. R. 2 P. C. 106 (1868) relied on. The principal ingredient of an offence under S. 228, I. P. C., is intentional insult or interruption. (1906) 10 CWN 1062 (1064): 4 Cal LJ 415: 4 Cr LJ 210 (DB).

**——S. 481.**

**——S. 481 — Applicability — Presidency Magistrates.**

Section 481, Criminal P. C., applies to all Courts including those of Presidency Magistrates. The failure of a Presidency Magistrate to comply with the provisions of this section cannot be cured by his explanation offered under S. 441, Criminal P. C. Section 441 does not in any way govern, modify or take away from the effect of the mandatory provisions of S. 481. I L R (1948) 2 Cal 50 : 52 CWN 336.

**——S. 481 (2) — Contempt of Court — Omission** to record nature of and stage at which Court was insulted as required by S. 481 (2), Criminal P.C., is fatal to proceedings and cannot be cured by S. 537, Criminal P. C. AIR (Vol 18) 1931 Nag 193 : 32 Cr LJ 1221 : 14 NLJ 106 : 134 Ind Cas 684.

**——S. 481 — Validity of proceedings.**

Record silent as to state and nature of the proceeding interrupted — Conviction under S. 228, Penal Code, is not proper. AIR (Vol 15) 1928 Lah 357 : 29 PLR 653 : 29 Cr LJ 880 : 11 AI Cr R 78 : 111 Ind Cas 464.

**——S. 481 — Interpretation — 'If any', meaning.**

No person can be punished for contempt of Court which is a criminal offence unless the specific offence charged against him be distinctly stated and an opportunity given him of answering. The words "if any" in S. 481 do not mean that in the special procedure provided by this section an exception to this general rule is provided. All that the expression "if any" indicates is that the Court cannot compel the accused to make a statement but it cannot mean that it should not give him an opportunity to make a statement. AIR (V 10) 1923 Cal 562: 37 CLJ 535: 24 Cr LJ 798: 74 Ind Cas 542 (DB).

**——S. 481 — Statement of accused.**

The order of the Magistrate fails short of the requirements of S. 481 if it does not contain the statement made by the offence. A I R (Vol 10) 1923 Lah 88 : 25 Cr LJ 588 : 81 Ind Cas 76.

**——S. 482.**

**——Ss. 482, 476 — Application under S. 476 to file complaint for offence under S. 175, Penal Code — Application dismissed but complaint made by Court — Complaint transferred to District Court on abolition of Court — Application dismissed but complaint made under S. 482 — Competency.**

An application under S. 476, Criminal P. C., was made to the Subordinate Judge to file a complaint against the defendants for an offence under S. 175, Penal Code. The sub-Court was abolished and the application was transferred to the District Court and it was dismissed on the ground that S. 476, Criminal P. C., was not applicable. But a complaint was made under S. 482, Criminal P. C. :

Held, the complaint was not competent as the District Court did not order the production of any document nor could the alleged offence be said to have been committed in the view or presence of the District Court. (1940) 187 Ind Cas 470 : (1940) 1 MLJ 272 : 41 Cr LJ 465 : 51 LW 230 : 1940 MWN 240 (1).

**——S. 482 — Order, if to be passed on same day the offence occurs.**

Under S. 482, Criminal P. C., the Court merely makes a complaint. The legislature does not limit the right of a Court to make a complaint on the day on which the offence takes place. An order under S. 482, passed subsequently is not invalid. AIR (Vol 23) 1936 All 762 : 1936 ALJ 1056 : 1936 AWR 879 : 38 Cr LJ 55 : 165 Ind Cas 698.

**——S. 482 — Recording of reasons.**

Reasons must be given for proceeding under S. 482 instead of acting under S. 480. AIR (Vol 11) 1924 Oudh 402 : 11 OLJ 358 :25 Cr LJ 1127 : 81 Ind Cas 951.

**——S. 482 — Drawing up of proceedings on the same day that the offence is committed — No necessity for.**

Section 482 does not require the Magistrate to draw up proceedings on the same day that the offence is committed. The section need not be read along with S. 489 of the Cr. P. C. (1908) 7 CLJ 63 (65) : 35 Cal 161 : 7 Cr LJ 95 (DB).

**——S. 486.**

**——S. 486 — Appeal lies against sentence imposed** under S. 480 only under S. 436 (1) to Court to which decrees or orders made in such Court are ordinarily appealable. AIR (Vol 29) 1942 Mad 181 : 54 LW 633 : (1941) 2 MLJ 852 : 1941 MWN 1073 (1) : 43 Cr LJ 397 : ILR (1942) Mad 587 : 198 Ind Cas 549.

**——S. 487.**

**——S. 487 — Scope of — Cognisance of offence — If prohibited.**

Section 487, Criminal P. C., does prohibit a Magistrate from taking cognisance of an offence referred to in S. 195, Cr. P. Code, so long as he does not actually try the case himself. (1950) 54 CWN (2 DR) 71 (DB).

**——S. 487 — A Magistrate, passing an order under** S. 144, Criminal P. C., cannot take cognisance of an offence under S. 188, Penal Code, for disobedience of his own order; he must make a complaint under S. 195 of the Code; S. 487, Criminal P. C., prohibits the trial of the case under S. 188, in these circumstances by the Magistrate. (1936) 61 CLJ 579 : 37 Cr LJ 936 : 39 CWN 1053 : 164 Ind Cas 434 (2) (DB).

**——S. 487 — Applicability.**

A Magistrate cannot try for offences mentioned in S. 195 (a) committed before himself. (1926) 27 Cr LJ 1344: 7 AI Cr R 96: 98 Ind Cas 416.

**——S. 487 — Appeal — Court that heard appeal in sanction proceeding cannot hear appeal from conviction.**

The mandatory provisions of S. 487, Cr. P. C., as amended, clearly prohibit the Sessions Judge from trying any person for any offence referred

to in S. 195 of that Code. The word "try" as used in S. 487 includes the "hearing of an appeal". AIR (Vol 11) 1924 Nag 51 : 25 Cr LJ 713 : 81 Ind Cas 201.

——S. 487 — **Power of Magistrate to try offence coming to his knowledge in the course of judicial proceedings.**

Under S. 487, a Magistrate who takes cognizance of an offence which came to his knowledge in the course of judicial proceedings pending before him, is debarred from trying it himself. AIR (Vol 7) 1920 Oudh 127 : 23 OC 138 : 2 UPLR (JC) 132 : 57 Ind Cas 936.

——S. 487 — **"Magistrate" — Includes Presidency Magistrate.**

The terms of S. 487, Cr. P. C., are wide enough to include Presidency Magistrates. A Presidency Magistrate has no jurisdiction to try a case under S. 188, I. P. C., when the order which is alleged to have been disobeyed was an order which he had himself passed. (1908) 7 CLJ 70 (71) : 12 CWN 246 : 3 MLT 154 : 7 Cr LJ 103 (DB).

——Ss. 487, 556, 476 — **Disqualification of Judges — Personal interest.**

A Sessions Judge is not, by reason merely of having as District Judge ordered an inquiry under S. 476, Cr. P. C., disqualified under S. 487 from trying the case, or hearing an appeal when the case had been tried by a lower Court, nor does this make him personally interested in the case within the meaning of S. 556, Cr. P. C. (Illustration in S. 556, Cr. P. C.) (1903) 7 CWN 708 (710) (DB).

——S. 487 — **Trial by Magistrate who made the order, of persons alleged to have disobeyed it.**

A Magistrate cannot try persons alleged to have disobeyed an order made by himself for such disobedience. (1901) 24 Mad 262 (265) (DB).

——S. 488.

See also Criminal P. C., S. 489.

1. **Against whom order can be passed.**
See also N. 4.
2. **Amount of maintenance.....**
See also Criminal P. C., S. 489.
3. Application **under.**
4. Award **of maintenance.**
5. Cancellation **of order.**
6. Civil **suit.**
7. Compromise.
8. Consent **to live separately.**
9. Costs.
10. Cruelty.
11. Decree **for conjugal rights.**
12. Decree **for maintenance.**
13. Divorce.
14. Enforcement **of order.**
See also N. 7 and Criminal P. C., S. 490.
15. Ex parte **order.**
16. Husband's **offer.**
See also N. 28
17. Jurisdiction.
18. Limitation.
19. Maintenance **to children.**
20. Means **and ability.**
21. Nature **and scope.**
22. Neglect **to maintain.**
23. Procedure.
24. Proof **of marriage.**
25. Refusal **to live with husband.**
26. Unchastity.
27. Wife's **income.**
See also, N. 2.
28. **Appeal and revision.**

**1. Against whom order can be passed.**
See also N. 4.

——S. 488 — **Application by wife — Considerations — Minority or fact of husband not doing any work — Relevancy.**

Though the mere fact of minority of the husband or that he does not work cannot come in the way of making an order for the maintenance of a wife, it is in all cases necessary to ascertain the visible means and the earning capacity of the husband if he is compelled to work. AIR (V 39) 1952 Madh B 96 : 1952 Cr LJ 868.

——S. 488 — **Order, if can be passed against joint family.**

Where, the husband who is a member of a joint Hindu family, is represented by his father in proceedings under S. 488, Criminal P. C., though the Magistrate has to consider what is the property of the family in considering what sum he should award the wife for maintenance, the order should be passed against the husband himself and not against the joint family. A wife, however, cannot be deprived of her right to maintenance nor be debarred from obtaining an order of maintenance nor can she be deprived of her right to enforce the order, even if necessary, by an order sentencing the husband to imprisonment for failure to pay maintenance merely on the ground that the husband is a member of a joint Hindu family, AIR (V 27) 1940 Sind 222 : 42 Cr LJ 278 : ILR (1941) Kar 58 : 192 Ind Cas 340 (DB).

——S. 488 — **Husband, member of joint Hindu family falsely alleged to have committed suicide or been murdered — Husband's father should not be made party but should be called as witness.**

Section 488, Criminal P. C., does not contemplate proceedings against the whole family merely because the husband against whom the proceedings are taken is a member of the joint Hindu family. Where, therefore, the husband is falsely alleged to have committed suicide or been murdered, a more proper course for the Magistrate is to treat the husband's father as a witness and not as a party to the proceedings. AIR (V 27) 1940 Sind 222 : 42 Cr LJ 278 : ILR (1941) Kar 58 : 192 Ind Cas 340 (DB).

——S. 488 — **Against whom can be given.**

A man is not, and ought not to be permitted by his own voluntary act to free himself from the elementary duty of maintaining his wife and children and a poongyi is amenable to the provisions of S. 488, notwithstanding the fact that he has adopted the yellow robe and become a member of the sangha. AIR (V 20) 1933 Rang 138 : 11 Rang 226 : 34 Cr LJ 815 : 144 Ind Cas 187 (2) (FB).

——S. 488 — A man's taking vows and becoming a sadhu cannot affect the status of his wife for the purpose of S. 488, Criminal P. C. AIR (V 19) 1932 Bom 285 : 34 Bom LR 587 : 56 Bom 260 : 33 Cr LJ 625 : 138 Ind Cas 517 (DB).

——S. 488 — **Order against husband's father.**

Under S. 488, Criminal P. C., only a husband can be ordered to make a monthly allowance for the maintenance of the wife. Such an order cannot be passed against the husband's father. AIR (V 18) 1931 Lah 532 : 32 PLR 346 : 32 Cr LJ 1175 (1) : 134 Ind Cas 488.

——S. 488 — An order of maintenance under S. 488 cannot be passed against the father of the husband. (1929) 113 Ind Cas 327 : 30 Cr LJ 135 : 12 AICrR 21 (Lah).

——S. 488 — **A Buddhist priest — Order against.**

A Pongyi is not liable to pay maintenance, the presumption in the case of a Buddhist priest be-

ing undoubtedly that he does not possess any property, except such as is necessary for his religious life and which is held under conditions which do not make it available for other purposes. AIR (V 9) 1922 UB 15 : 72 Ind Cas 974 : 1 Bur LJ 97 : 24 Cr LJ 510.

**——S. 488 — Maintenance order — Legality.**

A wife can claim maintenance from her husband if he ill-treats her ; but husband's father is not liable. Maintenance for a child cannot be ordered if the father is prepared to keep the child. AIR (V 1) 1914 Lah 417 : 21 PWR Cr 1914 : 115 PLR 1914 : 15 Cr LJ 529 : 24 Ind Cas 841.

**2. Amount of maintenance.**

See also Criminal P. C., S. 489.

**(a) Statutory limit.**
**(b) Nature of amount — Only cash.**
**(c) Measure in fixing the quantum.**

**(a) Statutory limit.**

**——S. 488 — Order for payment of annual allowance — Legality.**

Section 488, Cr. P. Code, empowers a Magistrate to fix a monthly allowance for maintenance. There is no provision for an order of payment of annual allowance, or any kind of annual payment. AIR (V 37) 1950 Cal 465 : 87 CLJ 185 (DB).

**——S. 488 — Rs. 100, if maximum maintenance for wife and child together.**

Obiter. — The amount awarded by the Magistrate, Rs. 100 for the wife and Rs. 50 for the child, is not illegal. Under S. 488 (1), sum of Rs. 100 is not the maximum limit of maintenance for wife and child together. AIR (V 26) 1939 Rang 151 : 40 Cr LJ 537 : 181 Ind Cas 377.

**——S. 488 — Wife and her child — Court, if can direct husband to pay Rs. 100 per month to each separately.**

Power is given under S. 488 (1), Criminal P. C., to make an order for the maintenance of the wife "or such child." Therefore, an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the section which says that if an application is made on behalf of the wife, an application shall not lie on behalf of the child. Where a woman makes an application for herself and also for her child, the application can be treated as an application for an order in favour of the petitioner and also for an order in favour of the child, and the husband can be directed to pay Rs. 100 per month for the maintenance of the petitioner and Rs. 100 for the maintenance of her daughter. AIR (V 25) 1938 Mad 721 : 39 Cr LJ 865 : 47 LW 594 : 1938 MWN 424 : (1938) 1 MLJ 821 : ILR (1938) Mad 729 : 177 Ind Cas 334 (DB).

**——S. 488, if precludes granting of lump sum — Future application for maintenance of child — Statutory obligation to maintain child.**

Parties cannot contract themselves out of the statutory obligation to maintain children under the Criminal P. C. The mere fact that S. 488, sub-s. (1), refers to monthly allowances merely shows that the Court has taken the month as a convenient unit whereby to calculate allowances. It does not show that independently of an order of the Court, lump sums cannot be paid for the maintenance of a child. Of course this lump sum is not a complete answer to future applications by the woman. If at any time, she finds that she has nothing left of this sum, she can apply to the Court for a fresh order for maintenance, and there will be no obstacle then to this fresh order in the fact that this lump sum had been paid on a previous occasion. AIR (V 24) 1937 Rang 246: 38 Cr LJ 913 : 170 Ind Cas 13.

**——S. 488 — 'In the whole,' meaning of — Order fixing monthly allowance of Rs. 100 to wife and Rs. 30 each to five children, whether justifiable.**

The words 'in the whole' in S. 488, Criminal P. S. are intended to prevent the Court from exceeding the statutory limit in the case of any particular dependant and are not intended to restrict the powers of the Court to ordering a monthly allowance of Rs. 100 in respect of the maintenance of all the dependants.

Consequently an order awarding a monthly allowance of Rs. 100 for the maintenance of the wife and a monthly allowance of Rs. 30 in respect of each of five minor children, is a proper order. AIR (V 20) 1933 Cal 406 : 34 Cr LJ 590 : 37 CWN 655: 143 Ind Cas 296 (DB).

**——S. 488 — Amount of maintenance.**

Order of the Magistrate directing a monthly allowance to be paid at the rate of Rs. 100 per month under S. 488 is clearly in excess of his jurisdiction. AIR (V 14) 1927 Bom 46 : 99 Ind Cas 83 : 28 Bom LR 1299 : 28 Cr LJ 51 : 7 AICrR 209 (DB).

**——S. 488 — "In the whole", meaning.**

The words "in the whole" mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid. The words do not mean that when a woman makes an application for herself and for children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number. The words mean that the Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself. AIR (V 13) 1926 Mad 59 : 90 Ind Cas 669 : 49 Mad 891 : 26 Cr LJ 1597 : 49 MLJ 335.

**(b) Nature of amount — Only cash.**

**——S. 488 — Only order fixing cash maintenance can be passed under S. 488 (1).**

The only order that can be made by a Magistrate under sub-s. (1) of S. 488 is the fixing of a cash maintenance for the wife or child, as the case may be, and no other order. The Magistrate is not empowered under S. 488 (1) to order the husband to provide a house for his wife. AIR (Vol 30) 1943 Lah 59 : 45 PLR 18 : 44 Cr LJ 425 : 205 Ind Cas 637 (DB).

**——S. 488 — Mixed basis of cash and grain.**

An order under S. 488, Criminal P. C., fixing maintenance on a mixed basis of cash and grain is a bad one. The section contemplates an allowance to be made in cash only. AIR (Vol 19) 1932 Nag 183 : 28 NLR 284 : 34 Cr LJ 123 : 141 Ind Cas 115.

**——S. 488 — Only monthly cash allowance can be ordered.**

It is not legal under S. 488 to order the husband to give his wife twelve maunds of grain each harvest and to provide her with a separate house because under that section any other order than one for a monthly cash allowance is not allowed. AIR (Vol 12) 1925 Lah 142 : 82 Ind Cas 279 : 25 Cr LJ 1271.

**——S. 488 — Award in money only is permissible.**

Section 488 only permits of the Court directing a monthly payment of money. An order directing a mixed payment in kind and in cash every year is contrary to the terms of the section. AIR (Vol 11) 1924 Bom 332 : 81 Ind Cas 613 : 26 Bom LR 136 : 25 Cr LJ 965 (DB).

——S. 488 — **Maintenance order — Legality.**

The Magistrate's order for maintenance based on agreement by the husband to pay to his wife some allowance, together with something in kind is not a proper order under this section. AIR (Vol 7) 1920 Lah 223 : 57 Ind Cas 276 : 21 Cr LJ 612.

——S. 488 — **Maintenance order — Legality — Grain allowance if justifiable.**

An order under S. 488 must be for a sum of money payable as a monthly allowance not exceeding Rs. 50 per mensem. Payment in grain or the like is not justifiable. 19 PR Cr 1911 : 52 PWR Cr 1911: 13 Cr LJ 188: 13 Ind Cas 1004.

**(c) Measure in fixing the quantum.**

——S. 488 — **Quantum of maintenance — Consideration in fixing.**

As regards fixing the quantum of maintenance, such factors as the husband's commitments concerning his own family by his second wife and the sudden drain the payment of maintenance, would cause upon his slender resources would have to be taken into consideration. AIR (Vol 34) 1947 Mad 304 : 229 Ind Cas 163 : 60 LW 328 : 1946 MWN 768 : 48 Cr LJ 284 : (1946) 2 MLJ 479.

——S. 488 — **Net wages of husband and his other liabilities must be taken into account.**

In fixing the amount of maintenance, the Courts must take into account the net wages of the husband and his other liabilities; his duty, for instance, to maintain the children by his first marriage, unmarried sisters and so on. AIR (Vol 28) 1941 Sind 214 : ILR (1941) Kar 417 : 43 Cr LJ 290 : 197 Ind Cas 849 (DB).

——S. 488 — The means of the husband and station in life of both the parties must be taken into consideration in fixing the amount of maintenance. ('38) 40 PLR 1052.

——S. 488 — **Means of person from whom maintenance is sought must be considered — High Court's interference.**

While fixing maintenance under S. 488, Criminal P. C., some reference should be had to the means of the person required to maintain the wife. The section does not contemplate a mere maintenance for food, clothing and lodging.

In awarding maintenance, Magistrates must award a reasonable amount. Where the allowance is obviously grossly inadequate, the High Court will interfere. AIR (Vol 24) 1937 Rang 370 : 10 Rang 192 : 39 Cr LJ 14 : 171 Ind Cas 800.

——S. 488 — **Nominal maintenance.**

The fact that husband is a young boy of 16 is no ground for granting nominal maintenance. AIR (Vol 13) 1926 Rang 88 : 4 Bur LJ 258 : 27 Cr LJ 725 : 95 Ind Cas 53.

——S. 488 — **Principles in awarding maintenance — Wife — Separate rate — Reduction.**

If the breach between the husband and wife is irreparable and the returning of the wife to the husband after many years is likely to lead to fresh disputes, a wife will be granted separate maintenance. The amount of maintenance should be reduced when the income of the husband is reduced. AIR (Vol 1) 1914 Lah 185 : 170 PLR 1914 : 26 PWR 1914 : 15 Cr LJ 554 : 24 Ind Cas 962.

——S. 488 — **Principles — Maintenance order — Wife living separately — Difference between Old and New Code — Amount of maintenance how to be fixed.**

The new Code does not restrict the payment of maintenance to cases, where the wife is living separately and she has been treated with habitual cruelty. In fixing maintenance, necessaries of life should be considered according to the applicant's station in life and the means of the Respondent and luxuries should not be allowed. (1912) 4 Bur LT 269 : 13 Cr LJ 55 : 13 Ind Cas 391.

**3. Application under.**

——S. 488 — Applicability — "Wife" — Valid marriage — Roman Catholic husband and Jewish wife — If validly married — Right of wife to maintenance. See AIR (Vol 38) 1951 Cal 293 : ILR (1950) 1 Cal 409.

——S. 488 — **Abandoned mistress.**

Section 488, Criminal P. C., applies only to the abandoned wife and not to the abandoned mistress, however, faithful she may have been to her paramour, and, however badly she may have been treated by him.

A Brahman woman who has one husband living cannot lawfully marry another; and, therefore, the marriage of such a woman to another person, even if certain ceremonies took place, is not a lawful marriage and she is not such person's lawfully wedded wife and S. 488 does not, therefore, apply to her case. AIR (Vol 30) 1943 Sind 156 : ILR (1943) Kar 102 : 44 Cr LJ 787 : 208 Ind Cas 439 (DB).

——S. 488 — **Buddhist woman married by Muhammadan, whether 'wife' for purposes of S. 488.**

A Buddhist woman married by a Mahammadan person is a "wife" for the purposes of S. 488, Criminal P. C., although the marriage is not strictly valid according to the Muhammadan law. Even in the eye of the Muhammadan Law, she appears to be so regarded and it is in accordance with justice, equity and good conscience that she should be so regarded. AIR (Vol 26) 1939 Rang 207 : 40 Cr LJ 653 : 182 Ind Cas 259.

——S. 488 — **Lawful wife is entitled to maintenance.**

Under S. 488, Criminal P. C., a woman is not entitled to maintenance even if she has lived with a man as his wife for 12 years and has also borne him a child. Only legally married women are entitled to maintenance under S. 488, Criminal P. C. AIR (Vol 25) 1938 Mad 66 : 1937 MWN 1131 : (1937) 2 MLJ 885 : 39 Cr LJ 228 : 46 LW 766 : 172 Ind Cas 811.

——S. 488 — **Dancing girl dedicated to temple, marriage of — Maintenance, right to claim.**

Where a dancing girl who was dedicated to a temple contracts a valid marriage with a person she can claim maintenance from him. 1937 MWN 735.

——S. 488 — **Application of mistress and child — Held maintenance of child alone could be considered.**

An application for maintenance by a mistress under S. 488, Criminal P. C. was dismissed by the Magistrate. She did not apply to the High Court for revision but subsequently, after the birth of a child applied again for maintenance of herself and her child :

Held, that only the maintenance of the child could be considered. AIR (Vol 22) 1935 Rang 277 : 36 Cr LJ 1391 : 158 Ind Cas 641.

——S. 488 — **Apostacy — Effect of.**

The apostacy of a Mohamedan wife ipso facto dissolves the marriage and the wife is not therefore entitled to receive maintenance from her husband. AIR (Vol 6) 1919 Low Bur 150 : 9 LBR 206 : 12 Bur LT 60 : 19 Cr LJ 799 : 46 Ind Cas 719.

——S. 488 — Unable to maintain.

A wife's application for maintenance against her husband cannot be dismissed on the mere ground that she has relation and friends willing to maintain her or to bear the cost of her proceedings. AIR (Vol 3) 1916 Mad 567 : 16 Cr LJ 80 : 26 Ind Cas 672.

——S. 488 — Buddhist Law — Lesser wife marrying without knowledge that husband had a first wife.

A lesser wife, refusing to live with the chief wife, will not be deprived of her right to maintenance if, at the time she married, she did not know of her husband's first marriage. (1910) 3 Bur LT 154 : 11 Cr LJ 750 : 8 Ind Cas 997.

4. Award of maintenance.

(a) General.
(b) Conditional order.

(a) General.

——S. 488 — Reasonable amount for medical attention for invalid wife.

In the case of a wife who is admittedly an invalid and requires medical attention, it cannot be said that the expenses of a reasonable amount of medical attention appropriate to her status in life are not within the meaning of the word "maintenance" as used in S. 488, Criminal P. C. AIR (Vol 30) 1943 Mad 342 : 56 LW 157 : (1943) 1 MLJ 230: 44 Cr LJ 522: (1943) MWN 150: 206 Ind Cas 462.

——S. 488 — Opposite party behaving badly — Date from which maintenance to wife should be awarded.

Where in an application for maintenance by the wife, the opposite party is found to have behaved badly so as not to deserve any sympathy or consideration, the Magistrate should award maintenance not from the date of his order but from the date of the wife's application. AIR (Vol 27) 1940 Sind 222 : 42 Cr LJ 278 : ILR (1941) Kar 58 : 192 Ind Cas 340 (DB).

——S. 488 — Wife living with husband for short while during pendency of her application — Maintenance, if should be disallowed.

Where the husband has neglected his wife for a number of years and the fact that he has succeeded by means of a subterfuge in making her live in his house for a short while during the pendency of an application for maintenance by her should not be allowed to affect the decision of the application presented by her for maintenance. AIR (Vol 26) 1939 Lah 533 : 41 PLR 605 : 41 Cr LJ 107 : 185 Ind Cas 69.

——S. 488 — Father making gift of half share of house to child — Held, income from share not being sure, order could not be cancelled but amount might be reduced.

Subsequent to an order of maintenance of child against its father, the latter made a gift of his half share in a house to the child, the other half share of which was held by the mother. The mother was living in the house up to the time of the execution of the deed of gift. The order of maintenance was sought to be cancelled.

Held, that the child's income from its half share was not an income which was sure by any means and hence the order could not be cancelled completely, but in view of the fact that the house had now become the sole property of mother and child and thus caused a change in the child's circumstances, the effect of which it was difficult to assess, the amount might be reduced. AIR (Vol 24) 1937 Rang 239 : 38 Cr LJ 910 (1) : 170 Ind Cas 285.

——S. 488 —Criminal Court ordering payment of arrears — Test to see if amount is liable to be attached in execution — Arrears, assignability of — Civil P. C., S. 60.

Where the right to receive maintenance is only a personal right, it is not assignable and is not liable to be seized and sold in execution of a decree for money. The test is whether a purely personal right was created by the order for maintenance or not.

Where, therefore, the monthly allowance directed to be paid by the Criminal Court was to be paid by the husband for maintenance of his wife, it is not in the nature of property but only money to be paid by the order of the Court personally to the wife for her maintenance and hence not assignable by the wife and arrears payable to her cannot be attached. AIR (Vol 22) 1935 Cal 578 : 62 Cal 404 : 39 CWN 281 : 157 Ind Cas 1089 (DB).

——S. 488 — Ex-communication of wife from caste.

The fact that the wife had been outcasted and that her husband could not take her to live with him without being himself outcasted is not a sufficient reason to refuse an order of maintenance of the wife against the husband. AIR (Vol 20) 1933 Bom 21 : 34 Bom LR 1449 : 34 Cr LJ 140 : 141 Ind Cas 348 (DB).

——S. 488 — Award of maintenance.

Magistrate cannot direct maintenance for the period prior to order of maintenance — Magistrate must direct the husband to pay future maintenance. AIR (Vol 15) 1928 Mad 899 : 10 AI Cr R 75 : 29 Cr LJ 458 : 1 Mad Cr C 10 : 108 Ind Cas 906.

——S. 488 — Grant of increased rate of maintenance.

A Magistrate has power to increase the rate of maintenance once awarded, and to direct that the increased rate of maintenance be paid from the date of the application asking for the increase. AIR (Vol 13) 1926 Bom 419 : 28 Bom LR 669 : 27 Cr LJ 940 : 96 Ind Cas 396 (DB).

——S. 488 — Order for maintenance prior to date of application is illegal. AIR (Vol 13) 1926 Lah 532 : 7 Lah 365 : 27 Cr LJ 610 : 27 PLR 539 : 94 Ind Cas 354.

——S. 488 — Reduction.

It is desirable, before a referring Court recommends the reduction of maintenance, to hear both the parties. AIR (Vol 12) 1925 Rang 197 : 26 Cr LJ 535 : 2 Rang 682 : 85 Ind Cas 375.

——S. 488 (1) — Maintenance order — Legality.

The order of a Magistrate ordering a person to pay Rs. 50 to his wife and Rs. 10 for children for their maintenance is not illegal. (1911) 4 Bur LT 139 : 12 Cr LJ 583 : 12 Ind Cas 847.

——S. 488 — Maintenance order — Effect.

Where there is a valid order of payment of maintenance, a subsequent order by a Magistrate ignoring the prior order is nugatory and the husband is liable to pay from date of the first order. (1911) 4 Bur LT 13 : 12 Cr LJ 82 : 9 Ind Cas 457.

(b) Conditional order.

——S. 488 — Where the order of the Magistrate is conditional on neglect or refusal by the husband to maintain the wife a bona fide re-union must be interpreted as removing the basis on which the order of the Magistrate rests and as therefore vacating the order. AIR (Vol 18) 1931 Rang 89 : 32 Cr LJ 114 : 8 Rang 460 : 128 Ind Cas 353.

——S. 488 — Order for separate maintenance with proviso that if husband lived with wife, latter would not get maintenance, is bad in law. AIR (Vol 16) 1929 Lah 56 : 29 Cr LJ 895 : 111 Ind Cas 575.

——S. 488 — A condition in an order of maintenance that the wife must reside at the place to which her husband belongs is illegal. (1929) 11 AI Cr R 431 : 30 Cr LJ 51 : 113 Ind Cas 67 (Lah).

——S. 488 — **Legality.**

Where the husband is ordered to take the wife away and maintain her, but if he fails to do so, and turns her out he will be liable to pay a fixed sum per month to her for maintenance, the order is illegal. AIR (Vol 13) 1926 Lah 480 : 7 Lah 313 : 27 PLR 462 : 27 Cr LJ 556 : 93 Ind Cas 1052.

——S. 488 — **Conditional order — For maintenance — Legality.**

An order for maintenance of a wife passed or condition of her staying in her husband's house is illegal. AIR (Vol 4) 1917 Lah 259 : 14 PR Cr 1917 : 18 Cr LJ 528 : 39 Ind Cas 496.

——S. 488 — **Conditional order — Maintenance for son — Past neglect — Duty of Magistrate.**

The object of the proceedings under the section is not to punish a parent for his past neglect, but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and have a moral claim to support. If a father offers to maintain his son on condition that he lives with him the Magistrate should give an opportunity of proving that the offer is made in good faith before he passes an order under the section. Previous neglect to support his son should not be considered as sufficient by itself, to hold that the offer is not made in good faith. The Magistrate must inquire first as to whether the child is unable to maintain itself, (2) if the father is in a position to support his child, (3) whether the father is neglecting to maintain the child. Past neglect may be a factor in coming to a finding that at the time of application the father is neglecting or refusing to support his offspring. AIR (Vol 4) 1917 Lah 213 : 22 PR Cr (1917) : 16 PWR Cr 1917 : 18 Cr LJ 811 : 41 Ind Cas 331.

**5. Cancellation of order.**

(a) Procedure.
(b) Grounds of cancellation.
(c) When cancellation order becomes effective.
(d) Forum.
(e) Re-union.

**(a) Procedure.**

——Ss. 488, 489 — **Order regarding fixation of maintenance — When can be vacated.**

Before the orders regarding fixation of maintenance can be vacated, action must be taken under S. 489, Criminal P. C. AIR (Vol 23) 1936 Pesh 32 : 37 Cr LJ 347 (1) : 160 Ind Cas 802.

**(b) Grounds of cancellation.**

——S. 488 (5) — **Order for maintenance — Subsequent cancellation on application by husband expressing willingness to take wife back — Wife refusing to live with husband — Cancellation if and when can be questioned.**

The petitioner was awarded separate maintenance in 1924. Subsequently, that order was cancelled in 1945 on the application of the husband, that he was willing to take her back; but the petitioner refused to live with him. In revision,

Held, that all that happened before 1924 could not be pleaded as a valid defence in 1945. So long as the husband and wife agreed to live separately, it was a different matter. It is always open to the husband to demand the wife's company and to insist that she should come and live with him. The only plea upon which she can resist the demand is by showing that the husband was subjecting her to a course of cruelty. In the absence of any such plea, the cancellation was justified. AIR (Vol 35) 1948 Mad 101 (1) : 49 Cr LJ 42 (2) : 1948 MWN 58 : 60 LW 573 : (1947) 2 MLJ 288.

——S. 488 — **'Sufficient cause' in S. 488 (3).**

The words 'sufficient cause' in S. 488 (3) are very wide and would include the raising of a plea that the order has become spent owing to the child having attained majority. AIR (Vol 23) 1936 Nag 228 : 38 Cr LJ 170 : ILR (1937) Nag 230 : 166 Ind Cas 27.

——S. 488 (5) — **Reasons given in S. 488 (5), if exhaustive.**

Section 488 (5), Criminal P. C., provides for the cancellation of the order. The reasons given therein for cancellation are not exhaustive. AIR (Vol 22) 1935 All 977 : 1935 AWR 1133 : 58 All 379 : 1935 ALJ 1186 : 37 Cr LJ 62 : 159 Ind Cas 308 (2).

**(c) When cancellation order becomes effective.**

——S. 488 (5) — **Cancellation of previous order — Retrospective effect — Arrears due up to date of order.**

When previous order to pay maintenance is subsequently cancelled under S. 488 (5), Criminal P. C., such order of cancellation takes effect from the date of the order and has no retrospective effect. It cannot, therefore, affect the arrears due up to the date of the order. AIR (Vol 25) 1938 Cal 144 : 42 CWN 64 : 39 Cr LJ 357 : ILR (1938) 1 Cal 509 : 66 CLJ 571 : 173 Ind Cas 785.

**(d) Forum.**

——Ss. 488, 489 — **Maintenance order — Power to cancel.**

Where an order has once been passed by a competent Court under S. 488 for the payment of maintenance for a child, the only power that exists of modifying such an order is that given by S. 489, Cr. P. C. (1904) AWN 149 : 1 Cr LJ 595 : 27 A 11 (12).

——S. 488 — **Maintenance order — Court to which application for cancelment should be made.**

An application for cancelling a maintenance order passed under sub-section (1) of S. 488 should be made to the Magistrate who made the original order or to his successor in office. (1903) AWN 103 : 25 A 545 (546).

**(e) Re-union**

——Ss. 488 and 489 — **Resumption of cohabitation after an order for maintenance — Effect — Remedy of wife — Cancellation, when justified. Subsequent neglect or refusal to maintain wife.**

When once after the passing of an order for maintenance under S. 488, Cr. P. Code, the husband and wife have resumed cohabitation, the order becomes automatically ineffective and unenforceable. No formal cancellation of that order appears to be necessary. If there is neglect or refusal on the part of the husband to maintain the wife subsequently, that would furnish a ground for the wife to make a fresh application, but she would not be entitled to claim the payment of maintenance on the strength of the order passed before the resumption of cohabitation.

After the passing of an order for maintenance there was a resumption of joint living and cohabitation. Subsequently the wife left her husband and claimed the maintenance awarded to be continued and the husband in his turn applied for cancellation of the order for maintenance under S. 489, Cr. P. Code, which was dismissed. In revision,

Held, that in the circumstances the order for maintenance should have been cancelled. A I R (Vol 34) 1947 Mad 423 : 48 Cr LJ 302 : 1947 MWN 160 : 60 LW 49 (2) : (1947) 1 MLJ 84 : 229 Ind Cas 176.

——S. 488 — **Parties living as husband and wife subsequent to order — Effect.**

An order for maintenance in favour of a wife must be regarded as having become ineffective if, subsequent to the passing of the order, they happen to live as husband and wife. But where the wife has not co-habited with her husband but she was only subjected to a ruse by him who offered to take her and made her live in his house but was not taken care of by him, it would not amount to such living as husband and wife so as to make the order of maintenance ineffective. AIR (Vol 33) 1946 Mad 222 : 58 MLW 570 : 1945-2 MLJ 408 : 1945 MWN 691.

——Ss. 488 and 489 — **Maintenance order — Wife living with husband as husband and wife — Order becomes inoperative — Wife claiming enhancement of maintenance — Claim must be based on subsequent facts.**

After a wife has lived with her husband as husband and wife, an order, whether a decree of a Civil Court or an order of a Criminal Court, for maintenance ceases to be operative and, therefore, in a subsequent application for enhancement of maintenance fixed by an order under S. 488 she has to base her claim on facts which happened subsequent to their living as husband and wife. AIR (Vol 33) 1946 Mad 222 : (1945) 2 Mad LJ 408 : 58 MLW 570 : 1945 MWN 691.

——S. 488 — **Application for getting original order cancelled on re-union.**

It is always open for the husband to apply to have the original order cancelled on good cause being shown. Re-union does not automatically vacate the previous order. The length of time during which re-union lasts is hardly relevant. The parties may contemplate permanent re-union and yet quarrel and separate again after short interval. AIR (Vol 23) 1936 Nag 228 : 38 Cr LJ 170 : ILR (1937) Nag 230 : 166 Ind Cas 27.

——Ss. 488, 489 — **Wife going to live with husband for some time — Whether makes order ineffectual — Separation — Right to enforce order.**

The general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependant upon the continued existence of some circumstances or set of circumstances, remains in force until it is cancelled, is, prima facie, applicable to maintenance orders passed under S. 488, Criminal P. C. The husband may, on proof of circumstances specified in S. 488 (5) or S. 489, Criminal P. C., obtain the cancellation or modification of the original order, as the case may be, and until he does that, the original order must be deemed to be still in force. The mere fact that a wife has returned to live with her husband, will not bring the order to an end automatically, though it may have the effect of suspending the order for the period the woman lives with her husband; and on her separating from him again, she can enforce it. AIR (V 22) 1935 All 977 : 1935 AWR 1133 : 1935 ALJ 1186 : 37 Cr LJ 62 : 58 All 379 : 159 Ind Cas 308 (2).

——S. 488 — Where the order of the Magistrate is conditional on neglect or refusal by the husband to maintain the wife a bona fide re-union must be interpreted as removing the basis on which the order of the Magistrate rests and as therefore vacating the order. AIR (V 18) 1931 Rang 89 : 32 Cr LJ 114 : 128 Ind Cas 353 : 8 Rang 460.

——S. 488 — **Order in favour of minor child — Temporary residence with father — Effect.**

Where an order is made granting maintenance allowance to a Mahomedan son, aged 3 on the application of the mother who was living separately from her husband, the mere fact that the mother, since the date of the order has taken the boy to live with his father and has again taken him away from his father cannot lead to an automatic cancellation of the order but it must be taken to subsist. AIR (V 17) 1930 Lah 1043 : 129 Ind Cas 216: 32 PLR 143 : 32 Cr LJ 247 : 1930 Cr C 1219:

——S. 488 — Order for maintenance — Wife returning to her husband — Order remains in force until husband gets it cancelled. AIR (V 14) 1927 Mad 1148: 99 Ind Cas 1037 : 38 MLT 13 : 28 Cr LJ 237.

——S. 488 — Maintenance order in favour of wife is not cancelled even if the wife returns to her husband for some time although it may remain suspended. 1888 A. W. N. 217, Diss. from. AIR (V 14) 1927 Mad 376 : 52 MLJ 176 : 100 Ind Cas 239 : 50 Mad 663 : 1927 MWN 111 : 25 MLW 148: 28 Cr LJ 271.

——S. 488 — **Ground for cancelling previous order.**

A mere temporary stay of the wife with husband though it may have suspended the operation of the order has not the effect of cancelling it in the way in which it could be cancelled under S. 488 (5) of the Code. AIR (V 10) 1923 Cal 456 : 75 Ind Cas 529 : 37 CLJ 180 : 24 Cr LJ 945 (DB).

### 6. Civil suit.

——Ss. 488, 489 (2) — **Order under S. 488 — Father obtaining declaration of non-paternity from Civil Court — Proper course for father in such case stated.**

Where subsequent to the passing of an order for maintenance to a child under S. 488, Criminal P. C., the father obtains from a Civil Court a declaration of non-paternity, it is not necessary for him to bring a suit for an injunction to restrain the defendant from drawing the maintenance awarded by the Criminal Court. Nor, of course, can the plaintiff sue for an injunction to restrain the Criminal Court from paying such sums of maintenance to the defendant. The proper course in such cases for the plaintiff, if he is successful in the civil suit, is to approach the Criminal Court under S. 489 (2), Criminal P. C., and apply to the Magistrate to cancel or vary the order for maintenance accordingly. AIR (V 27) 1940 Rang 298 : 1940 Rang LR 668 : 192 Ind Cas 439 (DB).

——S. 488 — **Miscellaneous.**

A Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under S. 488, Cr. P. Code, in a Criminal Court. AIR (V 17) 1930 Cal 753 : 32 Cri L J 232 : 1930 Cr C 1153.

——S. 488 — **Persons aggrieved by order under, should go to Civil Court.**

Persons aggrieved by the magisterial orders under S. 488 are expected to take their case to the Civil Courts. S. 488 provides a speedy remedy and safeguards a deserted wife or child from starvation; but when other issues are raised they should be settled in the Civil Courts, and not by protracted litigation in the Criminal Courts. AIR (V 13) 1926 Mad 346 : 50 MLJ 44 : 1926 M W N 146 : 27 Cr LJ 350 : 92 Ind Cas 862.

——S. 488 — **Civil and Criminal Courts — Order for maintenance against father by Criminal Court — Civil Court can make declaration as to paternity of child.**

The jurisdiction of the Civil Courts to grant a declaratory decree cannot be affected by the provisions of the Cr. P. Code relating to the maintenance of wives and children. The Civil Courts no doubt have no jurisdiction to cancel an order for maintenance or to grant an injunction against a Criminal Court, but there is no reason why the Civil Court having issued a declaration, the party who has obtained it should not apply to the Criminal Court, under the provisions of S. 489 of the Criminal Procedure Code or otherwise, for an order to stay the payment of maintenance. AIR (V 9)

1922 UB 20 : 75 Ind Cas 897 : 4 UBR 120 : 1 Bur L J 82.

——S. 488 — **Decree of a civil Court — Binding nature of.**

The jurisdiction under S. 488 of the Court being only auxiliary to that of the Civil Courts, a Magistrate should not enforce an order for maintenance of a child if a Civil Court subsequently holds that the respondent is not the father of the child. AIR (V 6) 1919 Low Bur 7 : 22 Cr LJ 127 : 59 Ind Cas 559: 13 Bur LT 104.

——S. 488 — Maintenance — **Declarations of Civil Court pending proceedings as to status. — If binds Magistrate — Jurisdiction.**

The decision of a Civil Court on the question of relationship between the parties i. e., that person is not the father of child is conclusive on the question and binds the Magistrate. A Civil Court cannot pass a decree interfering with a prior maintenance order by way of injunction or other similar orders. AIR (V 5) 1918 Mad 431 : 18 Cr L J 971 : 22 MLT 293 : 33 MLJ 449 : 6 LW 536 : (1918) MWN 65 : 18 Cr L J 971 : 42 Ind Cas 331 (DB).

——S. 488 — **Additional maintenance — Suit for — Order by Magistrate.**

Although there is an order by a Magistrate directing a husband to pay his wife's maintenance at a certain monthly rate, the Civil Court has power to make a further order in the matter in suit by the wife. (1912) 15 Ind Cas 603 (Cal) (DB).

——S. 488 — **Order, effect of — Order refusing maintenance no bar to civil suit.**

An order of a Magistrate under S. 488, Cr. P. C., refusing maintenance is no bar to a civil suit for maintenance. (1905) 32 C 479 (481) : 13 CWN 150 : 2 Ind Cas 550 (DB).

——S. 488 — Does not oust jurisdiction of civil Courts. (1907) 30 M 400 (401): 2 MLT 344: 7 Cr LJ 235 (DB).

——S. 488 — Suit for declaration that plaintiff not bound to provide maintenance — Suit while Magistrate's order in force — Cr. P. C. — Specific Relief Act, S. 42 — The fact that an order for maintenance has been made under S. 488 does not take away the jurisdiction of a civil court to make a declaration that the husband is not liable to pay maintenance. But the civil court cannot grant an injunction restraining the Magistrate from entering his order and consequently a suit which does not ask for an injunction is not bad on that account. (1907) 30 M 400 (401) : 2 MLT 344 : 7 Cr LJ 235 (DB).

### 7. Compromise.

(a) General.
(a-1) Jurisdiction of Criminal Court.
(b) Orders passed in terms of compromise.
(c) Effect.

#### (a) General.

——S. 488 — **Proper order to be passed stated.**

Where in proceedings under S. 488, Criminal P. C., a petition of compromise fixing the maintenance allowance is filed by both the parties, the proper order to be passed by the Magistrate is "petition of compromise filed. Order in terms of compromise," and not "case amicably settled. Petition of compromise filed. Rule discharged." AIR (V 28) 1941 Cal 558 : 45 CWN 765 : 42 Cr LJ 894 : 196 Ind Cas 527 (DB).

——S. 488 — **Duty of Court.**

Where the parties put in joint petition before the Magistrate to fix a particular amount as maintenance, the Court is bound to pass an order in accordance with it and cannot dismiss the petition on the score of compromise between the parties. 1937 MWN 640.

——Ss. 488, 490 — **Order of maintenance against husband — Subsequent compromise under which wife entitled to enforce Court's order on husband's failure to act according to compromise — Court's order, if should be set aside.**

After a maintenance order had been passed under S. 488 (1), Criminal P. C., the parties entered into a compromise and the husband, against whom the order had been passed, applied to the District Magistrate in revision praying that the order be set aside. The compromise merely provided for the maintenance of the wife by the husband in a certain manner other than by praying her the monthly allowance ordered by the trial Court; it further provided that in case of failure, the order of the trial Court should be enforced:

Held, that the maintenance order passed under S. 488 (1), should remain in force but the existence of the compromise, which could be proved at any time was sufficient ground for any Magistrate to refuse to enforce the order if moved to do so under S. 488 (3), or S. 490, Criminal P. C. It is not until the woman sought to enforce the order that any necessity for considering the compromise arose. AIR (V 24) 1937 Pesh 45 : 38 Cr LJ 614: 168 Ind Cas 832 (DB).

——S. 488 — During the pendency of a suit for declaration that the marriage has been dissolved, wife applied for maintenance and parties consented to the order that the amount of maintenance should be deposited in Court. The question whether such order was within the jurisdiction was referred to High Court — Held that the High Court had no reason to interfere. 1935 MWN 1338.

——S. 488 — **Previous compromise not acted upon — Application under S. 488 — Previous compromise, whether binding on Court.**

A compromise entered into previously, was neither acted upon by any Court nor made part of any order. In a subsequent application, under S. 488, it was held that such previous compromise did not limit Court's power. 1934 MWN 1287.

——S. 488 — **Order for maintenance based on compromise — Enforcement of order.**

Where an order for maintenance is passed on a compromise, the provisions of S. 488, Criminal P. C., do not cease to be applicable and the wife should not be directed to the civil Court as her proper remedy. AIR (V 20) 1933 Oudh 122 : 9 OWN 1189 : 34 Cr LJ 238 : 141 Ind Cas 805.

——S. 488 — **Compromise contemplating the passing of orders by Court — Validity.**

Where a husband has, in fact, neglected or refused to maintain his wife and has thus forced her to make an application under S. 488, Criminal P. C., his entering into a compromise to pay her a fixed monthly allowance when summoned before the Court, without any attempt to rebut the wife's allegation cannot be said to annul his previous refusal to maintain her so as to take the case outside the provisions of S. 488 of the Code, but where such compromise contemplates the passing of an order under S. 488, an order in the terms of the compromise can properly be passed by the criminal Court under that section. AIR (V 20) 1933 Oudh 119 : 10 OWN 374 : 34 Cr LJ 744 : 144 Ind Cas 51.

——S. 488 — **Subsequent compromise out of Court —Right to enforce order.**

Where, subsequent to the passing of an order for maintenance under S. 488, Criminal P. C., the parties enter into a compromise without the intervention of the Court and the compromise is not embodied in an order of the Court, the criminal Court cannot take cognizance of the compromise and refuse to enforce the order made by it whatever remedies the parties may have in the civil Court for breach of the terms of the compromise.

AIR (V 19) 1932 Lah 115 : 33 Cr LJ 121 : 33 PLR 927 : 135 Ind Cas 198.

**(a-1) Jurisdiction of Criminal Court.**

**——S. 488 — Agreement between husband and wife — Whether ousts jurisdiction of Criminal Court.**

The mere existence of an agreement between husband and wife, which is not acted upon, does not oust jurisdiction of Criminal Courts to order maintenance under S. 488, Criminal P. C. AIR (V 19) 1932 Cal 698 : 59 Cal 1229 : 36 CWN 571: 55 CLJ 341 : 33 Cr LJ 634 (1) : 138 Ind Cas 613 (1).

**——S. 488 — Maintenance proceedings — Compromise made an order of Court — Power of Criminal Court to enforce.**

Where in proceedings under S. 488, Cr. P. Code, parties come to a compromise and it is made an order of Court, the criminal Court has every jurisdiction to enforce its own order. AIR (V 37) 1950 A 454 : 51 Cr L J 961 : 1950 ALJ 351 : 1950 AWR 420.

**——Ss. 488 and 561-A — Order of maintenance — Cancellation on compromise petition filed by parties — Jurisdiction of Court.**

Where parties come together and file a compromise petition asking the Court to cancel an order for maintenance, the Court has jurisdiction to cancel such order. In any event the High Court by virtue of the provisions of S. 561-A, Cr. P. Code, has certain inherent powers and under those powers it can cancel the order for maintenance in the above circumstances. AIR (V 37) 1950 Cal 168 : 51 Cr L J 724.

**——S. 488 — Jurisdiction — Agreement by husband to pay maintenance to wife — If bar to order for maintenance.**

An agreement between a husband and his wife enforceable in a Civil Court, by which the husband agrees to pay his wife a fixed sum per month, cannot oust the jurisdiction of the Criminal Court to make an order for maintenance in favour of the wife under S. 488, Cr. P. Code, so long as the husband neglects or refuses to maintain the wife. Nothing short of a decree entitling the wife to maintenance will be a bar to the Criminal Court exercising its jurisdiction to make an order under S. 488. AIR (Vol 36) 1949 Nag 337: ILR (1949) Nag 435: 51 Cr LJ 166: 1949 NLJ 204.

**——S. 488 — Order for maintenance based on compromise — Nature of compromise — Enforcement of order — Jurisdiction.**

Where a compromise is made the basis of an order under S. 488, the correct procedure for the Magistrate is to dismiss the application for maintenance on the basis that the husband no longer refuses to maintain the wife. Such a compromise is of a civil nature and a Criminal Court is not a Court which can enforce it. It can only be enforced by a Civil Court. AIR (Vol 32) 1945 Pesh 20: 1945 Pesh LJ 20.

**——S. 488 — Court's jurisdiction, if ousted in all cases by mere petition of compromise — Order based on compromise, whether can be enforced by Criminal Court — Compromise also embodying other terms — Order based upon it, if can be passed or enforced.**

It is impossible to say generally in all cases, merely because a compromise petition between the parties has been filed, that there is no longer a refusal or neglect by the husband to maintain his wife and that the jurisdiction of the Court is ousted by the application for compromise. The refusal or neglect in question is refusal made or neglect committed before the proceedings commenced, and not a refusal or neglect that arose after the initiation of the proceedings. An order for monthly maintenance alone based on an application of compromise is not illegal. Where, however, the compromise not merely relates to the amount of monthly maintenance but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed to a Criminal Court, and a Criminal Court has no jurisdiction either to pass or enforce it.

Both parties to proceedings under S. 488 filed a joint petition for a consent order, which was headed "compromise petition". Orders were accordingly passed in terms of the petition, and it was directed that the husband keep his three children with the wife from the date of the application for maintenance; that the wife educate, feed and clothe the children properly; and that the husband pay the Rs. 20 a month from the date of the application and Rs. 25 a month from a date a year from that for the maintenance of his wife and children:

Held, that the application for compromise and the order based thereon clearly contained terms and conditions which were not within the jurisdiction of the Criminal Court to order or enforce. AIR (Vol 28) 1941 Rang 46: 1940 Rang LR 151: 42 Cr LJ 312: 192 Ind Cas 640.

**——S. 488 — Conditions outside S. 488 argued upon by parties.**

It is only where the compromise between the husband and wife does not cover matters outside the purview of S. 488, Criminal P. C., that an order for maintenance can properly be passed by a Criminal Court. Where the order purports to be based on a compromise, it cannot justly be enforced separately from and without regard to the other conditions agreed upon by the parties which conditions a criminal Court has no jurisdiction to enforce. A judicial order based on a compromise must be one giving the compromise effect as a whole. AIR (Vol 21) 1934 Lah 864: 36 PLR 153: 36 Cr LJ 193: 16 Lah 420: 152 Ind Cas 946.

**——S. 488 — Enforcement of compromise — Whether within jurisdiction of civil Court — Duty of Magistrate.**

Where in a proceeding for maintenance under S. 488, Criminal P. C., the parties enter into a compromise, the enforcement of the compromise comes within the jurisdiction of a civil Court, and not of a criminal Court. The Magistrate should relegate the parties to a civil Court for enforcement of the compromise and should not incorporate it in his order. AIR (Vol 20) 1933 Cal 776 (2): 37 CWN 736: 35 Cr LJ 501: 147 Ind Cas 914.

**(b) Orders passed in terms of 'Compromise'.**

**——S. 488 — Order by consent of parties — Order, held enforceable.**

Where an order ran "the child is to have Rs. 3 per month for its own maintenance until it attains puberty. The parties consent to this" :

Held, that the order did not embody the terms of any compromise on the question of the liability of the father to maintain his daughter and was enforceable. AIR (Vol 27) 1940 Cal 398 : 44 CWN 734 : 41 Cr LJ 789 : 189 Ind Cas 691 (DB).

**——S. 488 — Amount of maintenance.**

Compromise on the point of rate of maintenance should be given effect to but not on other points such as separate living, etc. (1935) 37 PLR 809 (DB).

**——S. 488 — Compromise to live apart as before — Order under S. 488 based on compromise — Legality.**

Per S. K. Ghosh and Guha JJ. — The mere fact that an order of maintenance under S. 488, Criminal P. C., is based on a compromise between husband and wife that they would live apart as they had been doing, does not render the order illegal.

Per M. C. Ghose J. — Although a compromise of this nature may possibly be enforced in a civil Court, an order under S. 488, Criminal P. C., will not be legal. AIR (Vol 20) 1933 Cal 675 : 37 CWN 538 : 35 Cr LJ 606 : 148 Ind Cas 151 (DB).

——S. 488 — **Order in terms of compromise — Enforceability.**

In a proceeding under S. 488, Criminal P. C., by a wife against her husband, if the husband and wife agree as to the rate of maintenance without adding conditions which cannot form part of an order under S. 488, the Magistrate can pass an order under the said section in terms of the compromise and the order can be enforced by him. But a Magistrate is not entitled to pass an order under S. 488, in terms of a compromise which contains such conditions or amounts to an agreement to live separate by mutual consent or to enforce the same if such an order has been passed. AIR (Vol 19) 1932 Lah 349 (2) : 33 PLR 292 : 33 Cr LJ 488 : 137 Ind Cas 364 (DB).

——S. 488 — **Compromise as to rate — Competency of Criminal Court to enforce maintenance.**

Merely because the parties compromise as to what is the proper rate of maintenance does not mean that S. 488, Criminal P. C., is no longer applicable and that the maintenance cannot be enforced through criminal Court.

Where the petitioner had been collecting through the magisterial Courts, arrears of maintenance since 1908, and the husband never moved the Court at the time the order was passed to have it set aside :

Held, that the Court should not, after such a long period refuse relief to the petitioner on the ground that the order for maintenance was wrong. AIR (Vol 18) 1931 Lah 574 : 33 PLR 589 : 32 Cr LJ 993 : 13 Lah 313 : 132 Ind Cas 854.

——S. 488 — **Consent order, whether bar to civil suit for restitution of conjugal rights.**

Although an order under S. 488, Criminal P. C., has been passed with the consent of both the parties, it cannot operate as a bar to a civil suit for restitution of conjugal rights unless it is expressed in the consent given that the consenting party agreed that in all circumstances, the wife should live apart from the husband and be entitled to the maintenance agreed upon. AIR (Vol 18) 1931 Mad 482 : 60 MLJ 433 : 33 LW 423 : 1931 MWN 364 : 54 Mad 558 : 131 Ind Cas 463 (DB).

——S. 488 — **Order passed on compromise, enforceability of.**

Where the parties to a proceeding under S. 488, Criminal P. C., settle the matter without any reference to the Court, there is no necessity for the Court to pass any order under S. 488. But if the passing of an order under S. 483 is an essential part of the compromise, the Court cannot refuse to enforce the order merely because it was based on a compromise. AIR (Vol 18) 1931 Mad 185 (1) : 60 MLJ 213 : 33 LW 405 : 1931 MWN 327 : 32 Cr LJ 688 : 131 Ind Cas 173.

**(c) Effect.**

——S. 488 — **Compromise — Effect of — Contemplation of changes in future, if material.**

The function of the Magistrate is restricted to passing an order as to the amount of maintenance and his order should not embody restrictive conditions which could not be enforced in summary criminal proceedings. It would be certainly undesirable if a Magistrate were to pass an order with regard to one part of the compromise incompatible with an order which the civil Court might pass with regard to the rest; but where the Magistrate restricts himself to the fixation of the amount of maintenance and where that order is to take effect immediately without further conditions, then it would not matter if charges are contemplated in the future. AIR (Vol 23) 1936 Nag 228 : 38 Cr LJ 170 : ILR (1937) Nag 230 : 166 Ind Cas 27.

——S. 488 — **Compromise — Effect of.**

Where, in an application under S. 488, the parties arrive at a compromise, the proper course for the Court is to dismiss the application leaving the parties to enforce the compromise in civil Courts. Such a compromise is a bar to an application under S. 489. An order of maintenance passed in accordance with a compromise cannot be enforced by a criminal Court. AIR (Vol 17) 1930 Lah 524 : 1930 Cr C 623 : 31 Cr LJ 1179 : 127 Ind Cas 13.

——S. 488 — **Compromise effected to pay maintenance — Section does not apply.**

Once a compromise is entered into to pay maintenance there is no refusal to maintain on the part of the husband and therefore S. 488 has no longer any application. An order passed regarding such a compromise is without jurisdiction. The proper remedy is by way of civil Courts to enforce the compromise. AIR (Vol 13) 1926 Lah 469 : 27 Cr LJ 779 : 95 Ind Cas 315.

——S. 488 — **Effect of.**

After an order for maintenance was passed in the wife's favour, both parties put in a petition in which they agreed that the present petitioner should pay his wife Rs. 10 a month as long as she remained at the house of the petitioner's father.

Held, that the lady forfeited her right to claim past maintenance up to the date of this petition. AIR (Vol 10) 1923 Cal 456 : 37 CLJ 180 : 24 Cr LJ 945 : 75 Ind Cas 529 (DB).

**8. Consent to live separately.**

——S. 488 (4) — **Applicability — "Living separately by mutual consent" — Compromise by husband and wife in proceedings for maintenance — Wife accepting sum of money in discharge of all claims and living separate thereafter — Subsequent claim to maintenance — Bar of.**

Where in proceedings under S. 488, Cr. P. Code, started at the instance of a wife against her husband, on the ground of cruelty and desertion and ill-treatment, the husband denies that the petitioner is his wife, but the proceedings are dropped as the result of a settlement in and by which the husband pays a sum of money to the wife in discharge of all claims and the wife accepts it and gives up all claims on her husband and thereafter both of them live separate, it must be held that the parties are living apart by mutual consent, and S. 488 (4) will be a bar to any further or future application by the wife for maintenance under the section against her husband. AIR (Vol 35) 1948 Cal 186 : 49 Cr LJ 283.

——S. 488 (4) — **Scope — Application for maintenance of wife — Plea in defence of separate living by mutual consent for over seventeen years — Maintainability of wife's claim — Quantum of maintenance — Consideration in fixing.**

Where a wife claimed maintenance under S. 488, Cr. P. Code and the husband contended that himself and his wife had been living by mutual consent separately for a period of seventeen years so as to bring the case within sub-s. (4) of S. 488, Cr. P. Code,

Held, (1) that mutual consent involves the consent of both parties, and if any one of them decides to put a stop to separate living, sub-s. (4) ceases to operate and then the wife gets her right to claim maintenance subject to such defences as the husband may have under S. 488. In the absence of such defences in the present case the

wife would be entitled to her maintenance. (2) As regards fixing the quantum of maintenance, such factors as the husband's commitments concerning his own family by his second wife and the sudden drain the payment of maintenance would cause upon his slender resources would have to be taken into consideration. AIR (Vol 34) 1947 Mad 304 : 60 LW 328 : 1946 MWN 768 : 48 Cr LJ 284 : (1946) 2 MLJ 479 : 229 Ind Cas 163.

**——S. 488 — Wife ill-treated by husband submitting to sum agreed by her panchayat, whether "living separately by mutual consent".**

Where a helpless woman who has been ill-treated by her husband has to submit or thinks she has to submit to a sum agreed by her panchayat, it cannot be said that she is living separately by mutual consent within the meaning of sub-s. (4) of S. 488, Criminal P. C. AIR (Vol 28) 1941 Sind 214 : ILR (1941) Kar 417 : 42 Cr LJ 290 : 197 Ind Cas 849 (DB).

**——S. 488 (4) — Compromise that husband would pay certain amount to wife if she lived in house allotted to her by him separate from his second wife — "Living separately by mutual consent".**

In proceedings under S. 488, Criminal P. C., by wife claiming maintenance from her husband after some evidence had been recorded, the parties entered into a compromise and the following order was made by the Magistrate: "The husband shall pay Rs. 15 per mensem to the applicant for her children's maintenance provided she, along with the children, resides in that house which the husband allots to her separate from his second wife. If the husband maltreats her or is cruel to her, the applicant shall be entitled to live separate from the husband wherever she likes and to receive Rs. 15 per mensem as maintenance allowance". The husband refused to provide any house for her and gave her a beating and turned her out :

Held, that the condition, in the order, that the husband would provide a house for his wife where she would live separately from his second wife did not amount to the husband and wife "living separately by mutual consent," as laid down in sub-s. (4) of S. 488. It was open to husband to live either with her or his second wife. No question of "living separately by mutual consent" was involved in the condition embodied in the compromise. AIR (Vol 26) 1939 Lah 209 : 41 PLR 527 : 40 Cr LJ 794 : 183 Ind Cas 464.

**——S. 488 (4) — Wife unwilling to live in separate house with husband and insisting on living where they were — Husband going away and living apart.**

Because the wife would not live in a separate house with her husband but insisted on staying on with him, where they were, and the husband, on his part, was not willing or did not find it possible to comply with her wishes, and left the house and lived away from the wife, his living apart did not amount to "living separately by mutual consent". AIR (Vol 25) 1938 Cal 623 : 66 CLJ 567 : 39 Cr LJ 969 : 177 Ind Cas 939.

**——S. 488 — Mutual consent — Refusal of wife to live with husband — Husband not insisting.**

The expression 'mutual consent' as used in sub-s. (4) of S. 488, Criminal P. C., means a consent on the part of the husband and wife to live apart, no matter what the circumstances may be. Where a wife refuses to live with her husband on some specific ground, such as cruelty or the fact that he is keeping another woman, it cannot be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. AIR (V 24) 1937 All 115 : 1936 ALJ 1379 : 1936 AWR 1268 : 38 Cr LJ 312 : ILR (1937) All 430 : 166 Ind Cas 894.

**——S. 488 (4) — Indifference of husband — Wife living separate — Whether can be said to have been forced to live separately.**

The mere indifference of the husband is not a sufficient cause for the wife to refuse to live with him. If the wife finds her husband cold and indifferent, it may make her prefer to live separately from him ; but that is a matter of preference or choice. If each party finds it impossible to live amicably and comfortably with the other and each party is content that they should live separately, the separate living is by mutual consent. AIR (Vol 22) 1935 Rang 359 : 37 Cr LJ 6 : 159 Ind Cas 81.

——S. 488 — Husband and wife living separately — Wife's house washed away — Husband again offering to keep her in a separate house — Wife refusing and claiming maintenance — Maintenance should be allowed. AIR (Vol 15) 1928 Bom 418 : 52 Bom 763 : 30 Bom LR 958 : 29 Cr LJ 1049 : 11 AI Cr R 288 : 112 Ind Cas 473 (DB).

**——S. 488 — Must be a deliberate consent.**

The separate living must be the result of a deliberate and express agreement between the parties. A hasty rejoinder to a husband, who, in the course of a quarrel, was manoeuvring, for a consent from a wife, cannot be considered to be such consent as would come within the meaning of the law, specially when she was willing to return to him. Under Burmese Buddhist Law the wife has one-third share if not one-half in what the husband earns ; one-fifth of the salary of the husband (i.e. Rs. 30) was therefore granted as maintenance. AIR (Vol 10) 1923 Rang 100 : 1 Bur LJ 124.

**——S. 488 — Living apart — Mutual consent — Decree of panchayat — Right of wife to maintenance.**

To come within sub-s. (4) of S. 488, Cr. P. C., the husband and the wife must have lived apart by a definite contract mutually made between them.

Where a husband and wife are living apart from obedience to the decree of a Panchayat of their castemen by which the wife is awarded maintenance, it cannot be said that they are living apart from mutual consent within sub-s (4) of S. 488 of the Cr. P. Code. AIR (Vol 6) 1919 Pat 339 : 4 Pat LJ 109 : 20 Cr LJ 154 : 49 Ind Cas 346 (DB).

## 9. Costs.

**——S. 488 — Recovery of costs — Method.**

The only method provided for the recovery of costs awarded is by distress warrant (S. 386), and it is only for default of payment of each month's allowance that imprisonment may be awarded. AIR (Vol 28) 1941 Rang 247 : 1941 Rang LR 403 : 43 Cr LJ 30 : 196 Ind Cas 563.

**——Ss. 488, 439 — Revision — Power of High Court to award costs.**

Sub-section (7) of S. 488, gives the High Court power in revision in dealing with applications under that section to make such order as to costs as may be just. AIR (Vol 28) 1941 Rang 135 : 1941 Rang LR 65 : 42 Cr LJ 690 : 195 Ind Cas 120.

——S. 488 — Under S. 488, sub-s. (7), the Court may make orders as to costs in favour of the wife where the husband has failed in an action for maintenance. AIR (Vol 20) 1933 Bom 121 : 34 Bom LR 1449 : 34 Cr LJ 140 : 141 Ind Cas 348 (DB).

**10. Cruelty.**

——S. 488 — **Attribution of immorality to wife falsely — Wife's right to live apart and claim maintenance.**

Deliberate attribution of immorality falsely to a wife by the husband is legal cruelty sufficient to entitle the wife to live apart from her husband and yet claim maintenance. AIR (V 37) 1950 Mad 394: 51 Cr LJ 931: 63 LW 77: (1950) 1 MLJ 158: 1950 MWN 341.

——S. 488 — **Attribution of immorality falsely to wife — Legal cruelty entitling wife to live separately from husband and claim separate maintenance.**

Deliberate attribution of immorality falsely to a wife will certainly fall under the definition of legal cruelty and entitle a wife to live separately from such a husband and claim separate maintenance. AIR (V 37) 1950 Mad 385: 63 LW 66(3): (1950) 1 MLJ 75: 1950 MWN 220(2): 51 Cr LJ 907.

——Ss. 488, 439 — **Finding that wife proved cruelty against husband is one of fact — No interference in revision.**

A finding that the wife had proved cruelty against her husband being one of fact, the High Court will not go behind it in revision when the finding is reasonable on evidence. AIR (V 29) 1942 Mad 666: 55 LW 306: 1942 MWN 369: (1942) 2 MLJ 134: 44 Cr LJ 741: 208 Ind Cas 192.

**11. Decree for conjugal rights.**

——S. 488 — **Applicability — Discretion of Court — Decree for restitution of conjugal rights against wife — Refusal of wife to obey — Effect — Wife choosing to live away for purposes of advantage to herself — Right to maintenance — "Refusal or neglect to maintain".**

It cannot be held that a husband has refused or neglected to maintain his wife, when the latter is not prepared to go back to his house, when she has left it for no justifiable cause, and when there has been no cruelty on his part. Section 488, Cr. P. Code, is not intended to compel payments to be made to a wife who has deliberately disobeyed the order of a Civil Court to go and live with her husband. The Magistrate under S. 488 has no doubt a discretion, but that has to be exercised upon judicial principles. It is not in accordance with sound judicial principles to compel a husband to pay maintenance to his wife who contumaciously disobeys the decree of the Civil Court for restitution of conjugal rights. It is the duty of the Criminal Court to support the decision of the Civil Court, in such a matter and when the Civil Court has found that the wife left the protection of her husband upon no justifiable grounds and that there was no cruelty on the part of the husband, the Criminal Court cannot go behind the same and award maintenance to the wife.

If the wife chooses, for purposes of some advantage to herself, not to live with her husband, the wife cannot be heard to say that it is the husband who has refused to maintain her and has neglected her. In such a case there is no occasion for the application of S. 488, Cr. P. Code. AIR (Vol 39) 1952 All 616 (2): ILR (1950) A 485.

——S. 488 — **Decree for restitution of conjugal rights already obtained by husband — Circumstances subsequent to such decree justifying wife in not returning to husband — Court, if can make order for maintenance.**

Normally when a decree has been passed in favour of the husband for restitution of conjugal rights, it should be respected and treated as a sufficient cause for refusing an order for maintenance; otherwise an order for maintenance is merely encouraging the wife to disobey the order of the Civil Court. If, however, subsequently to the decree, other circumstances have arisen which might provide the wife with reasonable cause for not returning to her husband, then the Magistrate might, in a proper case, in spite of the existence of the decree for restitution, make an order for maintenance. AIR (Vol 32) 1945 Pesh 53: 47 Cr LJ 229: 221 Ind Cas 686.

——S. 488 — **Subsequent decree of Civil Court for restitution of conjugal rights in favour of husband, whether affects his liability to maintain his child —Failure of husband to comply with terms of decree — Effect — Restitution suit simply to evade payment of maintenance allowance — Effect.**

When a wife and child have obtained order for maintenance in their favour, subsequent order of the Civil Court for restitution of conjugal rights in favour of husband does not affect his liability to maintain the child.

The subsequent decree of restitution of conjugal rights has to be considered, and if the wife persists without cause in refusing to live with the husband, then the order for maintenance is to be cancelled.

Of course, the party who obtains a decree for restitution must comply with the conditions of the decree and failure to comply with those conditions would justify the Magistrate in holding that the order for maintenance should not be cancelled.

Another case where the Magistrate would be justified in not cancelling the order for maintenance is where the suit for restitution is brought, not with a view to take the wife back, but simply to evade the payment of the allowance awarded. AIR (Vol 26) 1939 Rang 314: 40 Cr LJ 827 (2): 1939 Rang LR 741: 183 Ind Cas 692.

——Ss. 488, 489 (2) — **Order under S. 488 — Subsequent decree for restitution of conjugal rights by a competent Civil Court — Consideration of effect of decree.**

Where, after an order under S. 488, Criminal P. C., a decree for restitution of conjugal rights has been passed by a competent Civil Court, the Magistrate should consider the effect of this decree under S. 489 (2). He should give each side an opportunity of being heard. AIR (Vol 21) 1934 Rang 39: 35 Cr LJ 813: 148 Ind Cas 908 (2).

——S. 488 — Order under S. 488 by High Court — Subsequent decree for restitution of conjugal rights by competent Civil Court — Magistrate should consider effect of this decree under S. 489 (2), and should give opportunity to each side for being heard. AIR (Vol 21) 1934 Rang 39: 35 Cr LJ 813: 148 Ind Cas 908 (2).

——S. 488 — **Civil suit for restitution of conjugal rights — Application for maintenance within a month — Ex parte decree in a civil suit — Want of bona fides for wife's petition — Maintenance order, if may be passed.**

A suit for restitution of conjugal rights was instituted by a person against his wife in the Civil Court. Within a month of this, the wife took proceedings under the Criminal P. C. for her maintenance on the ground of ill-treatment. The husband denied ill-treatment and during the examination of the husband, no question was put as to ill-treatment. The civil suit was decided ex parte:

Held, that under the circumstances, the proceedings for maintenance were not bona fide, and they were launched for the sole purpose of ignoring any decree that might be passed by the Civil Court:

Held, also, that the fact that an ex parte or a contested decree was passed by the Civil Court was

immaterial, and that no order under S. 488, Criminal P. C. should be passed in the case. AIR (Vol 19) 1932 All 583: 1932 ALJ 766: 34 Cr LJ 188: 141 Ind Cas 610.

**——S. 488 — Decree for restitution of conjugal rights against wife — Allegations as to adultery of wife by husband — Wife living apart — Trial Court finding her to be entitled to maintenance— Revision.**

Where the trial Court found that although, as a matter of law, a woman would not be entitled to an order under S. 488, Criminal P. C., when a decree for restitution of conjugal rights was in force against her, as the husband was making unfounded allegations of adultery against her, she was justified in refusing to live with him and was, therefore, entitled to maintenance:

Held, that in view of the history of the parties and precedent, the High Court would not interfere with the order of the Magistrate.

Held, further, that the fact that the parties were Muhammadans and the husband could, if he wished to do so, divorce his wife, was another reason for maintaining the order of the Magistrate. (1932) 139 Ind Cas 123 (1): 33 Cr LJ 748: 33 PLR 554.

——S. 488 — Husband obtaining decree for restitution — Wife refusing to allow its execution is not entitled to maintenance. AIR (Vol 13) 1926 Sind 270: 20 SLR 145: 27 Cr LJ 876: 96 Ind Cas 124 (DB).

——S. 488 — Maintenance order against husband— Husband obtaining a decree for restitution of conjugal rights only to avoid maintenance — Maintenance order should not be cancelled. AIR (Vol 12) 1925 Mad 1218: 91 Ind Cas 62: 27 Cr LJ 30: 22 MLW 479: 1925 MWN 645: 49 MLJ 269.

**——Ss. 488 and 489 — Restitution of conjugal rights — Decree for — Not executed — Effects of.**

A Magisterial order awarding the maintenance to a wife passed in 1910. The husband in 1912 obtained a decree for restitution of conjugal rights but he never executed it and went on paying the maintenance amount to his wife as before. On application of the wife for increase of maintenance, held, there was no substituting order under S. 488 of the Code, the same having been put an end to by the decree of 1912 and the present application was incompetent. AIR (Vol 6) 1919 Bom 140: 43 Bom 885: 21 Bom LR 766: 20 Cr LJ 687: 52 Ind Cas 607 (DB).

**——S. 488 — Restitution of conjugal rights — Decree for.**

A Magistrate's order for maintenance to a wife ceases if the husband obtains a decree for restitution of conjugal rights and the wife does not comply with it. AIR (Vol 3) 1916 Low Bur 17: 9 Bur LT 162: 17 Cr LJ 412: 35 Ind Cas 972.

**——S. 488 (3) and (4) proviso — Restitution of conjugal rights — Maintenance — Wife obtaining order for child — Subsequent decree for restitution of conjugal rights — Effects.**

The proviso to S. 488 (3) and (4) of the Code applies only when the wife obtains an order for herself and not when one is made for the children.

The obtaining of a decree subsequently for restitution of conjugal rights against his wife does not absolve a person from paying maintenance for the child under the order under S. 488. (1913) 6 LBR 127: 6 Bur LT 51: 14 Cr LJ 98: 18 Ind Cas 658.

**——S. 488 (4) — Restitution of conjugal rights — Wife still refusing to go to her husband.**

The husband obtained a decree for restitution of conjugal rights and while the decree was in full force, the wife applied for maintenance. The application should be dismissed. Obiter. In Upper Burma, a grievance against an elder wife is not a sufficient cause for a wife to refuse to live with her husband. A father cannot refuse to maintain his children on the ground that they are not living with him, he should apply for their custody. (1910) 1 UBR 34: 11 Cr LJ 662: 8 Ind Cas 479.

**——S. 488 — Restitution of conjugal rights — Maintenance, Application — Decree for restitution of conjugal rights.**

A decree for restitution of conjugal rights does not bar the adjudication of the application for maintenance made by the wife subsequent to the decree, if the wife proves that the husband has since deserted her. The order of the Civil Court in such a case does not prevent her being 'a woman whose husband having sufficient means neglects or refuses to maintain her. 8 Cr LR 382 (Mad).

**——S. 488 — Supersession — Of order by decree for restitution of conjugal right.**

An order under S. 488, Cr. P. C., will be superseded by a decree for restitution of conjugal rights whether passed by consent or otherwise. 1905 AWN 54: 2 ALJ 160: 27 A 483 (484): 2 Cr LJ 104.

### 12. Decree for maintenance

**——S. 488 — Existence of decree of Civil Court for maintenance — Jurisdiction of Magistrate, if ousted.**

In a proper case, the jurisdiction of the Magistrate to make an order under S. 488, Criminal P. C., is not ousted by the mere existence of a decree of a Civil Court directing a certain sum to be paid as maintenance. Of course, the existence of a decree of a Civil Court is relevant when the Magistrate is considering what form of order he should make under S. 488. If the Magistrate comes to the conclusion that an order for maintenance should be made, he ought to make it clear in his order that anything paid under the decree of the Civil Court will be taken into account against anything which he may order to be paid. AIR (Vol 25) 1938 Bom 499: 40 Bom LR 1103: 40 Cr LJ 91: 178 Ind Cas 533 (DB).

——S. 488 — Once the Civil Court has decided the question of maintenance, the Magistrate cannot have jurisdiction under this section. 1936 MWN 524 (DB).

**——S. 488 — Decree for maintenance — Magistrate's jurisdiction is not ousted.**

A mere decree of a civil Court awarding maintenance which has become unexecutable owing to the pendency of the insolvency proceedings against the husband is not equivalent to maintaining the wife. Therefore, the Magistrate has jurisdiction under S. 488 to pass an order for maintenance in favour of the wife. AIR (Vol 17) 1930 Bom 144: 124 Ind Cas 127: 31 Bom LR 1366: 31 Cr LJ 609 (DB).

**——S. 488 — Weight of decree varies with circumstances.**

Weight to be attached to a decree must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a Civil Court is for ever binding on the Magistrate or that, his discretion is never fettered. Where the husband had obtained decree for restitution of conjugal rights but was ill-treating wife:

Held, Magistrate could ignore decree and permit wife to live apart, while granting her maintenance under S. 488, Cr. Pro. Code. Maintenance can be granted to wife with permission to live separate from husband, notwithstanding decree for restitution of conjugal rights, if wife is ill-treated. AIR

(Vol 11) 1924 All 784: 82 Ind Cas 174: 22 ALJ 806: 5 LRA Cr 126: 25 Cr LJ 1246: 46 All 877.

——S. 488 — **Effect of decree on previous order under the section.**

A Civil Court decree is no answer to an application for enforcement of an order previously obtained by the wife under S. 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that, without any sufficient reason, she has left his custody. The question that her consent to the decree was obtained by fraud could not be investigated by the Criminal Court. AIR (Vol 10) 1923 Pat 153: 65 Ind Cas 576: 3 PLT 51: 23 Cr LJ 144: 1 Pat LR Cr 158.

——S. 488 — **Maintenance order — Execution — Order of Civil Court — Effect of.**

A Magistrate ought to refuse to enforce an order for maintenance under S. 488 if after the passing of the order a Civil Court has decided that the respondent was not the father of the child. AIR (Vol 6) 1919 Low Bur 7 (2): 13 Bur LT 104: 59 Ind Cas 559.

——S. 488 — **Maintenance order — Effect.**

Refusal of Magistrate to grant maintenance under S. 488 is not conclusive order so as to bar a civil suit (1905) 32 Cal 479: 13 CWN 150: 2 Ind Cas 550 (DB).

**13. Divorce.**

——S. 488 — **Application under by wife — Plea of divorce in defence — Onus.**

Where in defence to an application by the wife for maintenance under S. 488, Cr P. Code, the husband pleads a divorce, he should establish the fact in a regular suit and obtain a declaration and till then he is liable to pay maintenance. Mere oral evidence as to divorce from interested parties is not enough particularly in summary proceedings under S. 488, Cr. P. Code. (1950) 3 Sau LR 12 (DB).

——Ss. 488, 489 and 490 — **Maintenance order in favour of Mohamedan wife — Subsequent divorce by husband — Effect — Enforceability of order regarding maintenance, thereafter — Power of Court to modify that order.**

When a valid and irrevocable divorce has been given by a Mohamedan husband to his wife in conformity with the Mohamedan Law and she was also paid the Iddat maintenance, he is not bound to pay the maintenance awarded to his divorced wife under S. 488, Cr. P. Code, after the marriage has ceased to subsist between them. In such a case the Magistrate is not only bound to refuse to enforce the maintenance order under S. 490 of the Cr. P. Code, but is also empowered under S. 489 of the Code to alter the amount payable under it to nothing, that is to say, by a combined effect of those provisions he is competent to set aside the order for maintenance. AIR (Vol 34) 1947 Mad 461: ILR (1947) Mad 859: 229 Ind Cas 447: 48 Cr LJ 382: 1947 MWN 101: 60 LW 58: (1947) 1 MLJ 70.

——S. 488 — **Relationship of husband and wife existing on date of application — Maintenance from date of application until expiry of period of iddat— Divorce in middle of proceedings.**

There is nothing in the provisions of S. 488, Criminal P. C., which suggests that a husband can avoid payment of sums which a Magistrate might order to be paid under S. 488 (2), by Divorcing his wife in the middle of the proceedings. The proper date to be considered for an order under S. 488 (2), is a date on which the application was made. If on the date on which the application is made relationship of husband and wife exists, the Magistrate has jurisdiction to pass an order under S. 488 (2), directing the husband to pay sums due on account of maintenance from the date of that application until the period of iddat has expired. AIR (Vol 26) 1939 Sind 179: 40 Cr LJ 814: ILR 1939 Kar 659: 183 Ind Cas 536 (DB).

——S. 488 — **Divorce by mutual consent — Order of maintenance cannot stand.**

Where there has been a divorce by mutual consent, an order of maintenance passed in the wife's favour cannot stand. AIR (Vol 24) 1937 Rang 246: 38 Cr LJ 913: 170 Ind Cas 13.

——S. 488 — **Maintenance of wife after divorce.**

Where in proceedings for maintenance, before the passing of an order under S. 488, Criminal P. C., the Magistrate's attention was drawn to the fact that the husband had given talak to his wife:

Held, that it was the duty of the Magistrate to consider the fact of the talak.

It is competent for the relations of a Muhammadan girl at the time of her marriage or for a Muhammadan woman herself to take measures for her protection in the event of ill-treatment or even divorce on the part of the husband, e. g., by providing for her maintenance for a fixed period or for life. AIR (Vol 20) 1933 Cal 27: 59 Cal 833: 141 Ind Cas 689.

——S. 488 — Divorce effects a change not in circumstances but in the status. (1933) MWN 734.

——S. 488 — Mahomedan wife — Divorce — Wife is not entitled under S. 488 to claim maintenance beyond period of iddat from date of irrevocable divorce. 8 Cal 736, Diss, from. 32 Bom LR 582: 126 Ind Cas 893: 31 Cr LJ 1110: 1930 Cr C 610: AIR (Vol 17) 1930 Bom 178 (DB).

——S. 488 — Maintenance to wife — Divorce — Husband can, by plea of divorce, avoid payment after date of alleged divorce. 30 Bom LR 617: 29 Cr LJ 908: 111 Ind Cas 668: 11 AI Cr R 103: AIR (Vol 15) 1928 Bom 224 (DB).

——S. 488 — **Contracting sagai with brother-in-law by a Kahar's wife does not dissolve marriage under Hindu Law.**

The fact that the parties are Kahars and the wife contracted a sagai with her brother-in-law, is not sufficient to constitute a dissolution of marriage under Hindu Law, when no caste panchavat was ever held for the purpose of either dissolving or recognizing the dissolution, and the wife is entitled to maintenance. 7 LRA Cr 104: 27 Cr LJ 550: 93 Ind Cas 1046: AIR (Vol 13) 1926 All 426.

——S. 488 — **Divorce — Effect — Period of Iddat — "Wife" — Maintenance order — Subsequent divorce.**

An order for the maintenance of a wife under S. 488 is untenable in the case of Mahomedans on the expiry of the period of Iddat if there is a divorce between the parties after the order was passed. 10 LBR 104: 13 Bur LT 43: 21 Cr LJ 503: 50 Ind Cas 663: AIR (Vol 7) 1920 Low Bur 54.

——S. 488 — **Buddhist Law — Burmese — Dissolution of marriage — Desertion.**

A wife who is driven away from her husband by cruelty cannot be said to have "left the house not having affection for the husband" within the meaning of the Dhammathats. But a wife who refuses to join her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; but a husband who is bound to maintain his wife cannot escape that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. 9 LBR 44: 10 Bur LT 212: 18 Cr LJ 767: 41 Ind Cas 143: AIR (Vol 5) 1918 Low Bur 121.

——S. 488 — Buddhist Law — Burmese — Separation.

There is no such thing as judicial separation in Buddhist Law, but an order under S. 488, Cr. P. C., is practically a judicial separation, and if a child is born while the order is in force, the onus is on the wife to prove access. S. 112, I. E. A., is inapplicable to the case. 46 Ind Cas 620: AIR (Vol 5) 1918 Law Bur 34.

——Ss. 488 and 489 — Divorce, plea of — Application by husband to cancel maintenance — Duty of Magistrate.

Where a husband applies for the cancellation of an order of maintenance for his wife alleging his divorce of her, it is the duty of the Magistrate to entertain such plea and give it consideration. UBR (1915) II 53: 16 LJ 531: 29 Ind Cas 659: AIR (Vol 2) 1915 UB 8.

——S. 488 — Divorce — Maintenance order — Subsequent divorce — Effect.

An order directing a Mahomedan under S. 488 to pay a certain monthly allowance as maintenance to his wife becomes Functus Officio on a subsequent divorce of his wife. 17 OC 260: 15 Cr LJ 646: 25 Ind Cas 846: AIR (Vol 1) 1914 Oudh 367 (DB).

——S. 488 — Divorce of Mahomedan wife — Effect.

An order of maintenance against a Mahomedan husband continues in spite of divorce till the period of Iddat elapses. (1911) 4 Bur LT 13: 12 Cr LJ 82: 9 Ind Cas 457.

——S. 488 — Divorce — Effect — Period of Iddat.

Since an irrevocable divorce under Mahomedan Law does not completely destroy the relationship of husband and wife until after the expiry of the period of 'iddat', a wife during 'iddat" is entitled to an order for maintenance under S. 488, Cr. P. C., and an order already subsisting in the wife's favour can be enforced by the Magistrate during that period. (1910) 20 MLJ 12: 7 MLT 33: 10 Cr LJ 502: 4 Ind Cas 140 (DB).

——S. 488 — Applicability — Essentials — Relationship of husband and wife — Mahomedan Law — Marriage — Talak or Divorce — Rajai and Bayan Talaks — Iddat explained.

An irrevocable divorce does not completely destroy the relationship of husband and wife until after the expiry of the period of Iddat and a wife in that position is entitled during Iddat to an order for maintenance under S. 488, Cr. P. C. On a petition by the wife under S. 488, Cr. P. C., a Magistrate can make or enforce an order under the section only if the relationship of husband and wife exists between the petitioner and the counter-petitioner. It is not only competent to a Magistrate to refuse to enforce an order duly made under S. 488, Cr. P. C., on the ground that the relationship of husband and wife has ceased to exist since the date of the order, but he is also bound to abstain from enforcing his order under such circumstances. (1910) 20 MLJ 12 (13): 4 Ind Cas 140: 7 MLT 33: 10 Cr LJ 502 (DB).

——S. 488 — Mahomedans — Divorced wife — Children living with mother — Father's liability for maintenance.

A divorced wife is, according to Mahomedan Law, entitled to the custody of her children; but the father is not on this account relieved from the obligation of maintaining the children. Their maintenance can, therefore, be claimed by the wife by a proceeding under S. 488, Cr. P. C. (1904) 6 Bom LR 536 (538): 1 Cr LJ 599 (DB).

### 14. Enforcement of order.

See also Note 7 and Criminal P. C. S. 490.

(a) General.
(a-1) Against third persons.
(b) Abatement of enforceability.
(c) Arrears.
(d) Consent orders.
(e) Insolvency.
(f) Imprisonment.
(g) Warrant of attachment.

#### (a) General.

——Ss. 488 (3), 489 — Maintenance in respect of daughter — Marriage of daughter, if sufficient cause.

In defence to an application for the enforcement of an order of maintenance against a person in respect of his wife and his three daughters, it is open to him to set up the marriage of his daughter as a sufficient cause within the meaning of S. 488 (3) for failure to comply with the order in so far as she is concerned. It, therefore, follows that the only remedy of such person is not by way of an application under S. 489. AIR (Vol 30) 1943 Mad 416: 56 LW 106: (1943) 1 MLJ 179: 1943 MWN 127: 44 Cr LJ 540: ILR (1944) Mad 69: 206 Ind Cas 598.

——S. 488 — Wife entitled to recover maintenance by "execution according to law" — Expression, held meant according to S. 488 (3).

In proceedings under S. 488, a compromise petition filed by both the parties provided that in cases of failure on the part of the husband to pay the maintenance allowance as agreed, the wife would be entitled to have the amount realized by "execution according to law":

Held that the words "execution according to law" meant in accordance with the provisions of S. 488 (3). AIR (Vol 28) 1941 Cal 558: 45 CWN 765: 42 Cr LJ 894: 196 Ind Cas 527 (DB).

——S. 488 — Order granting maintenance — Successor, if can refuse to enforce it.

Where a Magistrate passes an order under S. 488, Criminal P. C., granting maintenance, his successor cannot refuse to enforce that order on the ground that it was improper. AIR (Vol 27) 1940 Cal 398: 44 CWN 734: 41 Cr LJ 789: 189 Ind Cas 691 (DB).

——Ss. 488 (3), 490 — Magistrate passing order, whether can enforce it — Order, if should be enforced in district where person ordered to pay lives.

The provisions of S. 490, Criminal P. C., are merely supplementary to those of S. 488, sub-s. (3) of the Code, which allows the Magistrate who passes the order for payment of maintenance to enforce it. There is no such restriction that such order should be enforced only in the district where the person ordered to pay lives.

The proviso to S. 488 (3), Criminal P. C., was clearly enacted to prevent the person in whose favour an order for maintenance was made, from being negligent and allowing arrears to pile up until their recovery would become a hardship or an impossibility. It was not meant that a loophole should be given to the person against whom an order for maintenance was made to evade payment by preventing the service of process on him. In fact, the proviso was evidently worded in the way it was, expressly to preclude the possibility of such an evasion.

In a suit instituted by wife, she applied for maintenance for four months. Since the husband could not be traced, the application was dismissed. She again applied for maintenance in arrears for fifteen months:

Held, that a warrant could be issued for the whole period and the order of maintenance for 15 months was correct. AIR (Vol 22) 1935 Rang 407: 13 R 289: 37 Cr LJ 91 (2): 159 Ind Cas 289.

——S. 488 — Execution of order — Court making an order for maintenance cannot refuse to enforce it.

Court refused to enforce an order for maintenance made by itself and said that the same should be got enforced by the Court within whose jurisdiction the person, against whom the order was made, then resided,

Held, that the Court should not thus refuse to enforce an order made by itself. 52 Mad 77: 1 M Cr C 263: 1928 MWN 837: 28 MLW 421: 11 AI Cr R 298: 29 Cr LJ 932: 111 Ind Cas 852: AIR (Vol 15) 1928 Mad 1171: 55 MLJ 516 (DB).

——S. 488 — Execution of order directing maintenance to be charge on joint estate which was not appealed against cannot be revised. 49 Bom 906: 27 Bom LR 1363: 27 Cr LJ 652: 94 Ind Cas 604: AIR (Vol 13) 1926 Bom 103 (DB).

——S. 488 — Magistrate is bound to consider judicially any objection to execution of maintenance order.

When execution of a maintenance order is applied for and the counter-petitioner contends that the order should not be executed and sets out certain grounds in support of his contention, the Court is bound to consider the sufficiency of the cause alleged by the counter-petitioner and refuse execution if the Court should be satisfied that the cause is sufficient and to grant execution if the Court is not so satisfied. The expression "sufficient cause" in sub-Cl. (3) means that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all circumstances and that such judicial discretion should not be fettered or limited by any definite rules. 87 Ind Cas 105: 26 Cr LJ 953: 21 MLW 702: AIR (Vol 12) 1925 Mad 715: 48 MLJ 494.

——Ss. 488, 489, 490 — Execution — Requisites for action under S. 490 — Subsequent agreement, effect of.

A Magistrate to whom an application under S. 490, Cr. P. C., is made to enforce an order of maintenance passed under S. 488 should not take into consideration anything further than the identity of the parties and the non-payment of the allowance. The fact that the parties had made an agreement subsequent to the order modifying its terms is not matter for the Magistrate's consideration in enforcing the order, though it would be competent to the party interested to apply under S. 489 and get the order altered. 10 Mad 13, Not Foll. (1902) AWN 224: 25 A 165 (166, 167).

### (a-1) Against third persons.

——S. 488 — Order against creditors of husband.

Where the husband against whom an order under S. 488, Criminal P. C., had been passed defaulted in paying maintenance and thereupon the Magistrate directed a person to whom the husband had mortgaged certain properties to pay the maintenance from out of the income of the property:

Held, that S. 488 does not contemplate such an order against a third party and that the order was invalid. AIR (Vol 18) 1931 Cal 644: 35 CWN 692: 33 Cr LJ 93: 134 Ind Cas 1199.

### (b) Abatement of enforceability.

——S. 488 — Death of husband — Effect of.

An order for maintenance under S. 488 in favour of a wife abates when the husband dies and the woman cannot recover her arrears of maintenance from the estate of her deceased husband. AIR (Vol 31) 1944 Pesh 6: 45 Cr LJ 399: 211 Ind Cas 425 (DB).

——S. 488 — Maintenance order for wife and three children — Two children living with husband at time of enforcing order.

Where an order for maintenance prescribed a certain amount for the maintenance of the wife and three children but at the time of the application for enforcement of the order, two of the children were with the husband:

Held, that the order had become of no effect, in that it could not be partially enforced, and that the wife's remedy was to make a fresh application for maintenance. AIR (Vol 28) 1941 Rang 46: 42 Cr LJ 312: 1940 Rang LR 151: 192 Ind Cas 640.

——S. 488 — One child attaining majority and able to maintain himself — Order, enforceability of.

Where an order is made against a father for the maintenance of his children and subsequently it is proved that the eldest child who has attained majority is in a position to maintain himself, the order ceases to be enforceable in respect of him but it does not cease to be enforceable in respect of other children. AIR (Vol 26) 1939 Rang 67: 40 Cr LJ 241: 179 Ind Cas 643.

——S. 488 — Maintenance order — Execution — Death of person against whom order made — Execution against estate.

A maintenance order under S. 488 of the Code, cannot, after the death of the person against whom the order was passed, be enforced against his estate. AIR (Vol 1) 1914 Cal 172: 41 Cal 88: 17 CWN 1130: 14 Cr LJ 378: 20 Ind Cas 138 (DB).

### (c) Arrears.

——S. 488 — Dismissal of application to execute order of maintenance — Subsequent application.

An order refusing to enforce a maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period. AIR (Vol 20) 1933 Rang 138: 34 Cr LJ 815: 11 R 226: 144 Ind Cas 187 (2) (FB).

——Ss. 488 and 489 — Arrears — Maintenance — Execution — Alteration of amount.

When an order for maintenance in favour of the wife and the son is sought to be executed, the question of the son's ability to support himself during the period for which arrears are claimed after the order for maintenance under S. 488, may be considered by the Magistrate under S. 489 of the Code, but a Magistrate cannot under S. 489 order separate allotment for the wife, when the original order does not do so. AIR (Vol 4) 1917 Low Bur 84: 9 LBR 49: 10 Bur LT 209: 18 Cr LJ 103: 37 Ind Cas 311.

——Ss. 488 and 490 — Arrears — Jurisdiction of Magistrate.

An order for the recovery of arrears of maintenance may be made by the Magistrate who made the original order or by the Magistrate within whose jurisdiction the person ordered to pay maintenance had gone to reside. AIR (Vol 2) 1915 Low Bur 88: 7 LBR 116: 15 Cr LJ 701: 26 Ind Cas 149.

——S. 488 — Arrears — Reasons for granting an application for.

No definite rule can be laid down as to whether a Magistrate should grant or refuse an application for recovery of arrears of maintenance; he should, however, take into consideration the circumstances under which the arrears accumulated, the delay or

promptitude in making the application, etc. (1910) 11 Cr LJ 79: 4 Ind Cas 899 (U.B.).

**——S. 488 — Arrears.**

A Magistrate acting under S. 488, Cr. P. C., may refuse to recover accumulated arrears, but he should not refuse to enforce payment from the time of the new application because the order of maintenance is to be enforced so long as it holds good. (1910) 11 Cr LJ 79: 4 Ind Cas 899 (UB).

**(d) Consent orders.**

**——S. 488 — Order, whether on compromise or otherwise is enforceable under S. 488 (3).**

An order lawfully made by a Magistrate under S. 488, Criminal P. C., whether on compromise or otherwise, must be deemed to be enforceable in the manner provided by sub-s. (3) of S. 488. AIR (Vol 28) 1941 Cal 558: 45 CWN 765: 42 Cr LJ 894: 196 Ind Cas 527 (DB).

**——S. 488 — Order for maintenance passed with consent of parties.**

There is nothing in the provisions of S. 488, Criminal P. C., which would lead to the conclusion that an order for maintenance passed by a Magistrate with the consent of a husband and wife cannot, afterwards, be enforced. Whether it is or is not to be enforced depends upon the circumstances of the case into which the Magistrate has power to make an enquiry. Where the Magistrate passes an order for maintenance with the consent of the wife and husband, the order can afterwards be enforced. AIR (Vol 24) 1937 All 115: 1936 ALJ 1379: 1936 AWR 1268: 38 Cr LJ 312: ILR (1937) All 430: 166 Ind Cas 894.

**——S. 488 — Compromise as to amount of maintenance — Order, if can be enforced.**

Where compromise has been arrived at only as to the amount of maintenance and no terms have been imposed in the compromise, the order can be enforced by taking proceedings under S. 488, Criminal P. C. AIR (Vol 22) 1935 All 294: 1935 AWR 195: 37 Cr LJ 9(1): 158 Ind Cas 1123.

**(e) Insolvency.**

**——S. 488 (3) — Insolvency of husband — If bars proceedings.**

The insolvency of the husband is not in itself a bar to proceedings for arrears of maintenance by the wife. The fact that the bulk of an insolvent's property vests in the receiver and that this might in given cases afford "sufficient cause" for non-payment of the maintenance is of course relevant, but there may be cases in which a part of the insolvent's property does not vest in the receiver. In such cases, provided the portion left to the insolvent is sufficient to enable him to comply with the order under S. 488, Cr. P. Code, the fact of adjudication would afford no protection. AIR (Vol 35) 1948 Nag 416: 49 Cr LJ 592: ILR (1948) Nag 387: 1948 NLJ 228.

**——S. 488 (3) — Husband's adjudication as insolvent.**

An order of adjudication, in itself, is not a rebuttal of an allegation that the insolvent has failed, without sufficient cause, to comply with the order of the Magistrate directing the payment of maintenance. Therefore, on presentation of an application to a Magistrate for distress warrant, the duty of the Magistrate is to decide, in the first place, whether the person against whom the adjudication is made, has failed without sufficient cause to comply with the order and if that fact is established, to proceed as directed by S. 481 (3), Criminal P. C. AIR (Vol 27) 1940 Cal 569: 71 CLJ 507: ILR (1940) 2 Cal 525: 44 CWN 898: 42 Cr LJ 250: 192 Ind Cas 185 (DB).

**——S. 488 (3) — Person failing to comply with maintenance order — Magistrate sentencing him — Subsequent insolvency and order under Provincial Insolvency Act, S. 23 (1) — Magistrate, if can set aside his own order of sentence — Nature of sentence under S. 488 (3).**

Wording of S. 488 (3), Criminal P. C., shows that in every case, it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order under S. 23 (1), Provincial Insolvency Act, nor the adjudication order passed by Insolvency Court subsequent to the sentence by the Magistrate could be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself. 'Prima facie', of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the Insolvency Court. It is not possible for a Magistrate who has passed a sentence of imprisonment under S. 488 (3) to cancel the sentence merely because the Insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of S. 23, Provincial Insolvency Act, that a person who has been sentenced under S. 488 (3) is under imprisonment in execution of the decree of any Court for the payment of money. AIR (Vol 27) 1940 Mad 697: 41 Cr LJ 785: 1940 MWN 237: 1940-1 MLJ 868: 51 LW 718: ILR (1940) Mad 692: 189 Ind Cas 692 (DB).

**——S. 488 — Insolvency of husband — Protection order against arrears of maintenance — English and Indian law.**

Arrears of maintenance ordered to be paid to a wife under S. 488, Criminal P. C. are a debt payable in the insolvency of the husband, in respect of which a valid protection order may be granted. The rule of English law that a liability to alimony under an order of the Divorce Court is not a debt provable in insolvency is not applicable to orders for maintenance made under S. 488, Criminal P. C. AIR (Vol 23) 1936 Mad 793: 44 LW 292: 71 MLJ 403: 1936 MWN 1024: 37 Cr LJ 1129: ILR (1937) Mad 90: 165 Ind Cas 227.

**——S. 488 — Order of discharge under S. 44(1)(d), Provincial Insolvency Act (V of 1920) — Liability under order for maintenance, whether remains.**

Under S. 44 (1) (d), Provincial Insolvency Act, an order of discharge shall not release the insolvent from any liability under an order for maintenance made under S. 488, Criminal P. C. AIR (Vol 22) 1935 Lah 758: 36 PLR 191: 37 Cr LJ 207: 159 Ind Cas 939.

**(f) Imprisonment.**

**——S. 488 (3) — Construction — Term of imprisonment — If limited to one month in respect of arrears due for several months — Power of Magistrate to**

award one month in respect of each month or part thereof.

The maximum of one month's imprisonment provided by S. 488 (3), Cr. P. Code, is the maximum in respect of the amount in arrears for a month or for a portion of a month and is not the maximum for the whole amount of arrears due under the order irrespective of the number of months for which the arrears are payable. 9 All 240, Diss. AIR (Vol 36) 1949 Nag 269: 50 Cr LJ 673: 1949 NLJ 51: ILR (1949) Nag 230.

——S. 488 (3) — **Sentence of imprisonment a second time for default in respect of same identical arrears; legality.**

A defaulter may be sentenced to one month's imprisonment in respect of the arrears for each month or a further broken period but he cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears. AIR (Vol 28) 1941 Rang 247: 1941 Rang LR 403: 43 Cr LJ 30: 196 Ind Cas 563.

——S. 488 (3) — **Imprisonment, when should be ordered.**

Where the person ordered to pay maintenance, refuses to pay it, the Magistrate cannot straightway order him to be committed to jail; the first thing that must be done is to issue a distress warrant, under S. 488 (3), Criminal P. C., and it is only for the whole or part of each month's allowance that remains unpaid after the execution of the warrant that imprisonment may be awarded. AIR (Vol 28) 1941 Rang 247: 1941 Rang LR 403: 43 Cr LJ 30: 196 Ind Cas 563.

——S. 488 — **Enforcement by single application including arrears covering several months — Defaulter, if can be sentenced to more than one month's imprisonment.**

The proper construction of sub-s. (3) of S. 488, Criminal P. C., is that when a wife applies to enforce a maintenance order and in a single application includes arrears which cover several months, then the Magistrate has power to sentence the defaulter to more than one month's imprisonment. He may sentence the defaulter to one month's imprisonment for each full month's arrears of maintenance and to a further month for any broken period over and above that completed number of months' arrears which falls short of another complete month. AIR (Vol 28) 1941 Rang 135: 42 Cr LJ 690: 1941 Rang LR 65: 195 Ind Cas 190 (DB).

——S. 488 (3) — **Arrears allowed to accumulate — One warrant and cumulative sentence of imprisonment.**

The intention of the Legislature in enacting S. 488, Criminal P. C., was to empower the Magistrate after execution of one warrant only to sentence a person, who has defaulted in the payment of maintenance ordered under S. 488, Criminal P. C., to imprisonment for a period of one month in respect of each month's default and the section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, the Court can issue one warrant and impose a cumulative sentence of imprisonment. AIR (Vol 25) 1938 All 386: 1938 ALJ 565: 39 Cr LJ 720: 1938 OWN 591: 1938 AWR 379: ILR (1938) All 750: 176 Ind Cas 397 (FB).

**( (1887) 9 All 240 Overruled.)**

——S. 488 — **Default — Imprisonment for period for which allowance is outstanding — Civil debtor — Expenses in jail.**

A person who has been ordered to pay maintenance can be committed to prison for a term amounting to the whole or any part of each month's allowance remaining unpaid after execution of the warrant. Where such person commits default and is committed to prison, it is not a case of civil debtor, but a proper warrant of imprisonment on failure to pay maintenance in which imprisonment can be simple or rigorous; the person committed to jail under this warrant is a prisoner in the ordinary sense of the term and can only be released at the end of the term or when he pays the amount. The person who is given the maintenance cannot be ordered to pay expenses of the person committed to jail for his maintenance. AIR (Vol 22) 1935 Lah 758: 36 PLR 191: 37 Cr LJ 207: 159 Ind Cas 939.

——Ss. 488, 489, 490 — **Second Class Magistrate — Sentence of imprisonment**

A Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under S. 488, Criminal P. C., directing payment of maintenance. Enforcing an order for maintenance does not necessarily include the power to sentence a person, against whom it was passed, to imprisonment. AIR (Vol 22) 1935 Mad 572 (1): 1934 MWN 922: 68 MLJ 493: 36 Cr LJ 830: 41 LW 697: 155 Ind Cas 694.

——S. 488 — **Arrears of maintenance — Imprisonment for — Second imprisonment for same arrears.**

Under S. 488 (3), Criminal P. C., a person who has undergone a sentence of imprisonment for a default in payment of arrears of maintenance, cannot be sentenced a second time to imprisonment for the same default. AIR (Vol 19) 1932 Rang 93: 10 R 176: 33 Cr LJ 554: 1937 Ind Cas 673.

——S. 488 — **Arrest under — Effect.**

It is doubtful whether a person arrested in pursuance of an order for maintenance under S. 488 (3), Criminal P. C., can be said to be arrested in execution of a decree of any Court. AIR (Vol 19) 1932 Rang 51: 10 R 71: 32 Cr LJ 435: 137 Ind Cas 36.

——S. 488 (3) — **Arrears — Imprisonment.**

Six months' simple imprisonment for failure to pay Rs. 170 as arrears of maintenance is justified. AIR (Vol 6) 1919 Lah 197: 12 PR Cr 1919: 20 Cr LJ 367: 50 Ind Cas 841.

——S. 488 — **Arrears — Imprisonment — Maximum sentence.**

Where the arrears of maintenance for more than one month remains unpaid after the execution of a warrant therefor, the Magistrate cannot pass a sentence of imprisonment exceeding one month. AIR (Vol 1) 1914 Low Bur 163: 7 Bur LT 225: 7 LBR 351: 15 Cr LJ 434: 24 Ind Cas 170 (DB).

**(g) Warrant of attachment.**

——S. 488 — One of the co-wives obtaining maintenance order under S. 488—Certain property attached and money deposited in Court—Claim by other co-wife rejected — Suit by her under S. 88 (6) — Plaintiff asking for money decree and not for declaration.

Held, that the money which had been realised, although capable of being realised as fine under

S. 488, cl. (3) was not in part a fine itself and was not being held by or at the disposal of the Government for its own purposes and therefore, the Secretary of State was not a necessary party. AIR (Vol 29) 1942 Mad 93: 54 LW 362: 1941 MWN 865: (1941) 2 MLJ 510: 43 Cr LJ 325: 198 Ind Cas 203.

**——Ss. 488, 386 — Magistrate under S. 488 cannot attach immovable property — Proper procedure.**

Under S. 488, Criminal P. C., Magistrate has no jurisdiction to attach immovable property. The amount due in cases under S. 488, can be realized in the same manner as fines and if immovable property is to be attached, the warrant of sale should be sent to the Collector in accordance with S. 386, Criminal P. C. AIR (Vol 28) 1941 Lah 360: 43 Cr LJ 61: 196 Ind Cas 691.

**——S. 488 — Order directing attachment of movables of husband's joint family is beyond provisions of S. 488 (1) and (2).**

Where, in proceedings under S. 488, the Magistrate comes to the conclusion that the wife is entitled to maintenance at certain amount per month but does not pass, in proper terms, an order for maintenance and at once directs an attachment of the movables of the husband's joint Hindu family, holding the joint property liable for the wife's maintenance, the order is premature and beyond the provisions of S. 488 (1) and (2). The liability of the joint family property and the way in which the order for maintenance should be enforced is a matter to be considered after he has passed an order in the terms of S. 488 (1) and (2), and after an application is made by the wife under S. 488 (3), for the enforcement of the order for maintenance. AIR (Vol 27) 1940 Sind 222: 42 Cr LJ 278: ILR 1941 Kar 58: 192 Ind Cas 340 (DB).

**——Ss. 488, 489—Jagir income, if can be attached — Civil Court, if has jurisdiction to go into the matter.**

Jagir income of a person, against whom maintenance order had been passed by a Magistrate, when collected by the Revenue Authorities, can be taken in satisfaction of the arrears due under the order. The provisions of the Civil P. C., exempting certain property from attachment and sale do not apply to the Criminal Courts. Under Ss. 4 and 9, Criminal P. C., Civil Courts have no jurisdiction to go into the matter. AIR (Vol 24) 1937 Lah 367: 39 PLR 100: 169 Ind Cas 944.

**——S. 488 (3) — Maintenance order — Execution of — Attachment of moveables.**

In execution of a warrant under S. 488 (3) Cr. P. C. two cows were attached. The defaulting husband's brother claimed that the cows were his. The Magistrate held a summary enquiry and came to the conclusion that the cows were the joint property of both brothers. Held, the Magistrate ought to give the petitioner a further opportunity to establish his claim to the cattle in question in the Civil Court. Before he should proceed to sell the cattle the petitioner should be allowed an opportunity of bidding at the sale and only half, if that be the defaulter's share of the sale proceeds, should be retained against the balance due from him. (1920) 32 CLJ 64 (DB).

### 15. Ex parte order.

**——S. 488(6) (1) — Order against absent party at adjourned hearing.**

The proceedings instituted under S. 488, Criminal P. C., are of a quasi civil nature. Therefore, the word ex parte used in the aforesaid section is used in the same sense as is used in Orders 9 and 17, Civil P. C. Therefore, an order passed against an absent party at the adjourned hearing of a case is an ex parte order. AIR (26) 1939 Rang 151: 40 Cr LJ 537: 181 Ind Cas 377.

——S. 488 — Party present in Court along with pleader — Ex parte order against him is not justified. AIR (V 17) 1930 Lah 524: 31 Cr LJ 1179: 127 Ind Cas 13: 1930 Cr C 623.

——S. 488 — Application under — Husband not refusing notice — Ex parte proceeedings are not justified. AIR (V 15) 1928 Lah 853: 10 A I Cr R 490: 110 Ind Cas 239: 29 Cr LJ 687.

**——S. 488 — Succeeding Magistrate has power to re-open the case.**

Under S. 488, Cr. P. Code, an order for maintenance was passed ex parte. Within three months of the order applicant presented a petition to the successor of the Magistrate who passed the order to modify the order alleging that he had no notice. The petition was rejected on the ground that the Magistrate had no power to modify his predecessor's order.

Held, the Magistrate was clearly wrong in supposing that he had no power to re-open the case. S. 488 (6) gives him the power. AIR (V 10) 1923 Rang 159: 75 Ind Cas 304: 2 Bur LJ 61: 24 Cr LJ 928.

### 16. Husband's offer.

See also N. 23.

**——S. 483 — Application by first wife for maintenance — Offer by husband to take back first wife after he has married again — Effect.**

Where a person marries a second wife and the first wife applies for separate maintenance, any offer by the husband to take her back and treat her well cannot be taken to be sincere and an order for separate maintenance is quite justified. AIR (V 37) 1950 Mad 357: 51 Cr LJ 775: (1949) 2 MLJ 820: 1950 MWN 220(3).

**——S. 488 — Application by wife for maintenance — Wife leaving husband's protection owing to ill-treatment — Offer by husband to take her back.**

If a wife has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband, and in an application by her for maintenance, it is no defence for the husband to say that he is prepared to take her back. AIR (V 37) 1950 Nag 168: 1950 NLJ 317: 51 Cr LJ 1141.

**——S. 488—Proviso to sub-s. (3) is proviso to that sub-section only and not to sub-s. (1).**

The proviso to sub-section (3) of S. 488, Criminal P. C., is a proviso to that sub-section only and is not a proviso to sub-s. (1). Hence a separate inquiry which is made into the offer of the husband to maintain his wife when such offer is made in execution proceedings under S. 488(3) is not necessary when such offer is made in proceedings under sub-s. (1). AIR (V 30) 1943 Lah 223: 45 PLR 218: 44 Cr LJ 802: 208 Ind Cas 629.

——S. 488(3), proviso (1) — Proviso (1) following S. 488(3) is proviso to sub-s. (3) and not to sub-s. (1).

Although the word "section" is used in proviso (1) following S. 488(3), it is proviso to sub-s. (3) and not to sub-s. (1). This conclusion is further strengthened by the fact that the proviso that follows relates definitely to sub-s. (3) of S. 488 alone. AIR (V 30) 1943 Lah 59: 45 PLR 18: 44 Cr LJ 425: 205 Ind Cas 637 (DB).

——S. 488 — Husband agreeing to maintain wife or give her Rs. 5 per month as maintenance — Wife's petition ought to be dismissed.

An order under sub-s. (1) of S. 488 cannot be made unless it is proved that the husband neglects or refuses to maintain his wife or child as the case may be. A wife refusing without any sufficient reason to live with her husband is not at all entitled to receive any allowance under S. 488(1). Hence, when after the wife's petition under S. 488 for maintenance, the husband and wife had entered into a compromise by which both had agreed to live together and the husband has, on condition of his providing a residence for the wife, undertaken to properly maintain and feed her or to give Rs. 5 per month to her as maintenance, it cannot in any circumstances be said that the husband was neglecting or refusing to maintain the wife and the only proper order that the Magistrate can make is to dismiss the petition. AIR (V 30) 1943 Lah 59: 45 PLR 18: 44 Cr LJ 425: 205 Ind Cas 637 (DB).

——S. 488 — Wife agreeing to stay with husband — Husband's offer — Subsequent repudiation by her — Effect.

Magistrate should not allow maintenance when the husband offered to keep his wife with him specially, when in her application, she had stated that she was perfectly prepared to live with him in spite of the fact that she had alleged beating in the past, though when the husband made the offer, she repudiated it saying that she did not want to go with him as he had already given her trouble and would give her a lot more. AIR (Vol 28) 1941 Nag 175: ILR (1941) Nag 262: 1941 NLJ 199: 42 Cr LJ 647: 195 Ind Cas 5.

——S. 488 — Husband deserting wife due to frequent quarrels — Offer by husband to maintain, held not bona fide and order of maintenance, proper.

A husband deserted his wife and went away to live elsewhere owing to the constant quarrels between them and made no attempt to maintain her. She instituted a suit for judicial separation but was unsuccessful. Subsequently, there was an attempt on the part of the neighbours to bring about a compromise which also failed as the husband told that he could not compromise. The wife then applied for maintenance under S. 488. The husband, as a defence, offered to maintain his wife if she lived with him. The Magistrate refused to believe the husband and passed maintenance order:

Held, that the Magistrate rightly refused to believe that the belated offer of the husband to maintain his wife was made bona fide. The suit by wife for judicial separation and her failure in it did not alter the fact that the husband had deserted his wife and failed to maintain her. The order of maintenance was, therefore proper. AIR (V 25) 1938 Rang 25: 39 Cr LJ 287: 173 Ind Cas 212 (DB).

——S. 488 — An order for separate maintenance cannot be made in favour of a wife where the husband had offered to give his wife maintenance in his house but he wants her to live in a separate room and not to associate with the other members of his family and she has refused the offer. AIR (V 20) 1933 Mad 688(1): 34 Cr LJ 950(1): 38 LW 392: 65 MLJ 386: 56 Mad 913: 1933 MWN 1029: 145 Ind Cas 378(1).

——S. 488 — Offer to maintain — When a good defence.

An offer to maintain to be a good defence, should be made bona fide and not with the object of escaping obligation. (1911) 4 Bur LT 269: 13 Cr LJ 55: 13 Ind Cas 391.

## 17. Jurisdiction.

(a) General.
(a-1) Temporary residence — Casual visit.
(b) Pecuniary jurisdiction.
(c) To decide issue of paternity and marriage relation.
(d) Working for gain.
(e) Effect of wrong jurisdiction.

### (a) General.

——S. 488 — Jurisdiction — 'Reside' — Meaning.

It is wrong to treat the word "reside" as equivalent to something in the nature of having a domicile in a particular place or having a place as one's place of origin or the place where one's family used to live. "To reside" means to live or to have a dwelling place or an abode. A man cannot be said to reside in a place where he has no abode. AIR (Vol 34) 1947 All 4 : ILR (1946) All 879 : 228 Ind Cas 325 : 48 Cr LJ 208 : 1946 ALJ 305 (1) : 1946 AWR (HC) 438 (1) : 1946 ALW 339 (1) (DB).

——S. 488 — Person, if can reside at place where he lives in rented house.

A person who follows a profession must necessarily have some place of residence in which he can keep his wife and family and store his furniture and goods and to which he can return when he is not on tour. He can, as well, be said to reside in a rented house as in a house of which he is the owner. Hence a person can be taken to reside at a place even if he lives in a rented house. AIR (Vol 29) 1942 Mad 666 : 55 LW 306 : 1942 MWN 369 : (1942) 2 MLJ 134 : 44 Cr LJ 741 : 208 Ind Cas 192.

——S. 488 — "Reside", meaning explained.

The expression "reside" implies something more than "stay." The word implies some intention to remain at a place and not merely to pay it a casual visit, intending shortly to move on to one's permanent residence.

The husband was an Assistant Engineer in the Mysore State for nine years. He then took service with the Ceylon Government but after some time, gave up that post because his wife refused to live with him there. He then returned to his old post in Mysore and rented a house in Bangalore. Although he and his wife had not been getting on well for many years, she consented to come and live with him in Bangalore after panchayatdars had mediated between them. She had been there for about two months, when both the husband and the wife went to Ceylon for a short visit. On their return from this short visit to Ceylon, they halted at Trichinopoly, Where both the brother of the husband and the wife's father lived, and went to stay in the house of the husband's brother. During the few days they remained there, the husband ill-treated his wife and

drove her out of the house. She then went to her father's house. The husband returned to his duties in Mysore State. As a result of what happened in Trichinopoly, the wife brought an application for maintenance in the Court of the Sub-Divisional Magistrate at Trichinopoly:

Held, that the husband had made Bangalore his home before he visited Trichinopoly and intended to continue to reside there. His visit to Trichinopoly was clearly a casual one, in order that the parties might see their relatives on their way from Ceylon to Bangalore. The residence of the husband at the time when he illtreated his wife was, therefore, Bangalore and not Trichinopoly; and that was where the husband last resided with his wife at the time when the application for maintenance was filed. Consequently, the Magistrate at Trichinopoly had no jurisdiction to entertain the petition. AIR (Vol 29) 1942 Mad 666 : 55 LW 306 : 1942 MWN 369 : (1942) 2 MLJ 134 : 44 Cr LJ 741 : 208 Ind Cas 192.

**——S. 488 (8) — Sub-s. (8), if necessarily refers to permanent residence — Sufficient evidence — Section should not be strictly construed.**

Where there is something more than a flying visit, where a man leaves his house and resides for some time in the house of his parents-in-law with his wife, that is a sufficient residence within the meaning of sub-s. 8 of S. 488, Criminal P. C. Sub-section 8 does not necessarily refer to permanent residence. It refers also to temporary residence. The word "residence" of course implies something more than a mere brief visit, a mere flying visit. It suggests a certain continuity, but if there be a continuity, for such a period of time as to allow it fairly to be said that the husband did reside, even for a matter of some weeks with his wife, the section should not be so strictly construed as to deprive the woman, who, often in these cases, is helpless of assistance from the Court which is most easily accessible to her. It is not possible in such cases to fix any arbitrary period of time, to say, for instance, two months at Agra, six weeks at Bombay, one month at Karachi as a minimum to constitute residence for the purposes of S. 488, Criminal P. C. It could easily be said that a visit of a few days is not residence within the meaning of S. 488, Criminal P. C., but it could not easily be said that a visit of a few weeks was not residence within the meaning of S. 488, Criminal P. C. Each case, however, must be dealt with on its merits, the distinction between a mere visit and residence being borne in mind. AIR (Vol 25) 1938 Sind 223 : 40 Cr LJ 117 : ILR (1939) Kar 196 : 178 Ind Cas 527 (DB).

——S. 488 — The wife was abandoned in District 'A' after which the husband took up permanent residence at B'; held that suit under this section is to be brought at A. 1939 OWN 190 (1) : 1939 AWR 50.

——S. 488 — The Court has jurisdiction to decide a case if the husband last resided with the wife within the jurisdiction of that Court. 1935 MWN 475.

**——S. 488 — Place where husband is actually residing.**

The Court at the place where the husband is residing when proceedings under S. 488, Criminal P. C., are started, has jurisdiction to entertain the proceedings. The fact that the husband's father was residing in another place does not invest the Court in that place with jurisdiction. AIR (V 20) 1933 Lah 387: 34 Cr LJ 1171: 146 Ind Cas 51.

**——S. 488 — Permanent residence.**

Where the parties to an application under S. 488, Criminal P. C., have their permanent residence within the jurisdiction of a Court, that Court has the jurisdiction to entertain the application although the husband may have deserted his wife from a different place where he was only on a seasonal visit. AIR (V 20) 1933 Oudh 119: 10 OWN 374: 34 Cr LJ 744: 144 Ind Cas 51.

——S. 488 — Jurisdiction—Husband resident of X district — Wife residing with her father in Y district — Last visits of husband to his wife in her parents' house when he lived there — Wife's petition for maintenance in a Court in Y district can be entertained. AIR (V 15) 1928 Lah 853: 10 AI Cr R 490: 110 Ind Cas 239: 29 Cr LJ 687.

**——S. 488 — Place of marriage.**

The mere fact that the marriage of the parties had taken place within the jurisdiction of a Magistrate is not sufficient to give the Magistrate jurisdiction under S. 488 (8). AIR (V 13) 1926 Lah 663: 96 Ind Cas 865: 27 Cr LJ 1009.

**——S. 488 (9) — Residence of accused — Settled abode of mistress.**

For S. 488 (9) of the Cr P.C. a man may be said to reside with the mother of his illegitimate children at the place of her settled abode, if he visits there occasionally, so long as he has the intention of continuing to so visit her. Where a mother of illegitimate children is not shown to have a permanent residence anywhere, her stay for two months at a place where she is occasionally visited by the father of the children, is sufficient to constitute that place as her residence for the purposes of the section. (1911) 5 SLR 220: 13 Cr LJ 522: 15 Ind Cas 794 (DB).

**(a-1) Temporary residence — Casual visit.**

**——S. 488 — Petition by wife for maintenance at a place where she is stranger and where her husband never resided, but was on temporary visit to get married.**

An application for maintenance by wife can only be entertained at the place where husband and wife last resided together, and this rule has been modified to the extent that it has been held possible for a husband to have more than one residence for the purpose of S. 488. But there is no warrant for the proposition with one exception that a casual visit is to be taken as residence for the purpose of granting jurisdiction. Casual residence in a place for temporary purpose with no intention of remaining is not residence so as to attract jurisdiction. Temporary visit of the husband to a place where he does not reside to get married, and to which the first wife (applicant) is also a stranger, does not give jurisdiction to the Magistrate to entertain an application of the first wife under S. 488, Criminal P.C. AIR (V 28) 1941 Nag 175: ILR (1941) Nag 262: 1941 NLJ 199: 42 Cr LJ 647: 195 Ind Cas 5.

**——S. 488 (8) — Mere casual visit to place other than fixed residence would not confer jurisdiction on Court at that place.**

The word "reside" in S. 488 (8), Criminal P. C., must connote some sort of permanent intention to stay at a particular place. In the case of persons who have a fixed residence, a visit to another place, for however long a period, so long as it is casual, will not confer jurisdiction. A person who works and has a permanent home in L cannot, by his visit during period of casual leave,, confer jurisdiction on the Court at S. Where, however, the parties have no home of any sort and are moving about from place to place each place where they so live, would be their home for the time being. The sole test on

the question of residence is whether a party has animus manendi, or an intention to stay for an indefinite period at one place; and if he has such an intention, then alone can he be said to 'reside' there. AIR (V 27) 1940 Lah 449: 42 PLR 470: 42 Cr LJ 105: ILR (1940) Lah 755: 191 Ind Cas 203.

**(Overrules AIR (V 15) 1928 Lah 853: 29 Cr LJ 687: 110 Ind Cas 239).**

——S. 488 — **Mere hiring or purchase of a residential building at a place.**

The mere hiring or purchase of a residential building at a place would not confer jurisdiction on the Magistrate of that place to entertain petitions under S. 488, against the owner. AIR (V 24) 1937 Bom 35: 38 Bom LR 1107: 38 Cr LJ 248: 166 Ind Cas 574 (DB).

——S. 488 — **Temporary residence of husband — 'Last resided'.**

Even temporary residence of the husband at a place confers jurisdiction on the Court there to entertain an application for maintenance.

The expression 'last resided' in sub-s. (8) of S. 488 Criminal P. C., means both a permanent as well as a temporary residence. AIR (V 19) 1932 Nag 85 (2): 15 NLJ 24: 34 Cr LJ 32 (2): 140 Ind Cas 394.

——S. 488 — The words "last resided" are not restricted to permanent residence but include also a temporary residence of two months with wife at the house of parents-in-law as "gharjamai" so as to confer jurisdiction on the Court of that place. AIR (V 17) 1930 Bom 348: 54 Bom 548: 127 Ind Cas 179: 1930 Cr C 780: 32 Bom LR 764 (DB).

——S. 488 — **Forum — Casual residence in place in absence of settled abode or permanent place of residence gives jurisdiction.**

Where the husband and wife have a fixed place of abode or permanent place of residence a casual or temporary residence at any other place will not confer jurisdiction on the Court situate at that place. But where the husband and wife have no fixed place of abode or permanent place of residence, and both are going about from place to place, a casual or temporary residence at any particular time is sufficient to give that Court jurisdiction under sub-S. (8), S. 488. AIR (V 16) 1929 Bom 410: 53 Bom 781: 31 Bom LR 931: 122 Ind Cas 59: 31 Cr LJ 331: 1929 Cr C 462 (DB).

——S. 483 — 'Residence' in Cl. (8) includes also temporary residence — Stay of two months at a place is sufficient. AIR (V 14) 1927 All 291: 49 All 479: 25 ALJ 435: 8 LRA Cr 24: 7 AI Cr R 318: 28 Cr LJ 494: 101 Ind Cas 670.

——S. 488 — **Mere casual residence is not sufficient.**

Mere casual residence in a place for a temporary purpose with no intention of remaining is not "dwelling" and where a party has fixed his residence out of jurisdiction, occasional visits within the jurisdiction will not suffice to confer jurisdiction by reason of residence.

Where, therefore, a husband takes his wife to another place than where he resides and leaves her there, declaring that he would support her no longer, the Magistrate at the place where the wife is left has no jurisdiction to award the maintenance under S. 488. AIR (V 13) 1926 Oudh 268: 95 Ind Cas 596: 1 Luck 343: 3 OWN 231: 27 Cr LJ 820: 13 OLJ 597.

——S. 488 — Husband visiting wife casually at mother-in-law's house is not "residence" within Cl. 9. AIR (V 8) 1921 Oudh 168: 63 Ind Cas 870: 22 Cr LJ 710: 24 OC 249.

——S. 488 (a) — **Residence — Temporary residence.**

The residence for a week in Calcutta, during which an application was made under S 488, is sufficient to give the Presidency Magistrate jurisdiction having regard to Sub-Section (9) of S. 488 Cr. P. C. AIR (5) 1918 Cal 785: 21 CWN 872: 18 Cr LJ 706: 40 Ind Cas 706 (DB).

**(b) Pecuniary Jurisdiction.**

——S. 488 — **Claim exceeding Rs. 100.**

Jurisdiction of a Magistrate is not ousted simply because the maintenance claimed exceeds Rs. 100. The Magistrate is bound to entertain such application and deal with it on merits, he only cannot allow maintenance beyond Rs. 100. 1937 MWN 1127.

**(c) To decide issue of Paternity and marriage relations.**

——S. 488 — **Question of relation can be put in issue — Magistrate has jurisdiction to decide the same.**

In proceedings under S. 488, the question of relationship can be put in issue and the Magistrate has jurisdiction to decide the same. To say that once the relationship of marriage or paternity, as the case may be, is denied, S. 488 ceases to have application is to make the provisions of the section a complete nullity. Cas law reviewed. AIR (V 33) 1946 Pat 176: 24 Pat 692: 227 Ind Cas 446: 48 Cr LJ 111(DB).

**(d) Working for gain.**

——S. 488 (8) — **Opposite party working for gain within jurisdiction but not having permanent residence there.**

In S. 488 (8), Criminal P.C. the expression "where he resides or is or where he last resides with his wife" is sufficiently wide to confer jurisdiction upon the Chief Presidency Magistrate in a case in which the opposite party works for gain within the jurisdiction of his Court, even though he may not have a permanent residence within such jurisdiction. AIR (V 26) 1939 Cal 333: ILR (1939) 1 Cal 345: 40 Cr LJ 598: 181 Ind Cas 898.

(e) **Effect of wrong jurisdiction.**

——S. 488 — Proceeding in wrong district — Magistrate otherwise competent — Final order is not vitiated. AIR (V 16) 1929 Cal 336: 49 CLJ 205: 115 Ind Cas 602: 30 Cr LJ 225: 12 AI Cr R 343 (DB).

**18. Limitation.**

——S. 488 (6), **Proviso — Period of three months —Computation — Starting point.**

It cannot be said that the period of three months mentioned in the proviso to Cl. (6) of S. 488,, Cr. P. Code, means three months from the date of the knowledge of the order. There is no reason why the section should be read with the word "knowledge" which is not there. AIR (V 37) 1950 Mad 153: 51 Cr LJ 455: 62 LW 760 (2): (1949) 2 MLJ 557: 1950 MWN 221 (2).

——S. 488 (3), **Proviso — Absence of application for maintenance within one year of order of maintenance.**

It is a general principle of law that an order whose term is not fixed and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, and prima facie this rule applies to maintenance orders passed under S. 488, Criminal P.C. Hence, where the wife is not living in adultery nor does she refuse to live with her husband, she is not deprived of her right to maintenance under the order merely because she did not apply for maintenance within one year of the order of maintenance. AIR (V 26) 1939 Sind 180: 40 Cr LJ 776: ILR 1939 Kar. 674: 183 Ind Cas 336 (DB).

——S. 488 — **Arrears, if can be allowed to accumulate.**

Proviso 2 to sub-s. (3) of S. 488, Criminal P.C., only means that a person in whose favour an order for maintenance has been made must, to enable her to recover arrears of maintenance, apply to the Court to recover such arrears within one year from the date the arrears became due. She cannot allow arrears to accumulate indefinitely and apply for the recovery of those arrears for the first time after several years. AIR (V 25) 1938 Sind 151: 39 Cr LJ 847: 176 Ind Cas 863 (DB).

——S. 488 — Maintenance cannot be refused on the ground of delay in putting the petition for maintenance. 1936 MWN 1130.

**——S. 488 — Arrears.**

Proviso to sub-s. (3) of S. 488, Criminal P.C., does not bar the claim for arrears of maintenance due within a year prior to the date of application. 1934 MWN 926.

——S. 488 — Limitation within the proviso to S. 488 (3) runs from the date when the arrears accrue after the last payment of the maintenance. 1934 MWN 567.

**——S. 488 — Prior unchastity and denial of right to maintenance, effect of.**

Where, in certain proceedings under S. 488, Criminal P.C., the husband had asserted that his wife was unchaste and the Magistrate had declined to grant her maintenance and in a subsequent suit for maintenance by the wife, it was contended that this denial by her husband of her right to maintenance made it incumbent on her to establish her right within 12 years from the termination of the prior proceedings:

Held, that the right to maintenance was a recurring right and would revive on cessation of unchastity and the suit was not time-barred and that the suit was governed by Art. 128, Limitation Act. AIR (V 20) 1933 Lah 747: 34 PLR 1082: 14 Lah 759: 148 Ind Cas 479 (DB).

**19. Maintenance to Children—**

**(a) General**
**(a-1) Adopted child — Applicability.**
**(b) Age of Child.**
**(c) Child in the custody of mother.**
**(d) Educational expenses and Medical charges**
**(e) Illegitimate Child — Burden of proof**
See also Evidence Act S. 112
**(f) Marriage of Female Child.**
**(g) Grounds for maintenance — Neglect or Refusal — Proof.**
**(h) Unable to maintain.**

**(a) General**

**——S. 488 — Joint order — Considerations depriving mother of her right, whether affect child — Distinction.**

Where the maintenance allowance under the orders referred to under S. 488, Criminal P.C., is in favour jointly of the mother and her minor son, consideration which would deprive the mother of her right to the allowance would not prevent the child from asking and recovering it. AIR (V 25) 1938 Sind 151: 39 Cr. LJ 847: 176 Ind Cas 863 (DB).

**——S. 488 — Maintenance of child — Father's obligation — Mother's ability whether relevant—offer to maintain made by the father — Whether absolves father.**

A father must maintain his child whatever the position of the mother may be and merely requiring to know if the child would come to live with the father does not amount to an offer to maintain and so would not absolve the father from his liability. AIR (Vol 1) 1914 UB 1 : 7 Bur LT, 34: 15 Cr LJ 278: 23 Ind Cas 486.

**(a-1) Adopted Child — Applicability.**

**——S. 488 — Adopted child.**

An adopted child does not fall within the phrase 'his legitimate or illegitimate child' in S. 488, Criminal P.C., and an adoptive father is not liable under the section to pay maintenance to his adopted child. AIR (V 24) 1937 Mad 547: 45 LW 431: 1937 MWN 464: (1937) 1 MLJ 618: 38 Cr LJ 602 (1): ILR (1937) Mad 775: 168 Ind Cas 782.

**——S. 488 — Adopted child, if can claim maintenance — General Clauses Act (X of 1897), S. 3, Cls. (18), (53).**

The word 'child' in S. 488 merely expresses a relationship which may exist whether the child is under the age of majority or over the age of majority. A child which has reached majority may, for some reason, be unable to maintain itself, in which case the parent will, under S. 488, Criminal P. C., be liable to maintain it. Section 3, General Clauses Act, refers only to specific words and the meaning which it is there enacted, shall be attached to different words of somewhat similar meaning. If it had been intended that adopted children should benefit under S. 488, Criminal P. C., the word 'adopted' would have been inserted. The ordinary meaning of the expressions 'legitimate child' or 'illegitimate child' implies that the child is a natural child and not an adopted child. An 'adopted child' could not be described as either a 'legitimate' or an 'illegitimate' child. Therefore, an adopted child is not entitled to maintenance under S. 488, Criminal P.C. AIR (V 24) 1937 Rang 370: 39 Cr LJ 14: 171 Ind Cas 800.

**(b) Age of Child.**

**——S. 488 — Child — If includes son aged 17 or 18 or 19.**

In S. 488, Cr. P. Code, the word "child" has been deliberately used to leave the Courts free to order maintenance for such sons and daughters as are unable to earn livelihood for themselves having due regard to the class of society to which they belong and other surrounding circumstances. The fact therefore that the son is 17 or 18 or 19 is no ground for refusing maintenance on his account. AIR (V 37) 1950 Cal 465: 87 CLJ 185 (DB).

**——S. 488 — Child under — If should be a minor.**

A child entitled to maintenance under S. 488 of the Criminal Procedure Code must be a minor, that is, normally below 18 years, though if he is a ward under the Court of Wards or a person for whom a guardian is appointed by Court the age may perhaps be advanced to 21. AIR (V 37) 1950 Mad 394: 51 Cr LJ 931: 63 LW 77: (1950) 1 MLJ 158: 1950 MWN 341.

**——S. 488 — Children — Right to maintenance— Age, if material.**

The word "child" used in S. 488, Cr. P. Code, means son or daughter and reference to age is purposely omitted from it because the object of the section is to confer a right on any son or daughter to obtain maintenance from the father so long as he or she is unable to maintain himself or herself.

No doubt, the question whether a person is a major or minor is not wholly irrelevant in a proceeding under S. 488, for if a person is a minor there can be no presumption against him that he is able to maintain himself. On the contrary, if it is shown that he is a major there would be a presumption against him that he is able to maintain himself. AIR (V 37) 1950 Nag 231: 1950 NLJ 655: ILR (1951) Nag 475.

**——S. 488 — "Child"**

The word "Child" has not been defined, but a person is a child for purposes of this section till

he or she attains the age of majority. AIR (V 36) 1949 Bom 36: 50 Bom LR 281: 49 Cr LJ 630: ILR (1948) Bom 380 (DB).

——**S. 488, if confined to minor children.**

The word "child " is used in S. 488, Criminal P. C. with reference to the father. There is no qualification of age ; the only qualification is that the child must be unable to maintain itself. Hence, there is no justification for saying that S. 488, is confined to children who are under the age of majority. AIR (V 30) 1943 Bom 48 : 44 Bom LR 919 : 44 Cr LJ 334 : ILR (1943) Bom 38 : 205 Ind Cas 157 (DB).

——**S. 488 — Age of girl is immaterial.**

Section 488, Criminal P. C., does not limit the right of maintenance to minors. The age of the girl is immaterial. AIR (V 28) 1941 Mad 685 : 42 Cr LJ 838 : 1941 MWN 479 (1) : 196 Ind Cas 16 (DB).

——**S. 488 — Muhammadan girl between 15 and 16 years, whether entitled to maintenance.**

A Muhammadan girl between 15 and 16 years of age is entitled to maintenance under S. 488, Criminal P. C. She is not a child able to maintain herself. AIR (V 24) 1937 Rang 518 : 39 Cr LJ 196 : 172 Ind Cas 879.

——**S. 488 — Any person below eighteen years of age, if a child.**

The word "child" has not been defined in the Criminal P. C. In the absence of any statutory definition or anything to the contrary in the Act, a "child" is a person who is not competent to enter into any contract or to enforce any claim under the Majority Act, a person who has not attained the age of majority, that is, 18, is incompetent to contract and is therefore, a child within the meaning of the section. Consequently, it cannot be said that a child, as contemplated by S. 488, Criminal P. C. is an infant who had not yet attained puberty. AIR (V 22) 1935 Cal 488 : 61 CLJ 141 : 39 CWN 432 : 36 Cr LJ 1114 : 62 Cal 639 : 157 Ind Cas 365.

——**S. 488 — Boy below 18 — College boy unable to maintain himself — Right to maintenance.**

A boy below 18 years of age can be considered a child so long as he is not able to maintain himself. A boy can ask for maintenance from his parent so long as he is unable to earn his own living, even though that inability results from his taking an educational course provided the said educational course is not being undergone with the object of inflicting upon the parent the burden of maintenance. AIR (V 20) 1933 Lah 1026 : 35 Cr LJ 473 : 35 PLR 320 : 147 Ind Cas 719.

——**S. 488 — Arrears — Child attaining majority and becoming able to maintain itself, effect of.**

The words 'without sufficient cause' as applied to S. 488 (3), Criminal P. C. are very wide and justify the raising of a plea that the order has become 'spent' owing to the child for whom the maintenance was ordered having attained the age of majority and being able to maintain itself.

Section 488 ordinarily contemplates a case of a child unable to maintain itself owing to its tender years, and in ordinary cases a strong presumption would arise that when a child reached the age of majority, it was no longer unable to maintain itself under the provisions of the section. AIR (V 19) 1932 Rang 94 : 38 Cr LJ 495 : 10 Rang 194 : 137 Ind Cas 439 (DB).

——S. 488 — Maintenance — Daughters under ten years of age are entitled to separate allowance. AIR (V 15) 1928 Bom 418 : 112 Ind Cas 473 : 52 Bom 763 : 11 AICrR 288 : 30 Bom LR 958 : 29 Cr LJ 1049 (DB).

——S. 488 — Major son cannot claim maintenance. AIR (V 9) 1922 Nag 249 : 65 Ind Cas 631 : 5 NLJ 247 : 23 Cr LJ 167.

——S. 488 — There is no age limit for maintenance allowance awarded to child — Allowance should continue until it is able to maintain himself. AIR (V 8) 1921 Pat 379 : 2 PLT 109 : 22 Cr LJ 336 : 61 Ind Cas 64.

——**S. 488 — "Child."**

"Child" in S. 488 of the Code means one who has not attained the age of majority. AIR (V 1) 1914 Mad 594 : 37 Mad 565 : (1913) MWN 695 : 14 MLT 224 : 25 MLJ 349 : 14 Cr LJ 525 : 20 Ind Cas 1005.

——**S. 488 — "Child" — Meaning.**

"Child" in S. 488 means son or daughter of any age. Hence a son or daughter of any age can claim maintenance, so long as he or she is unable to maintain himself or herself. 28 PWR Cr 1910 : 11 Cr LJ 427 : 6 Ind Cas 960.

**(c) Child in the custody of mother**

——S. 488 — In a proceeding under S. 488, so far as the maintenance of a child is concerned, the Criminal Courts is concerned only with the fact of its custody and not the propriety of that custody. AIR (Vol 32) 1945 Bom 390 : 47 Bom LR 345 (DB).

——**S. 488 — Wife leading adulterous life — Child in custody of wife — She is entitled to maintenance of child.**

A wife leading an adulterous life is not entitled to maintenance. But where she has the custody of a child and has to maintain it and it is not shown that at any time when the child was living away from him, the husband wanted the child to go to him and the child refused to live with him, she is entitled to the costs of maintaining the child till in due process of law, the husband is able to obtain the custody of the child. AIR (Vol 30) 1943 Mad 768 : 56 LW 496 (2) : 1943 MWN 584 : (1943) 2 MLJ 318 : 45 Cr LJ 266 : ILR (1944) Mad 382 : 210 Ind Cas 375.

——**S. 488 — Maintenance for child in custody of mother must be given.**

As long as the child is with the mother, the mother must be given sufficient to maintain the child. If the father has a right to the custody of the child, he can, at any time, institute proceeding for that purpose. An adult can be coerced into coming into proper custody by refusing maintenance, but a child has no such choice; it must remain with whomsoever takes it. So that it would be improper for the Court to refuse maintenance for the child merely because it was of opinion that the petitioner had no right to the custody of the child. AIR (Vol 29) 1942 Mad 705 : 55 LW 568 : 1942 MWN 582 : 44 Cr LJ 125: 1943 MLJ 120: 203 Ind Cas 615.

——**S. 488 — Children residing with wife — Court, if can order maintenance — Husband's remedy.**

The object of S. 488, Criminal P. C., is to avoid vagrancy by providing that a Magistrate may, up to a limited extent, see that a wife and children are maintained by the husband or father able to maintain them. But the Magistrate must take the facts as he finds them to be. If in fact, the children are living with the wife, and if, in fact, the father is refusing or neglecting to maintain them where they are living, the Magistrate has jurisdiction to make an order. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceed-

ings in a Civil Court to get the children removed from the custody of mother. AIR (Vol 28) 1941 Bom 267: 43 Bom LR 515: 42 Cr LJ 639: 195 Ind Cas 232 (DB).

**——S. 488 — Muhammadan father willing to maintain minor son if custody were given to him.**

A Muhammadan woman made an application for maintenance under S. 488, Criminal P. C. against her husband for maintenance of herself and two children, a boy aged four years and a girl aged one and a half years. The husband contended that he would maintain the son if he were given into his custody:

Held, that as an enquiry into the Muhammadan Law as to custody was not made necessary by the Criminal P. C. which governed the proceedings, the mother was the proper person to have the custody of the son aged four and the father must maintain that child. AIR (Vol 24) 1937 Lah 236: 38 PLR 1117: 38 Cr LJ 672: 168 Ind Cas 896.

**——S. 488 — Minors living with mother after dissolution of marriage — Duty of father — Negligence.**

Where two minor children lived with the mother after dissolution of her marriage with their father, it is the duty of the father to make an allowance for their maintenance unless he can show that there has been no negligence or refusal on his part to support and maintain the children. If he has been making no contribution towards their support from the time they left his protection, there is negligence on his part and he can be directed to make an allowance for the maintenance of the children. AIR (Vol 24) 1937 Rang 205: 38 Cr LJ 782: 169 Ind Cas 428.

**——S. 488 — Child living with mother who refused to return to her husband under decree for restitution of conjugal rights — Liability of father to maintain child — Remedy for custody of child.**

The fact that the child is living with its mother who refuses to return to her husband under a decree for restitution of conjugal rights, does not absolve the father from his duty of maintaining the child. It is open to the father to apply to the Court for the custody of the child. AIR (Vol 19) 1932 Rang 183: 10 Rang 486: 33 Cr LJ 918: 140 Ind Cas 150(1).

**——S. 488 — Refusal to maintain minor child — Evidence — Unreasonable condition amounting to refusal.**

In the case of a minor who is living with its legal guardian, e.g., a Mohomedan boy, aged 3 with his mother, the condition imposed by the father that he would maintain it only if the child went to reside with him is tantamount to a refusal to maintain the child. AIR (Vol 17) 1930 Lah 1043: 1930 Cr C 1219: 129 Ind Cas 216: 32 Cr LJ 247: 32 PLR 143.

——S. 488 — Application for maintenance by a Mahomedan infant daughter living with her legal guardian, the mother, against her father — Father willing to maintain the child if given into his custody — Order of maintenance cannot be refused. AIR (Vol 15) 1928 Lah 543: 112 Ind Cas 476: 9 Lah 313: 29 PLR 401: 29 Cr LJ 1052.

**——S. 488 (1) — Maintenance of children living with mother — Father's liability.**

A father cannot refuse to maintain his children on the ground that they are living with their mother if they are unable to maintain themselves. Until he enforces his rights, if any, in a Civil Court he must maintain his children if unable to maintain themselves. AIR (Vol 3) 1916 Cal 657: 8 Bur LT 134: 16 Cr LJ 656: 30 Ind Cas 480.

**——S. 488(4) — Maintenance — Father's willingness to maintain the child — Effect of.**

The father's willingness to maintain the boy has nothing to do with his liability to maintain him when the boy is living with his natural guardian. Hence under S. 488 (4) the child is not disentitled to maintenance. (1913) 14 MLT 223: 25 MLJ 355: (1913) MWN 997: 14 Cr LJ 597: 21 Ind Cas 469.

(d) Educational expenses and medical charges.

**——S. 488 — Maintenance of child — It includes cost of ordinary education — Middle class family.**

Under S. 488, Cr. P. Code, the maintenance of a child in the case of a middle class family includes besides food, clothing and lodging, the cost of ordinary education. AIR (Vol 37) 1950 Cal 465 : 87 CLJ 185 (DB).

**——S. 488 — Amount of maintenance must include necessary education of child.**

The interpretation of S. 488 may well alter from time to time as ideas of social justice and social needs alter, as ideas advance. If maintenance is to serve the purpose of the section, it must be something more than starvation maintenance, maintenance sufficient only to keep body and soul together. It must include board and lodging, but boarding and lodging on such a scale as to enable a frugal and thrifty mother to save sufficient for a simple and necessary education of her child. There is nothing more likely to make a child a vagrant than that it should be merely clothed and fed and lodged and its mind to be utterly untrained. The purpose of the section is to prevent vagrancy. AIR (Vol 28) 1941 Sind 214: ILR (1941) Kar 417: 43 Cr LJ 290: 197 Ind Cas 849 (DB).

——S. 488 — Child — Educational expenses.

Amount of maintenance given to child must include simple and necessary education. AIR (Vol 28) 1941 Sind 214: ILR (1941) Kar 417: 43 Cr LJ 290: 197 Ind Cas 849.

——S. 488 — Education of children.

The meaning of "maintenance" as used in S. 488, Criminal P. C., includes the education of children, that is to say, the minimum amount of education which the conventions of the country call for. The mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience. AIR (Vol 26) 1939 Rang 95: 1938 Rang LR 673: 40 Cr LJ 440: 180 Ind Cas 584.

**——S. 488 — Maintenance of child — What it includes.**

S. 488 contemplates application by a wife or a child. Where the widow alleged herself to be a discarded mistress, and the application was made by her for the school fees of her son.

Held, that this would require only a formal amendment of the application as one by the woman as guardian of the child and that the amendment might be made by the Court on its own motion. The payment of money to the child's mother by the alleged father could be weighed as evidence of an intimacy between the alleged father and the woman, but in no sense could it be regarded as a binding composition of the claims of the child. The object of proceedings for maintenance is to prevent vagrancy and that object is attained by the provision of lodging, food and clothing. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing; he is not bound to maintain her as his wife.

A Court ought to allow an application framed as one for educational expenses into one for maintenance only if it was satisfied that the application as framed was framed in error, that what the woman really wanted on behalf of the child was maintenance, and not where the application had been deliberately and purposely framed. AIR

(Vol 12) 1925 All 73: 82 Ind Cas 257: 25 Cr LJ 1249: 5 LRA Cr 187.

——S. 488 — **Maintenance — Medical charges — Father whether bound to pay for medical attendance of child.**

A father who is paying maintenance for his child under order of court is not bound to pay the charge for the medical attendance of the child in the absence of an express or implied contract. AIR (Vol 5) 1918 Low Bur 96: 11 Bur LT 128: 41 Ind Cas 689.

——Ss. 488 and 489 — **"Maintenance" — School fees.**

In Ss. 488 and 489, maintenance does not include children's schooling fees. 4 Ind Cas 758: 11 Cr LJ 40 (U.B.)

(c) Illegitimate child — Burden of proof.

See also Evidence Act S. 112.

——S. 488 — Evidence — Claim by married women for maintenance of illegitimate child from putative father — Evidence of non-access by petitioner and her husband — Admissibility. See AIR (Vol 34) 1947 Cal 183: ILR (1947) 1 Cal 9: 47 Cr LJ 870: 50 CWN 960.

——S. 488 — **Illegitimate child — Parsi — Liability for — Law applicable — Civil suit for maintenance, if maintainable.**

There is no code of law which governs the Parsis in India, and except for the statutory law, they are governed by the common law of England. Therefore, the question whether there is any obligation upon a Parsi putative father to maintain his illegitimate child must be decided under the English Common Law. The father of an illegitimate child, so long as it remains illegitimate, is not recognised by law of England for civil purposes. A Parsi is not, therefore, under any legal obligation to pay maintenance to his illegitimate child apart from statutory liability under S. 488, Criminal P. C. The only duty of a father to maintain his infant children is merely a moral obligation or a duty of imperfect obligation. A civil suit for maintenance for such a child is not maintainable even on the general principles of justice, equity and good conscience. AIR (Vol 30) 1943 Bom 338: 45 Bom LR 687: ILR (1943) Bom 428: 210 Ind Cas 232.

——S. 488 — **Illegitimate children — No proof of non-access with husband — Admissions of paternity — Effect.**

In view of the clear wording of S. 112 of the Evidence Act, all admissions of paternity are irrelevant if the complainant fails to prove that she and her husband had no access at the time when the child could have been begotten. AIR (Vol 29) 1942 Mad 251: 43 Cr LJ 383: (1941) 2 MLJ 693: 1941 MWN 1037: 197 Ind Cas 883.

——S. 488 — **Illegitimacy of child — Burden of proof.**

It is for the mother to show that the child was born of the person against whom a maintenance is claimed before such person could be called upon to disprove it. It is settled law that it is prima facie improper to accept without corroboration the mere statement on oath of the mother who asserts that a certain man to whom she is not married is the father of her child. AIR (Vol 28) 1941 Pat 444: 7 BR 501: 42 Cr LJ 347: 22 PLT 273: 192 Ind Cas 893.

——S. 488 — **Illegitimate child.**

Application by mistress for maintenance dismissed — No revision against order — Subsequent application for maintenance of herself and child born subsequently:

Held, that maintenance of the child alone could be considered. AIR (Vol 22) 1935 Rang 277: 36 Cr LJ 1391: 158 Ind Cas 641.

——S. 488 — **Offspring of Malabar marriage.**

Independently of any legislative enactment, the law of Malabar does not recognise marriage as a legal institution, the relation in truth being not marriage but a state of concubinage into which the woman enters of her own choice and which she is at liberty to change when and as often as she pleases, and the offspring of such a connection would be entitled to an order for maintenance against the father only if and when the mother's tavazhi or tarwad is unable to maintain them. AIR (Vol 20) 1933 Mad 794: 38 LW 587: 34 Cr LJ 1159 (2): 65 MLJ 629: 1933 MWN 1276: 145 Ind Cas 970 (1).

——S. 488 — A father is liable for the maintenance of his legitimate or illegitimate child unable to maintain itself but not for the child of another man. AIR ( Vol 13) 1926 Lah 532: 94 Ind Cas 354: 7 Lah 365 : 27 Cr LJ 610 : 27 PLR 539.

——S. 488 — **Paternity of child — Proof of — Corroboration.**

In a case under S. 488, where the question at issue is, whether a certain man was the father of a certain child, it is prima facie improper to accept without corroboration the mere statement on oath of the mother who asserts the paternity. Her evidence in such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own word without some independent corroboration of it.

A Municipal record of the birth of the child of what the mother herself said at the time of the birth is not an independent corroboration nor can the fact that letters, of which the contents were not known, passed between the mother and the alleged father is such a corroboration. The kind of evidence that one would look for to be given as corroboration, in such a case would be evidence that at or about that time when the child was conceived, the petitioner was frequenting the society of the counter-petitioner,, and had opportunities of access to her. 24 MLW 409: 27 Cr LJ 1095: AIR (Vol 13) 1926 Mad 1130: 97 Ind Cas 359.

(f) **Marriage of female child.**

——S. 488 — **"Child" — "Unable to maintain itself" —Interpretation — Daughter — If loses right to be maintained by father on marriage.**

The word "child" has not been defined, but a person is a child for purposes of this section till he or she attains the age of majority. A daughter does not on marriage ipso facto lose her right of maintenance from her father under this section as a child unable to maintain itself. The real and only test is whether the child is unable to maintain itself. A legally enforceable right to maintenance at the hands of a third person cannot mean the same thing as ability to maintain. It may be that a married daughter is still unable to maintain herself either because her husband is too poor to maintain her or he himself is a child or is otherwise unable to maintain her. ILR (1948) Bom 330: AIR (Vol 36) 1949 Bom 36: 50 Bom LR 281: 49 Cr LJ 630 (DB).

——S. 488 — Daughter married after maintenance order — Order should continue if she is unable to maintain herself even then. 86 Ind Cas 220: 26 Cr LJ 732: 48 Mad 503: 21 MLW 142: 1925 MWN 67: AIR (Vol 12) 1925 Mad 491: 48 MLJ 183.

(g) **Grounds for maintenance—Neglect or Refusal.**

——S. 488 — No order can be passed against a person for maintenance under S 488, Criminal P. C., unless neglect or refusal to maintain his children is brought home to him. AIR (Vol 28) 1941 Pat 444: 42 Cr LJ 347: 22 PLT 273: 7 BR 501: 192 Ind Cas 893.

——S. 488 — Maintenance to child — Order cannot be passed without proof of neglect or refusal to maintain it. 101 Ind Cas 191: 28 Cr LJ 415: AIR (Vol 14) 1927 Lah 430.

——S. 488 — Husband ready to maintain wife and children — Court must enquire as to the wife's unwillingness to live with husband — Minority of children is no ground for separate maintenance. 98 Ind Cas 391: 27 PLR 333: 27 Cr LJ 1319: AIR (Vol 13) 1926 Lah 536.

**——S. 488 — Children — Offer to maintain in future is no bar to passing order.**

With regard to the maintenance of children, it is sufficient under sub-s. (1) of S. 488 if the neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him. 87 Ind Cas 431: 49 Bom 562: 27 Bom LR 359: 26 Cr LJ 975: AIR (Vol 12) 1925 Bom 259. (DB).

——S. 488—Child's capacity to contribute to its support should be disregarded in fixing the sum payable. 85 Ind Cas 375: 26 Cr LJ 535: 2 Rang 682: AIR (Vol 12) 1925 Rang 197.

——S. 488 — Neglect and refusal by father justifies order—Offer at trial to maintain is of no avail. 76 Ins Cas 30: 19 MLW 530: 25 Cr LJ 94: 1924 MWN 465: AIR (Vol 11) 1924 Mad 624.

——S. 488 — Child able to maintain himself but wanting to better his prospects cannot compel his father to maintain him. 73 Ind Cas 334: 1 Bur LJ 123: 24 Cr LJ 590: AIR (Vol 10) 1923 Rang 45.

**——S. 488 — Maintenance order — Legality — Children.**

Where a father has custody of his minor children and is maintaining them properly, the fact that they go and live with the mother does not entitle the wife to claim maintenance for the children. 8 LBR 105: 16 Cr LJ 217: 27 Ind Cas 841. AIR (Vol 2) 1915 Low Bur 133.

**(h) Unable to maintain.**

**——S. 488 — Person of 20 years age and healthy.**

A person who is 20 years old and who is healthy and does not suffer from any illness must be presumed to be capable of maintaining himself. His station in life does not make any difference in this question and the burden of proving to the contrary is on him. AIR (Vol 28) 1941 Lah 92: 42 PLR 743: 42 Cr LJ 439: 193 Ind Cas 548 (DB).

**——S. 488 — Maintainability is physical or pecuniary inability.**

The ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained and is being maintained as to a child which is able to earn a living by its own exertions. AIR (Vol 11) 1924 Mad 549: 77 Ind Cas 418: 19 MLW 275: 34 MLT 167: 1924 MWN 305: 25 Cr LJ 370: 46 MLJ 324.

**——Ss. 488 and 489 — Unable to maintain — Incapacity to earn — Pursuit of higher education.**

Where daughters in whose favour an order for maintenance is made have become sufficiently old and capable of maintaining themselves the order may be discharged notwithstanding that they are desirous of continuing their education or are reluctant to work for their living. AIR (Vol 5) 1918 Low Bur 28: 19 Cr LJ 160: 43 Ind Cas 448.

**——Ss. 488 and 489 — Unable to maintain — Maintenance.**

The issue of a Malabar Sambandam Marriage are not entitled to maintenance where the Tawazhi has sufficient funds to maintain them. (Per Napier J.) S. 488 refers not only to child's tender age, but also to its financial dependency. Insufficiency of tarwad funds is a change of circumstances within the meaning of S. 489 Special Law. S. 1 refers to statutory enactments and not to local family law. AIR (Vol 6) 1919 Mad 193: 10 LW 229: 26 MLT 238: 37 MLJ 361: (1919) MWN 632: 20 Cr LJ 733: 52 Ind Cas 893 (DB).

**——S. 488 — "Unable to maintain itself".**

The words "unable to maintain itself" cannot be interpreted to mean only physical inability to earn a livelihood, but the ability applies as much to the case of a child having means of its own or entitled in law to be maintained through other sources. Therefore a child possessing a legally enforceable right to maintenance from its mother's tarwad and being actually maintained by that tarwad cannot obtain an order for maintenance against its father under S. 488. AIR (Vol 4) 1917 Mad 276: 39 Mad 957: (1916) 1 MWN 111: 19 MLT 23: 17 Cr LJ 16: 32 Ind Cas 144 (DB).

**——S. 488 — Unable to maintain — Prostitution if a profession.**

For the purposes of the section, prostitution cannot be regarded as a profession by which a girl can earn her livelihood. AIR (Vol 1) 1914 Mad 594: 37 Mad 565: 1913 MWN 695: 14 MLT 224: 25 MLJ 349: 14 Cr LJ 525: 20 Ind Cas 1005.

**——S. 488 (1) — "Unable to maintain"—Meaning of.**

The words "unable to maintain" itself in S. 488 (1) relate to the absence of sufficient maturity in physical and mental development in the child enabling it to earn its livelihood by its own exertions, and if a child belongs to a well-to-do tarwad, the liability of the father to maintain the child does not cease in consequence. (1913) 14 MLT 223: 25 MLJ 355: (1913) MWN 997: 14 Cr LJ 597: 21 Ind Cas 469.

**20. Means and ability.**

**——S. 488 — Husband's indebtedness.**

The husband's indebtedness is no ground for dismissing the wife's petition for maintenance. AIR (Vol 28) 1941 Mad 762 (2): 1941 MWN 668: 54 LW 386.

**——S. 488 — Insolvency of husband.**

Insolvency of the husband is prima facie evidence of his inability to pay a maintenance debt but is not a conclusive evidence. AIR (Vol 27) 1940 Bom 344: 42 Bom LR 741: 42 Cr LJ 101: 191 Ind Cas 189 (DB).

**——S. 488 — Protection order under S. 25, Presidency Towns Insolvency Act, whether protects debtor against Criminal Court's power of committal under S. 488.**

The protection order under S. 25, Presi. Towns Insol. Act, does not protect the debtor from being proceeded against in a Criminal Court. A provable debt might have been incurred by reason of some criminal offence such as cheating or criminal misappropriation. It is obvious that a protection order would not protect against prosecution and conviction for such an offence and also a protection order does not protect against the special statutory power of committal given to a criminal Court under S. 488, Criminal P. C. AIR (Vol 27) 1940 Bom 344: 42 Bom LR 742: 42 Cr LJ 101: 191 Ind Cas 198 (DB).

**——S. 488 — "Means" includes capacity to earn money.**

The term "sufficient means" is not confined to pecuniary resources only, but includes a capacity to earn money and if a man can be shown to be capable of being able to earn money, then he has the means to obtain his wife. AIR (Vol 26) 1939 Lah 24: 41 PLR 161: 179 Ind Cas 766.

——S. 488 — **Husband adjudicated insolvent.**

The mere fact that the husband has been adjudicated an insolvent does not show that he is unable to pay for the maintenance of his wife and that, that constitutes sufficient cause for non-payment. Under the provisions of S. 60, Civil P. C. as now enacted, the salary to the extent of the first hundred rupees and one-half of the remainder of such salary is exempt from attachment and does not vest in Receiver. The husband would, therefore, if he is prepared to do work and earn salary be in a position to support his wife. AIR (Vol 25) 1938 All 253: 1938 ALJ 225: 1938 AWR 157: 39 Cr LJ 553: ILR (1938) All 486: 175 Ind Cas 235.

——S. 488 — **"Sufficient means," what is.**

The words "sufficient means" in S. 488, Criminal P. C. should not be confined to the actual pecuniary resources but should have reference to the earning capacity. (1936) 159 Ind Cas 120 : 18 NLJ 107: 37 Cr LJ 86.

——S. 488 — It is a question of fact, to be determined upon a consideration of the circumstances disclosed in each case, whether the person against whom it is sought to obtain or enforce a maintenance order has "sufficient means" or "sufficient cause," as the case may be, within S. 488, Criminal P. C. The term 'sufficient means' is not confined to pecuniary resources and a mere denial by a man himself of a sufficiency of means, when that man is an able-bodied man, is not conclusive proof of want of sufficient means. AIR (Vol 20) 1933 Rang 138: 34 Cr LJ 815: 11 Rang 226: 144 Ind Cas 187 (2) (FB).

——S. 488 — The word 'means' in S. 488 includes a capacity to earn money, and if a man can be shown to be capable of earning money, then he has the means to maintain his wife.

Prima facie, a young man of twenty-six years of age must be presumed to be capable of earning money. The presumption may be rebutted by showing that, in fact, whether through disease or accident he is not an able-bodied man, or by showing that owing to the state of the labour market, he is in fact incapable of earning any money. AIR (Vol 19) 1932 Bom 285: 34 Bom LR 587: 56 Bom 260: 33 Cr LJ 625: 138 Ind Cas 517 (DB).

——S. 488 — **Sadhu — Presumption.**

A man merely by becoming a sadhu is not in law excused from maintaining his wife. But if he can prove by reason of the vows he has taken, he is incapable of holding any property or of earning any money which will enable him to maintain his wife without incurring such serious consequences that no Court would expect him to incur them, then he cannot be said to have sufficient means to maintain his wife. AIR (Vol 19) 1932 Bom 285: 34 Bom LR 587: 56 Bom 260: 33 Cr LJ 625: 133 Ind Cas 517 (DB).

——**S. 488 — "Means" — Meaning of.**

The word "means" in S. 488 does not signify only visible means, such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife. AIR (Vol 13) 1926 Mad 346: 1926 MWN 146: 27 Cr LJ 350: 92 Ind Cas 862: 50 MLJ 44.

——**S. 488 — Buddhist monk not exempted from duty to maintain his child.**

Even a Buddhist monk is bound to maintain his child. The Cr. P. Code must override his personal law, if it conflicts with it. The presumption is that an able-bodied man has sufficient means to support his child as well as himself and that it is for him to prove the contrary. AIR (Vol 10) 1923 Rang 131: 72 Ind Cas 368: 4 UBR 138: 24 Cr LJ 368.

——**S. 488 — Able-bodied man — Presumption — Denial of sufficiency — Burden of proof.**

The presumption in the case of an able-bodied man not affected by any infirmity is that he has sufficient means to protect himself and the child. The burden of proving insufficiency of means lie on him and mere denial of sufficiency of means is not conclusive proof of it. UBR (1911) 1, 90: 13 Cr LJ 162: 13 Ind Cas 914.

### 21. Nature and scope.

——**S. 488 — Scope — Nature of right under — Summary remedy — Resort to — When justified — Right under personal law — If affected.**

S. 488, Cr. P. Code, provides only a speedy remedy against starvation for a deserted wife or a child. It prescribes a summary procedure which does not cover entirely the same ground as the civil liability of the husband or the father under his personal law to maintain his wife or child. The right under the section is a distinct statutory right irrespective of the personal law of the parties and under it, a person having sufficient means and neglecting or refusing to maintain his wife or child unable to maintain itself can be ordered to pay maintenance to his wife or child. Where substantial issues of civil law are involved and raised between the parties their remedy lies only in the Civil Courts. AIR (Vol 36) 1949 Bom 36: ILR (1948) Bom 380: 50 Bom LR 281: 49 Cr LJ 630 (DB).

——**Ss. 488 and 202 — Application under S. 488 is not complaint — It cannot be referred to another official for inquiry under S. 202.**

An application under S. 488 is not a criminal complaint within the meaning of the Criminal Procedure Code. Therefore, the petition, not being a complaint, cannot be referred to another official for inquiry under S. 202. Section 488 clearly contemplates that the inquiry should be made by the Magistrate himself and that function cannot be delegated to another officer. AIR (Vol 33) 1946 Pat 104: 226 Ind Cas 43: 47 Cr LJ 821.

——**S. 488 — Power to make order is discretionary.**

It is incorrect to say that on an application by the wife under S. 488, Criminal P. C. for maintenance, the Magistrate is bound to make an order under the first sub-section of S. 488, unless the respondent husband could establish any of the offences indicated by the fourth sub-section. The Magistrate's power to make an order under S. 488 is discretionary. AIR (Vol 31) 1944 Lah 392 : 45 Cr LJ 254: 211 Ind Cas 77.

——**S. 488 — Substantial issues of civil law arising between parties — Their remedy lies in civil Court.**

Section 488, Criminal P. C., provides only a speedy remedy against starvation for a deserted wife or child. It is only a summary procedure which does not cover entirely the same ground as the Civil liability of a husband or father under his personal law to maintain his wife or child, and when substantial issues of civil law are raised between the parties, their remedy lies only in the civil Courts. AIR (Vol 31) 1944 Lah 392: 45 Cr LJ 254: 211 Ind Cas 77.

——S. 488 — Section 488, has nothing to do with conjugal rights. Wife cannot exact promise of sexual fidelity from husband. AIR (Vol 24) 1937 Mad 794: 46 LW 324: (1937) 2 MLJ 488: 1937 MWN 1197: 39 Cr LJ 24: 171 Ind Cas 914.

——**S. 488 — Maintenance Orders Enforcement Act (XVIII of 1921) — Scope and application of.**

The Maintenance Orders Enforcement Act does not confer any jurisdiction on the Magistrates to

allow any amount they think fit as maintenance to wives and children living in India whose husbands and fathers respectively are in England. In India, the only relevant provision of law is S. 488, Criminal P. C. 1937 MWN 1127.

**——S. 488 — Magistrate cannot decide finally right of parties.**

A Magistrate acting under S. 488, Criminal P. C., is not a civil Court of inferior limited jurisdiction and has no right to settle finally the rights of the parties, but has only power to provide for immediate bare necessities. 1937 MWN 1127.

**——S. 488 — Speedy remedy.**

An application under S. 488, Criminal P. C., is a cheap and speedy but a limited relief for deserted wife and neglected children, the maximum maintenance awardable under the section being Rs. 100 a month. 1937 MWN 1127.

**——S. 488 — Non-payment of prompt dower — Personal law — Protection of Muhammadan Law in derogation of statutory provisions.**

The non-payment by the husband of prompt dower may be a good and sufficient reason under the Muhammadan Law for a married woman to withhold her person from her husband, but it does not follow that such non-payment is a sufficient or good enough ground within the meaning of S. 488, Criminal P. C., so as to empower a Court to pass a decree for maintenance to a Muhammadan wife against a husband who is willing to maintain her upon condition of her living with him. Section 488, Criminal P. C., provides a statutory right and cannot be affected by personal law. The right conferred upon the wife by the provisions of S. 488, Criminal P. C., is independent of personal law, and to claim protection of the Muhammadan Law in derogation of the statutory provisions of the Criminal P. C., is not permissible. Non-payment of a prompt dower is not sufficient reason under the provisions of the Criminal P. C., to entitle a wife to claim separate maintenance, when she refuses to live with her husband without any good reason. AIR (Vol 22) 1935 Oudh 285: 1935 OWN 292: 36 Cr LJ 524: 154 Ind Cas 561.

**——S. 488 — Proceedings, whether criminal.**

The provisions in the Criminal P. C., in regard to applications for maintenance stand by themselves. In fact, they might properly form part of a separate Act. They are not really criminal proceedings in the sense in which are proceedings in regard to the prosecution for the commission of an offence. AIR (Vol 22) 1935 Rang 277: 36 Cr LJ 1391: 158 Ind Cas 641.

**——S. 488 — Proceedings under Chap. XXXII, are of a summary nature.**

Proceedings under Chap. XXXII, Criminal P. C., are of a summary nature and the Court has not to go and should not go, so deeply into the relationships of the parties as a Civil Court would have to do. If parties are not pleased with the decision of the criminal Court under the chapter, their best plan is to apply to the Civil Court to settle their disputes. AIR (Vol 22) 1935 Rang 192: 36 Cr LJ 1044: 156 Ind Cas 968.

**——S. 488 — 'Maintenance', whether includes conjugal rights.**

The word 'maintenance' in S. 488, Criminal P. C., does not include ordinary conjugal rights; it is confined to appropriate food, clothing and lodging. AIR (Vol 20) 1933 Mad 688 (1): 34 Cr LJ 950 (1): 38 LW 392: 65 MLJ 386: 1933 MWN 1029: 56 Mad 913: 145 Ind Cas 378(1) (DB).

——S. 488 — The bare fact that civil litigation is pending between the parties is no reason for not giving effect to an order awarding maintenance under S. 488 so long as it is in force. AIR (Vol 17) 1930 Lah 213: 1930 Cr C 201: 30 PLR 740: 125 Ind Cas 63: 31 Cr LJ 770.

——S. 488 — The proceedings under S. 488 are not strictly speaking criminal proceedings and the person against whom action is taken under that section does not fall in the category of the 'accused." Therefore, it is not incumbent on the Magistrate to examine under S. 342 the husband or the father as the case may be before an order under S. 488 can be made against him to make a monthly allowance for the maintenance of his wife or his child as the case may be. AIR 1927 Cal 250; AIR 1921 Pat 11; and AIR 1926 Lah 667, Diss. from. AIR (Vol 16) 1929 Lah 32: 112 Ind Cas 218: 10 Lah 406: 30 PLR 549: 29 Cr LJ 1002: 11 AI Cr R 312 (DB).

——S. 488 — S. 342 is not applicable to a person proceeded against under S. 488. AIR (Vol 15) 1928 Bom 347: 112 Ind Cas 475: 11 A I Cr R 271: 30 Bom LR 957: 52 Bom 768: 29 Cr LJ 1051 (DB).

——S. 488 — Section 342 is not applicable to summons cases and therefore a case under S. 488 is not governed by the section. AIR 1926 Lah 667, Not Foll. AIR (Vol 14) 1927 Lah 435: 101 Ind Cas 606: 28 Cr LJ 478.

——S. 488 — The provision of a summary remedy under S. 488 cannot, unless an Act expressly says so, take away a right conferred by Hindu Law. AIR (Vol 13) 1926 Mad 261: 22 MLW 650: 95 Ind Cas 972: 1926 MWN 73.

**——S. 488 — Order for alimony in existence — Jurisdiction under S. 488 is not ousted.**

The existence of a previous order for alimony is not sufficient to oust the jurisdiction of the Magistrate; for a mere order for maintenance is not equivalent to maintaining the wife: and the order, whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife. AIR (Vol 13) 1926 Mad 59: 49 Mad 891: 26 Cr LJ 1597: 90 Ind Cas 669: 49 MLJ 335.

**——S. 488 — Nature of.**

An application under S. 488, Cr. P. Code, cannot be regarded as a proceeding of a civil nature within S. 12 of Chin Hills Regulation although the failure to maintain a child is not a criminal offence. AIR (Vol 12) 1925 Rang 140: 76 Ind Cas 111: 4 UBR 169: 25 Cr LJ 111.

### 22. Neglect to maintain.

**——S. 488 — "Neglects or refuses to maintain" — Meaning of.**

The expression "neglects or refuses to maintain" in S. 488, Cr. P. Code, cannot but mean "neglects or refuses to maintain properly". If therefore the maintenance paid by the husband is inadequate, the magistrate has jurisdiction to pass a proper order in favour of the wife under the section. AIR (Vol 37) 1950 Cal 465: 87 CLJ 185 (DB).

**——S. 488—Prima facie case of neglect—It is for husband to show that sub-s. (4), applies.**

Sub-section (4) of S. 488, does not state on whom lies the burden of proving whether the reasons for the wife refusing to live with her husband are sufficient or not. However, on general principles, where the Court has found prima facie case of neglect by the husband to maintain the wife, if an order is not to be passed on account of this sub-section, it is for the husband to show that the sub-section is applicable and that either the wife is guilty of adultery or that she is unreasonably refusing to live with him or that they are living separately by mutual consent. AIR (Vol 30) 1943 Lah 223: 45 PLR 218: 44 Cr LJ 802: 208 Ind Cas 629.

——S. 488 — **Wife suffering from unpleasant female disease which is not uncommon or incurable.**

The mere fact that the wife is suffering from unpleasant female disease which is not uncommon, incurable or serious, is not a just cause for the husband to refuse to live with her especially when the wife is cured. AIR (Vol 27) 1940 Sind 222: 42 Cr LJ 278: ILR (1941) Kar 58: 192 Ind Cas 340 (DB).

——S. 488 — **Children.**

Where the father compromises the claim for maintenance brought by his children through their mother and causes a third party to execute a pronote for the same but does not take the trouble to see that the money reaches the mother, the father must be deemed to be neglecting to maintain the children within the meaning of S. 488, Criminal P. C. 1937 MWN 985.

——S. 488 — **Muhammadans — Minor daughters in custody of mother who has been divorced by the father — Father's offer to maintain children if their custody is given to him whether amounts to refusal to maintain — Jurisdiction — Criminal Courts, whether can take notice of mother of minor children being their lawful guardian.**

Where the minor daughters of a Muhammadan are in the custody of their mother, who has been divorced by their father, but who is their lawful guardian, an offer by the father to maintain the children provided they are entrusted to his custody is tantamount to a refusal to maintain them within the meaning of the provisions of S.. 488, Criminal P. C.

Although it is not the function of a Criminal Court to decide questions as regards the right to guardianship of children, there is no reason why it should not take notice of the fact that the mother is their lawful guardian under the personal law and that the father is not prima facie entitled to demand their custody.

If the mother of minor girls who have not yet attained puberty is disqualified to be the guardian, it is open to the father to move a competent Court to appoint him or some one else as the guardian of the daughters. Until he does so, she is the natural guardian and there is nothing in the provisions of S. 488, Criminal P. C., to show that he is entitled to demand the custody of the daughters from their lawful guardian as a condition precedent to maintaining them. AIR (Vol 20) 1933 Lah 969: 35 Cr LJ 344: 14 Lah 770: 35 PLR 34: 147 Ind Cas 123 (DB).

——S. 488 — **Desertion.**

The fact that the husband has deserted the wife is not a ground for dismissing the application but is, on the other hand, a reason for allowing it. AIR (Vol 19) 1932 Lah 301: 33 PLR 230: 33 Cr LJ 447: 137 Ind Cas 30(1).

——S. 488 — **Neglect to maintain.**

In the case of a minor who is living with its legal guardian, e.g., a Mahomedan boy aged 3 with his mother the condition imposed by the father that he would maintain it only if the child went to reside with him is tantamount to a refusal to maintain the child. AIR (Vol 17) 1930 Lah 1043: 1930 Cr C 1219: 129 Ind Cas 216: 32 Cr LJ 247: 32 PLR 143.

——S. 488 — **Neglect or refusal to maintain is first essential to invest Court with jurisdiction under S. 488.**

In order to give jurisdiction to a Magistrate to take proceedings under S. 488 the first essential is to find that the respondent has neglected or refused to maintain the person for whose maintenance an allowance is asked for. Where wife is allowed maintenance under S. 488 the mere fact that the son is of tender years and that it is in the interests of the minor son that he should be left with the mother till the father is able to get the custody of the minor son from the civil Court is not sufficient to invest the criminal Courts with jurisdiction under S. 488 as regards the son unless it can be shown that he has neglected or refused to maintain the boy. AIR (Vol 17) 1930 Lah 886: 31 Pun LR 876: 1930 Cr C 982: 32 Cr LJ 196.

——S. 488 — A mere offer to maintain does not amount to absence of neglect to maintain. AIR (Vol 13) 1926 Mad 59: 49 Mad 891: 26 Cr LJ 1597: 90 Ind Cas 669: 49 MLJ 335.

——S. 488 — Neglect or refusal to maintain is the first essential. AIR (Vol. 12) 1925 Oudh 294: 83 Ind Cas 688: 27 OC 271: 26 Cr LJ 128.

——S. 488 — Where there is no neglect and no refusal to maintain, an order for maintenance under S. 488 is wrong in law. (AIR (Vol 12) 1925 Rang 205: 86 Ind Cas 479: 26 Cr LJ 831: 4 Bur LJ 11.

——S. 488 — **Insolvency of husband disproves wilful neglect.**

The fact that the husband has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that he is unable to pay his debts. He, being unable to pay his debts, is not guilty of wilful neglect within the meaning of S. 488. AIR (Vol 11) 1924 Cal 230: 81 Ind Cas 912: 25 Cr LJ 1088: 50 Cal 867 (DB).

——S. 488 — **Neglects to maintain.**

The expression "neglects or refuses to maintain his wife" does not apply where the husband states that he is willing to maintain the wife and the wife states that she is willing to live with her husband but that he refuses to maintain her. AIR (Vol 1) 1914 Lah 590: 46 PWR Cr 1914: 213 PLR 1915: 16 Cr LJ 86: 26 Ind Cas 998.

——S. 488 — **Neglects to maintain — Conduct may amount to neglect or refusal.**

Under the Section the neglect or refusal may be by words or by conduct. Implied or express denial of paternity by opponent, may safely be construed as neglect to maintain. (1912) 6 SLR 208: 14 Cr LJ 303: 19 Ind Cas 959 (DB).

——S. 488(1) — **Neglects to maintain — Maintenance — Children — Refusal to maintain unless living with father.**

Under S. 488 father cannot refuse to maintain his children on the ground that they will not live with him. If he wishes them to live with him he should apply for their custody. (1910) 1 UBR 1: 11 Cr LJ 488: 7 Ind Cas 460.

——S. 488 — **Maintenance — Wife voluntarily leaving husband's house — Husband illtreating the wife — Refusal or neglect to maintain.**

Where a wife voluntarily leaves the husband without being justified in so doing, she is not entitled to claim maintenance under S. 488, Cr. P. C. But if the husband either refuses to maintain her or turns her out or ill-treats her so as to make it impossible for her to live in the house, this will amount to refusal or neglect on his part to maintain her. (1903) 5 Bom LR 614 (615) (DB).

## 23. Procedure.

(a) General.
(a-1) Evidence.
(b) Presence of husband or father — Mandatory.
(c) Husband's offer.
See also N. 16.
(d) Service of summons.
(e) Dismissal in default.

**(a) General.**

——S. 488 — Procedure — Reference to Sub-Registrar for inquiry — Legality — Application for maintenance — If complaint — Cr. P. Code, S. 202. AIR (Vol 33) 1946 Pat 104: 12 BR 654: 47 Cr LJ 821: 226 Ind Cas 43.

——S. 488 — It is a wrong and improper use of his discretion by the Magistrate to lightly decide a question of the personal law of the parties in proceedings under S. 488. AIR (Vol 31) 1944 Lah 392: 45 Cr LJ 254: 211 Ind Cas 77.

**——Ss. 488, 369 — Subsequent cancellation of order without notice to wife and enhancement of maintenance to be paid to children.**

A Magistrate, in the first instance, actually ordered the husband to pay certain sum as maintenance for his wife although she had not applied for such an order. Subsequently, when his attention was drawn to his mistake, he amended his own order without notice to wife and cancelled the order of maintenance for the wife whilst enhancing that of the children:

Held, that this was an illegality on the part of the Magistrate. Having found his error, it was his duty to submit the proceedings to the Sessions Judge for submission to the High Court for rectification under S. 369, Criminal P. C. AIR (Vol 27) 1940 Rang 222: 41 Cr LJ 833: 190 Ind Cas 142.

**——S. 488 — Order should be made after careful enquiry.**

Making of an order in a hasty and a summary fashion is not contemplated by S. 488, Criminal P. C. That section contemplates a careful order made after a careful inquiry. It is wrong to dismiss an application by the wife under this section on the mere offer of the husband to maintain her without taking any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband; "finding" means a finding after an enquiry which is of a judicial nature. AIR (Vol 26) 1939 Sind 80: 40 Cr LJ 496: ILR (1939) Kar 383: 181 Ind Cas 75.

**——S. 488 — Dismissal of petition after hearing part of evidence, legality.**

Where nine witnesses are cited by the petitioner to support her application for maintenance for the illegitimate child, it is not open to the Magistrate to make up his mind after hearing some of them and dismiss the petition. 1937 MWN 336 (1).

**——S. 488 — Petition for arrears of maintenance — Procedure to be followed.**

Where the petitioner applied for arrears of maintenance and on the respondent paying a portion of the dues and promising to allot land to the petitioner in lieu of future maintenance, the trial Court considered this satisfactory and filed the petition without passing any order thereon:

Held, that the petition was for arrears of maintenance and not for future maintenance and the order granting maintenance was still in force and unpaid arrears could and should have been awarded. AIR (Vol 23) 1936 Pesh 32 (2): 37 Cr LJ 347 (1): 160 Ind Cas 802.

**——S. 488 — Duty of Court to examine wife.**

Proceedings under S. 488, Criminal P. C. are not complaints and hence it is not legally necessary for the wife to be examined. But when a husband expresses his willingness to take back the wife and child, it is the duty of the Magistrate to enquire from the wife her reasons for not going back to her husband and failure to do so amounts to illegality. AIR (Vol 21) 1934 Lah 946: 36 PLR 181: 36 Cr LJ 792: 155 Ind Cas 609.

**——Ss. 488, 489 — Pendency of divorce proceedings against wife — Application for maintenance by the wife in Criminal Court — Procedure.**

Where a husband has instituted proceedings in the Divorce Court against the wife, on receiving an application for maintenance by the wife against the husband, the Magistrate should properly refer the wife to the Civil Court for her remedy. Section 489, Criminal P. C., was not intended to encourage applicants to resort to Criminal Courts up to the very time when an order is passed by a competent Civil Court. When the Civil Court is seized of the matter, it is better that the Civil Court should dispose of it. AIR (Vol 19) 1932 Sind 210: 27 SLR 1: 34 Cr LJ 548: 143 Ind Cas 207 (DB).

——S. 488 — In a case under S. 488, Criminal P. C., before a Presidency Magistrate, if it appears to him that he cannot finish the case at one hearing and he finds that he is obliged to put off the decision for a considerable time, he should, in the exercise of his wide discretion, make notes so as to enable him at the time of judgment to remember what evidence has been recorded. In the same way, when he is not able to give judgment immediately after hearing the evidence, he should give reasons for his decision in such detail as to make it clear to the parties as well as to the High Court that his judgment is based on a proper consideration of the evidence which has been given in the case:

Per Madgavkar, J.— In applications under S. 488, Criminal P. C., Presidency Magistrates are bound to record evidence in writing in the manner they record evidence in summons cases. AIR (Vol 18) 1931 Bom 142: 32 Bom LR 1499: 32 Cr LJ 276: 129 Ind Cas 339 (DB).

——S. 488 — Application by wife for maintenance — Both husband and wife examined — Case closed for orders — Pleader for husband appearing and wishing to argue case and file documents — Court ruling him out and passing judgment against husband — Proper enquiry held not made — Case ordered to be retried. AIR (Vol 17) 1930 Nag 59: 1930 Cr C 147: 31 Cr LJ 110: 120 Ind Cas 416.

——S. 488 — Order for maintenance made in wife's favour and acted upon — Husband subsequently discovering the marriage to be void and applying for having the order set aside — Proper course is to approach the Court having matrimonial jurisdiction. AIR (Vol 14) 1927 Bom 46: 28 Bom LR 1299: 28 Cr LJ 51: 7 AI Cr 209: 99 Ind Cas 83 (DB).

——S. 488 — Proceedings under S. 488 — No guardian can be appointed—Case must be postponed if party insane — Cr. P. Code, alone governs the case. AIR (Vol 12) 1925 Mad 440: 48 MLJ 187: 26 Cr LJ 701: 48 Mad 388: 21 MLW 180: 1925 MWN 65: 86 Ind Cas 77.

**——S. 488 — Maintenance order — Evidence of cruelty by husband — Separate residence — Construction of statute.**

Where it is proved that a husband has not refused or neglected to maintain his wife, a Criminal court, acting under S. 488 of the Criminal Procedure Code,

has no jurisdiction to make an order upon the husband for her maintenance on the ground that the husband has been guilty of cruelty to her. But that is a very different thing from holding that no evidence of cruelty can be admitted in a proceeding under the section to prove, not indeed cruelty as a ground for separate maintenance but the conduct and acts of the husband from which the court may draw the inference of neglect or refusal to maintain the wife. A neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be express or implied. (1907) 9 Bom LR 359 (360, 361): 5 Cr LJ 334 (DB).

(a1) Evidence.

—S. 488 (6) — Absence of direct evidence — Formal order in writing need not be passed in certain cases — Dispensation of personal attendance of husband or father.

The direction in S. 488 (6), Criminal P. C., must be observed and in the absence of direct evidence such as an application made by the person concerned that his presence should be dispensed with, or an order of the Magistrate that in the circumstances which necessitated his absence, a dispensation of his presence should be directed, there is no room for inference that an order under the first part of S. 488 (6) has, in fact, been made. In certain cases, it may not be necessary that the Magistrate should pass a formal order in writing, but at least there must be present on the record circumstances which indicate clearly that the question of dispensation of personal attendance of the husband or the father was considered by the Magistrate. Hence where the evidence on which the order for maintenance was passed was not taken in the presence of the husband and his personal attendance was not dispensed with, the order must be set aside. AIR (Vol 29) 1942 Sind 32: ILR (1941) Kar 415: 43 Cr LJ 551: 199 Ind Cas 367 (DB).

——S. 488 — Evidence.

In the case of an application for maintenance by wife under S. 488, Criminal P. C., the Court is entitled to act if it thought fit upon the evidence of the wife. The law does not require corroboration in cases of this kind, though of course, such corroboration is always desirable. AIR (Vol 27) 1940 Pat 242: 41 Cr LJ 718: 6 BR 760: 21 PLT 824: 5 Cut LT 24: 189 Ind Cas 105.

——S. 488 — Evidence.

The effect of S. 488, sub-s. (6) and S. 362, sub-s. (4), Criminal P. C., read together, is that in a summons case tried by a Presidency Magistrate, it is not necessary to record the evidence. AIR (Vol 19) 1932 Bom 179: 34 Bom LR 276: 33 Cr LJ 461: 137 Ind Cas 27 (DB).

——S. 488 (6) — Recording of evidence — Presidency Magistrate.

The Presidency Magistrate has no doubt a discretion in the matter of recording of evidence on an application under S. 488. Where the case is disposed of in a single day it may not be necesary to record the evidence in detail as the judgment will contain an abstract of the same and his appreciation thereof. But where the case is likely to take more than a day it is imperative for the Magistrate to make notes for his own information and write a judgment containing reasons for his decision. AIR (Vol 18) 1931 Bom 142: 129 Ind Cas 339: 32 Cr LJ 276: 1931 Cr C 190: 32 Bom LR 1499 (DB).

——S. 488 — Person giving evidence on his own behalf under S. 488 — Omission to examine him under S. 342 does not vitiate proceedings. AIR (Vol 12) 1925 Cal 339: 25 Cr LJ 1091: 81 Ind Cas 915 (DB).

——S. 488 — Application, whether can be treated as evidence.

An application under S. 488 though verified cannot be a substitute for or supplement to the applicant's examination on oath in the presence of her husband nor is it legal evidence against the husband AIR (Vol 7) 1920 Oudh 307: 76 Ind Cas 974: 25 Cr LJ 302: 23 OC 237.

(b) Presence of husband or father—Mandatory.

——S. 488 — Where the amount of maintenance was fixed in the absence of the accused and the salary he was drawing was subject to certain deductions:

Held, that this matter should be taken into account and that the accused should be given an opportunity of having the amount fixed in his presence. AIR (Vol 19) 1932 Cal 488 (2): 36 CWN 380: 33 Cr LJ 640: 138 Ind Cas 629.

——S. 488 — A wife sued under S. 488 her husband for maintenance. The husband offered to receive her to live with him but she refused to go. There was no proof of cruelty or adultery. The Magistrate sent the case for inquiry under S. 202. The statement of the complaint was never taken in the presence of the opponent. The Magistrate finally granted a maintenance allowance and a separate house to live in.

Held, that there were irregularities and illegalities in the order which vitiated the trial. 10 LRA Rev 77: 29 Cr LJ 909: 11 AI Cr R 181: (1928) 111 Ind Cas 669 (Lah).

——S. 488, sub-ss. (6), (9) — Maintenance, proceedings for, ex parte — Residence.

Proceedings against a person for maintenance on the ground that he is the father of an illegitimate child should not be conducted ex parte. Evidence in such proceedings ought to be taken in the presence of such person or his pleader unless he is wilfully avoiding service of summons or neglecting to attend the court.

Quaere:— Whether the present case has been brought under sub-s. (9), S. 488, Cr. P. C. (1905) 1 CLJ 102 (103) (DB).

(c) Husband's offer.

See also N. 16.

——S. 488 — Offer to take back.

Where, in a proceeding against husband under S. 488 Cr. P. Code, the husband expresses his willingness to take his wife back although she had left him of her own will and was of bad character, it is incumbent on the Magistrate to ask the wife whether she was willing to return to her husband before proceeding further. AIR (Vol 17) 1930 Lah 665: 31 Cr LJ 876: 1930 Cr C 809: 125 Ind Cas 637.

——S. 488 — When husband is willing to maintain his wife,proviso to sub-s. 3 must be complied with. 27 Cr LJ 938: (1926) 96 Ind Cas 394 (Lah).

(d) Service of summons.

——S. 488 (6) — Service of summons by registered post — Permissibility — Court, if can proceed ex parte.

The proceedings under S. 488, Cr. P. Code, are judicial proceedings of a Criminal Court and are

governed by the Code. Summons issued in proceedings under this section must be served in accordance with S. 68, Cr. P. Code. The service of summons by registered post letter on the person proceeded against under S. 488, is not in any case permitted, and the Magistrate cannot proceed 'ex parte' in such a case under the proviso to S. 488 (6), Cr. P. Code. AIR (Vol 37) 1950 E. P. 20: 51 Cr LJ 390.

**(e) Dismissal in default.**

**——Ss. 488 and 403 — Application dismissed for default — Fresh application — Maintainability.**

Where an application for maintenance under S. 488, Cr. P. Code, is dismissed for default without any adjudication being made on the merits, it is open to the complainant to make a fresh, application on the same facts under that section. There is no acquittal in proceedings under S. 488, and S. 403, Cr. P. Code, has clearly no application. There should be a trial of an offence before there can be an acquittal or a conviction. Neglect to maintain one's wife and children is not an offence within the meaning of S. 4 (o), Cr. P. Code. AIR (Vol 37) 1950 Nag 45: 1950 NLJ 16: ILR (1950) Nag 222: 51 Cr LJ 451.

**——S. 488 — Application under.**

Previous application for maintenance dismissed for default — Subsequent application is not barred. AIR (Vol 14) 1927 Rang 328: 5 Rang 697: 6 Bur LJ 200: 28 Cr LJ 912: 105 Ind Cas 240.

**——S. 488 — Second application — Maintainability of.**

If a complaint under S. 488 of the Cr. P. C. is dismissed for default without an adujdication on the merits, a second application under S. 488 of the Cr. P. C. is maintainable.

Per Huda J.— There is no provision in the Cr. P. C. which bars a second application under S. 488 of the Code. AIR (Vol 7) 1920 Cal 38: 24 CWN 32: 30 CLJ 128: 21 Cr LJ 3: 54 Ind Cas 51 (DB).

**——S. 488 — Second application — Jurisdiction.**

The Court dismissing an application under S. 488 for maintenance cannot entertain another application as its orders are final so far as it is concerned. AIR (Vol 4) 1917 Cal 608: 17 Cr LJ 106: 32 Ind Cas 842 (DB).

**——S. 488 — Second application.**

No second inquiry into the same allegations which are already adjudicated on, by a competent Court, is competent. An application for maintenance was made, on the ground of cruelty. This was dismissed for want of proof. A fresh application on the same allegations should be dismissed. AIR (Vol 4) 1917 Lah 154: 24 PR Cr (1916): 18 Cr LJ 326: 38 Ind Cas 438.

**——S. 488 — Jurisdiction — Re-hearing — Offer to maintain wife — Dismissal for non-appearance — Willingness of wife to live with husband.**

In a case for maintenance, when the husband offers to maintain the wife, on condition of her living with him, and the wife states that she is willing to live with him, the Magistrate cannot make an order under S. 488, Cr. P. Code, unless the petitioner satisfies him that, notwithstanding such offer, there is just ground for making such order. The law does not empower a Magistrate to rehear an application for maintenance under S. 488, Cr. P. C., dismissed for non-appearance. (1905) 1 CLJ 214 (215): 2 Cr LJ 213 (DB).

**24. Proof of marriage.**

——S. 488 — Proof of legal marriage is necessary for maintenance suit. 1935 MWN 1339.

**——S. 488 — Application by wife — Necessity of valid marriage.**

Where an Adidravida woman applied for maintenance against a Naidu alleging that she was his lawful wife and the fact of marriage was proved:

Held, that under the Hindu Law, a marriage between a Naidu male and an Adidravida woman is not invalid and the applicant was entitled to an order for maintenance. Adidravidas are sudras and under the Hindu Law marriage between persons belonging to the different sub-castes among the sudras is valid. AIR (V 21) 1934 Mad 323: 39 LW 439: 35 Cr LJ 852: 1934 MWN 185: 66 MLJ 543: 148 Ind Cas 921.

**——S. 488 — Burden of proof — Rebuttal.**

In an application under S. 488, when the wife, while stating legality of the marriage, disclosed the place of marriage in evidence only, opportunity to husband to disprove the same must be given. 1934 MWN 739.

**——S. 488 — Long cohabitation as husband and wife.**

Where a man and a woman lived as a husband and wife for 13 years with the repute of being such, the man professing no particular religion at all and the woman claiming that they were married according to Burmese Buddhist rites, but no evidence was given as to what these rites were:

Held, that there was no law under which it could be held that the man's cohabitation with the woman had become, in effect, a legal marriage. They came together without any recognized ceremony, and it could not be assumed that there was any tie which bound them and that no order under S. 488 for wife's maintenance could be passed. AIR (V 21) 1934 Rang 166: 34 Cr LJ 1502: 151 Ind Cas 1089.

**——S. 488 — Proof of actual celebration.**

Where a wife claimed maintenance from her husband and the husband resisted the claim on the ground that the marriage was not proved, but it appeared that the parties who belonged to another province and to some low caste among whom nikah marriage was recognized, were married 17 or 18 years ago and the priest who married them was dead, and it was also found that a passport stated the relation of the parties to be husband and wife and the parties had lived as man and wife for several years:

Held, that under the circumstances, it was not reasonable to expect strict proof of the actual celebration of the marriage and that the Magistrate could not be held to have acted wrongly in relying on the wife's evidence and in finding the marriage duly proved. AIR (V 19) 1932 Cal 866: 59 Cal 1257: 34 Cr LJ 108: 140 Ind Cas 876.

**——S. 488 — Denial of valid marriage — Duty of Magistrate to decide the question — Desertion, effect of.**

If on an application by the wife for maintenance under S. 488, Criminal P. C., the respondent denies the validity of the marriage, the question should be decided by the Magistrate himself. The applicant should not be left to establish her claim by a civil

suit. AIR (V 19) 1932 Lah 301: 33 PLR 230: 33 Cr LJ 447: 137 Ind Cas 30(1)

——S. 488 — Claim for maintenance — Law to be applied for proving marriage between Burmese woman and half caste Chinese Customary law. AIR (V 13) 1926 Rang 82: 4 Bur LJ 255: 94 Ind Cas 608: 27 Cr LJ 656.

——S. 488 — Where relationship is declared not to exist by Civil Court order under S. 488 should not be given effect to. AIR (V 10) 1923 Mad 707: 45 MLJ 104: 73 Ind Cas 944: 46 Mad 721: 18 M LW 132: 32 MLT 345: 1923 MWN 401: 24 Cr LJ 720 (DB).

**——S. 488 — Maintenance order — Evidence.**

A maintenance order cannot be granted to a woman against a man unless she proves herself to be his legal wife according to his personal law. AIR (V 1) 1914 Low Bur 266: 7 LBR 270: 16 Cr LJ 39 : 26 Ind Cas 631.

**——S. 488 — Proceedings under — Marriage — Burden of proof.**

In maintenance proceedings under the Code the onus is on the wife to show that she is the wife of the accused. AIR (V 1) 1914 Low Bur 152: 7 Bur LT 71: 15 Cr LJ 484: 24 Ind Cas 572.

### 25. Refusal to live with husband.

(a) General.
(a-1) Apostacy.
(b) Cruelty and illtreatment.
(c) Disease and Physical infirmity.
(d) Second marriage — Keeping a mistress.

#### (a) General.

**——S. 488 — Words "without any sufficient reason" — Meaning of.**

The words "without any sufficient reason" in S. 488 (4) are objective and not subjective. The wife's maintenance cannot be refused merely because on account of her poverty of expression or her failure to understand her own motives, she is unable to analyse and state fully her reasons for refusing to go back to her husband. It is for the Court to examine the circumstances and see if those circumstances are or are not sufficient to justify the wife's refusal to accept the husband's offer. AIR (Vol 30) 1943 Lah 223: 45 PLR 218: 44 Cr LJ 802: 208 Ind Cas 629.

**——S. 488 — Wife refusing to live with husband without just grounds — Wife, if entitled to separate maintenance.**

Where the wife refuses to live with her husband without any just grounds for so doing and the husband has neither neglected nor refused to maintain her, she is not entitled to any separate maintenance. 36 Cr LJ 1457: (1935) 158 Ind Cas 376 (Lah).

**——S. 488 — Bona fides of offer and suffciency of reasons for refusal.**

The mere fact that some three years ago, the husband beat the wife and turned her out is no reason for holding that the subsequent offer to take her back was not bona fide or could justify the refusal of the wife to go back to her husband. Unless the Magistrate finds that the offer is not bona fide or that the reason given by the wife for not going back to her husband is sufficient, he should not make an order for maintenance. AIR (V 21) 1934 Lah 946: 36 Cr LJ 792: 36 PLR 181: 155 Ind Cas 609.

**——Ss. 488, 438 — Enquiry as to whether wife had good reason for not living with husband — Necessity of.**

When a petition under S. 488, Criminal P. C., is filed the Magistrate is bound to enquire into the truth of the allegation that the husband has turned out the wife and as to whether she had good reason for not living with her husband. If such an enquiry has not been made and the Magistrate has allowed maintenance, further enquiry may be directed by the High Court on a reference under S. 438, setting aside the order of maintenance. AIR (V 20) 1933 Pesh 101: 35 Cr LJ 491: 147 Ind Cas 772.

**——S. 488 — Separate living, effect of.**

When the breach between the husband and her wife is irremediable, and it is quite impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to live separately and get maintenance. AIR (V 18) 1931 Lah 561(2): 32 PLR 619: 32 Cr LJ 1251: 134 Ind Cas 817.

——S. 488 — Wife refusing to live with husband should be given chance to substantiate reasons for refusal by evidence — Court should consider grounds of refusal and pass the order for maintenance is case of just grounds. AIR (V 17) 1930 Lah 464: 32 Cr LJ 468: 130 Ind Cas 51: 31 PLR 664: 1930 Cr C 533.

——S. 488 — If the wife declines to go to her huband and live with him in his house, she cannot demand maintenance. (1929) 117 Ind Cas 903: 30 PLR 367: 30 Cr LJ 861.

——S. 488 — The wife's refusal of husband's offer to give separate residence does not amount to "refusing to live with her husband". AIR (V 11) 1924 Nag 297: 77 Ind Cas 805: 25 Cr LJ 453.

**——S. 488 — Maintenance order — Legality — Refusal by wife to live with husband — Legality of order.**

It is illegal to pass an order of maintenance, without considering the grounds, if any, set forth by the wife, for not living with her husband. (1909) 9 Cr LJ 501: 2 Ind Cas 155 (Mad).

#### (a-1) Apostacy.

——S. 488 — Husband becoming Jew is no ground for Christian wife to live separate — But husband's bringing another woman to live in the house with a view to marry her is sufficient ground. AIR (V 13) 1926 Sind 278: 19 SLR 128: 27 Cr LJ 1177: 97 Ind Cas 809 (DB).

#### (b) Cruelty and ill-treatment.

**——S. 488 — Physical ill-treatment.**

A wife is not bound to return to her husband and live with him if really she has reasonable apprehension of physical ill-treatment. Refusal of wife to accept a belated offer of her husband to take her back and maintain her, on the ground that she was afraid of further ill-treatment is sufficient or just ground when she has reasonable apprehension of physical ill-treatment. AIR (V 27) 1940 Mad 292: 1939 MWN 1255: 51 LW 204: (1940) 1 MLJ 171: 41 Cr LJ 532: 188 Ind Cas 32.

**——S. 488 — Ill-treatment likely to continue even when wife going back to live with husband — She is entitled to live apart.**

In a claim for maintenance, it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife has reasonable

cause for fearing to return to the husband's home. If a wife has been ill-treated and there is ground for believing that if she returns, the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case, the husband, who is the guilty party, must maintain his wife. Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the wife deliberately from the home. In such a case, the wife is justified in refusing to return to her husband. AIR (V 27) 1940 Pat 242: 41 Cr LJ 718: 6 BR 760: 21 PLT 824: 5 CLT 24: 189 Ind Cas 105.

——S. 488 — Held, on facts that the wife was justified in leaving her husband and demanding separate residence and that the offer of the husband was not a genuine one. (1936) 159 Ind Cas 120: 18 NLJ 107: 37 Cr LJ 86.

——S. 488 — Maintenance to wife can be ordered if she refused to live with the husband on account of ill-treatment. 1935 MWN 476.

**——S. 488 — Habitual ill-treatmtnt, if should be proved.**

Where the husband has behaved in a violent manner towards his wife who has consequently left his house, it is not necessary for her to prove habitual ill-treatment in order to justify her refusal to return to his house. AIR (V 22) 1935 Rang 192: 36 Cr LJ 1044: 156 Ind Cas 968.

**——S. 488 — Parties belong to low class.**

The words "just ground" in amended Code invest the Magistrate with a large discretion in the matter of granting maintenance. Where the evidence before the Magistrate clearly shows that the husband subjected his wife to a systematic course of ill-treatment and brutal oppression for a number of years, there is just ground for the wife to refuse to live with her husband and she is entitled to maintenance. The fact that the parties belong to a low class can make no difference. AIR (V 16) 1929 All 950: 120 Ind Cas 195: 1939 ALJ 1208: 10 LRA Cr 153: 31 Cr LJ 3: 13 AI Cr R 17: 1929 Cr C 593.

**——S. 488 — When justified.**

The principle, that where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband, or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him applies equally to the case of a Hindu or a Mahomedan where the question arises under S. 488, Cr. P. Code, or in a suit for restitution of conjugal rights. AIR (V 14) 1927 Nag 139: 100 Ind Cas 169.

**(c) Disease and Physical infirmity.**

**——S. 488 — Right to maintenance — Impotence of husband — Whether sufficient reason for living apart.**

A wife is not entitled to live apart from her husband and claim maintenance under S. 488, Cr. P. Code, on the ground that the husband is impotent and unable to perform his marital duties. A husband must 'prima facie' support his wife. This he can do by making her share in board and house. If he does not, then the wife has a right to be maintained by him. Ordinarily the husband's 'bona fide' willingness to maintain his wife would be a sufficient answer to the petition for maintenance. Circumstances may arise when the Court may consider that it would not be proper for the wife to live with her husband and then the wife may be permitted to live separate and yet claim maintenance. All such grounds have reference to the comfort and safety of the wife. They have no bearing upon conjugal relations except in so far as such relations are rendered unsafe for the wife. The failure to discharge the marital obligations by reason of impotence is not a good ground. Conjugal relations are hardly relevant to the order for maintenance under the section. AIR (Vol 35) 1948 Nag 69: 49 Cr LJ 52: 1947 NLJ 531: ILR (1947) Nag 979.

**——S. 488 — Husband suffering from venereal disease.**

When in proceedings by a wife for maintenance the husband offers to take her and live with her but the wife refuses to live with the husband, it is the duty of the Court to find whether there was sufficient justification for the wife not living with the husband and claiming maintenance. It is certainly cruel on the part of a husband who has got venereal disease to insist upon his wife sharing bed with him. In such a case, the wife can refuse to live with her husband and claim maintenance. AIR (Vol 30) 1943 Mad 647: (1943) 2 MLJ 150: 1943 MWN 632: 45 Cr LJ 91: 56 LW 413 (1): 209 Ind Cas 423.

**——S. 488 — Refusal to cohabit.**

There is nothing in the Code which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protect and maintain in a manner suitable to her position in life simply because he refuses to cohabit with her. AIR (Vol 9) 1922 Mad 209: 42 MLJ 566: 15 MLW 535: 1922 MWN 265: 30 MLT 315: 23 Cr LJ 336: 66 Ind Cas 832.

**(d) Second marriage — Keeping a mistress.**

**——S. 488 — Right to maintenance — Mere intimacy or liaison between a husband and another woman — No evidence of cruelty — Not a sufficient ground for wife's living apart.**

The occasional lapse from virtue of a husband would not entitle the wife to ask for maintenance under S. 488, Cr. P. Code. The wife cannot refuse to go and live with the husband solely on the ground of his having a mistress. In the absence of any evidence of ill-treatment or cruelty as would justify a wife's living apart from her husband, the fact of an existing intimacy between her husband and another woman by itself would not be a ground for her to claim maintenance under S. 488. But as regards children born to her, the matter rests on a different footing. Where the father neglects to maintain them, in the absence of evidence proving their ability to maintain themselves, they have to be given their maintenance charges by the father. As regards their custody he could take such legal steps as he is entitled and until then he has to pay their maintenance to the mother. AIR (Vol 35) 1948 Mad 509: 49 Cr LJ 758 (1): (1948) 1 MLJ 399: 61 LW 396: 1948 MWN 530.

**——S. 488 — Refusal to grant maintenance — Grounds.**

Where there is no cruelty or neglect on the part of the husband and it is only incompatibility of temperament which is preventing the wife from living with her husband's parents, and the husband

marries another wife after waiting for some years and his offer to take back the petitioner has been refused, there is no case for awarding maintenance. AIR (Vol 32) 1945 Mad 44: 57 LW 492: (1944) 2 MLJ 223: 1944 MWN 598: 46 Cr LJ 248: 217 Ind Cas 135.

——S. 483 — **Husband marrying second wife.**

The fact that the husband has married a second wife, though not a just ground for the first wife's refusal to live with him, is yet a factor to be taken into account in considering whether the offer is really bona fide or not. AIR (V 27) 1940 Mad 292: 1939 MWN 1255: 51 LW 204: (1940) 1 MLJ 171: 41 Cr LJ 532: 188 Ind Cas 32.

——S. 488 — **Burmese Buddhist having two wives — Refusal of one wife living separately, to come and live with husband along with other wife, whether justified — She, if can claim maintenance.**

Two wives of a Burmese Buddhist can never live amicably in the same house. Hence if one of them living separately refuses to come and live with her husband along with the other wife, she is justified in doing so and is entitled to claim maintenance. AIR (V 26) 1939 Rang 210: 40 Cr LJ 702: 182 Ind Cas 671.

——S. 488 — Grounds.

If a person is keeping another woman as his mistress in his own house, the Court is justified in saying that his wife can refuse to accept his offer and return to him. 1937 MWN 984.

——S. 488 — **Husband keeping mistress.**

The fact that the husband is keeping a mistress and is living with her, is sufficient for his wife to refuse to live with him. AIR (V 24) 1937 All 115: 1936 ALJ 1379: 38 Cr LJ 312: ILR (1937) All 430: 1936 AWR 1268: 166 Ind Cas 894.

——S. 488 — **Husband willing to take back his Christian wife but refusing to give up mistress — — Wife, if entitled to separate maintenance.**

Where, in a proceeding under S. 488, Criminal P. C., the husband offers to take back his Christian wife and maintain her but refuses to give up his mistress and it is found that the husband never insulted his wife as to compel her to live in the same house as his mistress nor was it likely that he would now adopt this course of conduct, the wife is not entitled to a separate maintenance. She cannot also exact from the husband a promise of sexual fidelity before she returns to live with him. Section 488 has nothing to do with conjugal rights. AIR (V 24) 1937 Mad 794: 46 LW 324: 39 Cr LJ 24: (1937) 2 MLJ 488: 1937 MWN 1197: 171 Ind Cas 914.

——S. 488 — Mere admission by Muhammadan husband of another marriage and of refusal to divorce complainant, first wife, does not justify order of separate maintenance. AIR (V 16) 1929 Lah 56: 111 Ind Cas 575: 29 Cr LJ 895.

——S. 488 — Husband having another wife is not a just ground for refusal to live with him. AIR (V 14) 1927 Lah 168: 28 Cr LJ 236: 99 Ind Cas 1036.

——S. 488 — Ill-treatment by husband — Wife's refusal to live with him does not disentitle her to maintenance — Husband marrying second wife is no ground to refuse to live with husband. AIR (V 13) 1926 Lah 353: 27 Cr LJ 507: 93 Ind Cas 971.

——S. 488 — **The husband having taken another wife is no ground for refusing to live with the husband.** AIR (V 11) 1924 Nag 297: 77 Ind Cas 805: 25 Cr LJ 453.

——S. 488(4) — **Buddhist Law — First wife refusing to live with husband — Husband taking second wife — Maintenance.**

The fact that the husband takes a second wife is among Burmese Buddists a good reason for the first wife declining to live with him in a separate house. If the first wife chooses to live separately from her husband, and declines to return to him when asked, and the husband takes second wife she is not entitled to maintenance under S. 488(4) of the Cr. P. C. AIR (V 5) 1918 Low Bur 9: 11 Bur LT 105: 19 Cr LJ 966: 47 Ind Cas 866.

——S. 488 — **Maintenance order — Legality — Second marriage, if ground for — Husband's father's liability.**

The husband's father cannot be made jointly liable for the wife's maintenance under S. 488 Cr. P. C. A second marriage by the husband does not of itself justify an order under S. 488 Cr. P. C. AIR (V 1) 1914 Lah 339: 12 PR Cr 1914: 245 PLR 1914: 15 Cr LJ 577: 25 Ind Cas 329.

### 26. Unchastity.

——S. 488(5) — **Evidence — Adultery of wife as ground for cancellation of order for maintenance— Proof — Nature of evidence to be adduced.**

Where a husband against whom an order for maintenance has been made pleads adultery of his wife as a ground for vacating that order, there must be produced definite evidence from which adultery may reasonably be inferred. It may not be possible to get direct evidence on the point, but there must be some evidence showing opportunity and desire to commit the offence or access by the man with whom she is alleged to have committed adultery to the woman. Mere hole and corner tattle or bazaar gossip is not sufficient to prove adultery. AIR (V 35) 1948 Pat 285: 49 Cr LJ 323.

——S. 488 — **Child.**

Wife leading adulterous life — Child in custody of wife—She is entitled to maintenance of child. AIR (V 30) 1943 Mad 768: 56 LW 496(2): (1943) 2 MLJ 318: 1943 MWN 584: ILR (1944) Mad 382: 45 Cr LJ 266: 210 Ind Cas 375.

——S. 488 — **Marriage proved — Wife not bound to prove that she remained chaste sonce her abandonment by husband.**

Where, in an application for maintenance by the wife against her husband, the marriage between the parties is proved, the wife is not bound to prove that she had been chaste from the date when her husband abandoned her. AIR (V 30) 1943 Mad 509: (1943) 1 MLJ 485: 1943 MWN 314(2): 44 Cr LJ 642: 207 Ind Cas 430.

——S. 488 — **Order of maintenance cancelled on ground of wife's adultery — Arrears, if can be cancelled.**

The effect of cls. (3) and (4) of S. 488, together is that on proof that the wife is living in adultery, the Magistrate will be justified in refusing and indeed bound to refuse to execute an order for maintenance, quite apart from the question whether the order has been cancelled or set aside.

Hence where an order for maintenance is cancelled on the ground of adultery, the effect of the cancellation is that even the arrears of the past maintenance cannot be recovered. AIR (V 29) 1942

Bom 258: 44 Bom LR 614: 43 Cr LJ 826: ILR (1942) Bom 776: 202 Ind Cas 328 (DB).

**——S. 488 — Charge of "living in adultery" put forward as defence — Procedure to be followed.**

In a case of claim for maintenance, the respondent who puts forward a charge of "living in adultery" against the petitioner as his only defence to the claim for maintenance ought to begin his case and the petitioner against whom this charge is made, ought to have an opportunity of adducing rebutting evidence. AIR (V 25) 1938 Mad 833: 1938 MWN 829: 48 LW 273: (1938) 2 MLJ 407: 39 Cr LJ 951: ILR (1938) Mad 1100: 177 Ind Cas 736.

**——S. 488—Occasional lapses from virtue, if sufficient for refusing maintenance.**

The clear implication from the words "living in adultery" used by the Legislature in S. 488, Criminal P. C., is that, unless the wife is actually living in adultery at or about the time of the application, she is not disentitled to obtain maintenance. It is nowhere said in the section and there is no need to introduce additional words therein that "living in adultery" must be in the house of the adulterer. The words 'living in adultery' are merely indication of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by "living in adultery". The question, therefore, for the Magistrate to decide in such a case is whether there had been such adulterous conduct on the part of the wife at or about the time of the application, that is to say, shortly before or shortly after the application was made interpreting the word 'shortly' in a reasonable manner. AIR (V 25) 1938 Mad 833: 1938 MWN 829: 48 LW 273: (1938) 2 MLJ 407: 39 Cr LJ 951: ILR (1938) Mad 1100: 177 Ind Cas 736.

**——S. 488 — "Living in adultery" — Meaning.**

"Living in adultery" means something quite different from living an unchaste life. The principle is that a husband is absolved from the obligation to maintain his wife when his wife has a de facto protector with whom she lives and by whom she is being maintained as if she were his wife. The obligation of a husband to maintain his wife arises from the anxiety of the Legislature to protect deserted wives from the bitter necessity of earning a living by trading on their sex. That obligation, however, ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men. But it obviously is not the law that a man may desert and neglect his wife and thus tempt her to unchastity and then resist her claim to be maintained by him on the ground that she is unchaste. AIR (V 25) 1938 Mad 66: 1937 MWN 1131: 46 LW 766: (1937) 2 MLJ 885: 39 Cr LJ 228: 172 Ind Cas 811.

**——S. 488 — Distinction between cls. (4) and (5).**

Under sub-cl. (5) of S. 488 the Magistrate is entitled to cancel the previous orders of maintenance and render them of no effect for the future on a finding that the applicant in whose favour the order had been made was "living in adultery." Under sub-cl. (4), the Magistrate is entitled to refuse to enforce the maintenance orders on a finding, that during the period in respect of which maintenance was sought to be recovered, the applicant was "living in adultery." AIR (Vol 25) 1938 Sind 151: 39 Cr LJ 847: 176 Ind Cas 863.

**——S. 488 (4) — "Living in adultery", meaning of — Whether conveys idea of continuance.**

The word "live" in the phrase "living in adultery" conveys the idea of continuance, and consequently, the phrase "living in adultery", refers to a course of guilty conduct and not to a single lapse from virtue. AIR (Vol 24) 1937 Rang 67: 38 Cr LJ 646: 168 Ind Cas 825.

**——S. 488 (5) — 'Living in adultery' — One or two lapses from virtue.**

The words 'living in adultery' in S. 488 (5), Criminal P. C., denote a continuous course of conduct and not isolated acts of immorality. One or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was "living in adultery" which means that she must be living in a state of quasi-permanent union with the man with whom she is committing adultery. The words used are not "committed adultery", and there is clearly a great distinction between "committing adultery" and "living in adultery.' AIR (Vol 23) 1936 Rang 446: 37 Cr LJ 1115: 1937 Rang LR 86: 165 Ind Cas 205.

**——S. 488 — Maintenance order — Cancellation — Order of — If retrospective.**

A wife who had been granted maintenance sued for recovery of arrears due and an order cancelling the maintenance on ground of adultery had been afterwards passed.

Held, that the cancelling order could not have retrospective effect so as to disallow the prior allowed maintenance and that a maintenance order stood good until it is cancelled. AIR (V 17) 1930 Lah 99 : 117 Ind Cas 67 : 30 Cr LJ 719 : 1930 Cr C 96.

——S. 488 — Order of maintenance allowance passed in wife's favour — Single act of adultery on her party does not entitle husband to discontinue allowance. AIR (V 16) 1929 Nag 238 : 1929 Cr C 262 : 115 Ind Cas 161 : 30 Cr LJ 403.

**——S. 488 — Single act of adultery does not necessarily disentitle a Magistrate to award maintenance.**

A single act of adultery does not necessarily amount to "living in adultery" within the meaning of Cl. (4) of S. 488 and will not justify a Magistrate in refusing maintenance, because the words "living in adultery" refer to a course of conduct and mean something more than a single lapse from virtue. AIR (V 15) 1928 Bom 59 : 108 Ind Cas 24: 30 Bom LR 79: 52 Bom 160: 29 Cr LJ 314: 9 AI Cr R 447 (DB).

——S. 488 — Wife not living in adultery at the time of application but previously did so live, was expelled from caste making it impossible for husband to approach should not be granted maintenance. AIR (V 13) 1926 Oudh 604: 97 Ind Cas 950 : 13 OLJ 802 : 3 OWN 717 : 27 Cr LJ 1190 : 7 AICrR 67.

**——S. 488 — "Living in adultery", meaning of — Continuous course of conduct is necessary.**

Unless continuity of conduct is established, it cannot be inferred from a single act of adultery that the woman is "living in adultery". In the present case it was held that although the woman had given birth to an illegitimate child it was open to the Magistrate to find that apart from that circumstance, she was not "living in adultery". AIR (V 12) 1925 Cal 794 : 88 Ind Cas 608 : 29 CWN 647 : 26 Cr LJ 1184 (DB).

——S. 488 — **Adultery — Desertion by wife without sufficient cause — Right to maintenance.**

Under the Hindu Law the duty of a husband to maintain his wife is absolute and under the Cr. P. C., it is subject only to the wife's chastity. When a Hindu wife, therefore, leaves her husband's house without good cause her right of maintenance is only suspended and she has the right to return to her husband's house at any time and claim to be maintained by him. AIR (Vol 5) 1918 Sind 25 : 12 SLR 90 : 20 Cr LJ 98 : 48 Ind Cas 978 (DB).

——S. 488 — **Refusal by wife to attend panchayat inquiry into charge of adultery against her, if a ground for refusing maintenance.**

A wife's refusal to attend a Panchayat to answer to a charge of adultery against her is no ground for rejecting her application for maintenance under S. 488. AIR (Vol 1) 1914 Mad 137 : 1 LW 156 : 15 Cr LJ 52 : 22 Ind Cas 324 (DB).

——**S. 488 (4) and (5) — Adultery.**

Mere giving birth to an illegitimate child by a woman would not amount to 'Living in Adultery' within the meaning of Sub-S. (5) of the Cr. P. C. so as to deprive her of a maintenance. So also is a single act of adultery though that may become a ground of refusal when applied for by wife. (1909) 5 NLR 19 : 9 Cr LJ 390 : 1 Ind Cas 801.

——**S. 488 — "May" — Discretion.**

The use of the word "may" in S. 488, Cr. P. C., shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made, though the discretion must be exercised judicially and reasonably and not capriciously. Held, also, that the refusal to make an order for maintenance against the husband on the ground of the woman living in adultery with a low caste man, was a proper exercise of discretion vested in the Magistrate. (1907) 18 MLJ 150 (151) : 31 M 185 : 3 MLT 269 : 7 Cr LJ 346 (DB).

——**S. 488 (1) — Maintenance — "Living in adultery."**

A woman who was found to have given birth to an illegitimate child two years prior to the order, but found to have led a chaste life ever since was held not to "be living in adultery" within the meaning of the section. (1903) AWN 23 : 1 ALJ 18 : 26 A 326 (327).

### 27. Wife's income.

See also N. 2.

——**S. 488 — Bare needs for food, clothes and lodging — Private income sufficient — Effect.**

Whatever may be the rights of the wife under the Civil law, she is not entitled to a maintenance allowance under the summary procedure under S. 488, Criminal P. C., greater than her bare needs for food, clothes and lodging.

Where, therefore, in proceedings under S. 488 by the wife for maintenance, the evidence shows that the wife has a private income of her own, which, though not princely, is sufficient to keep the wife from starvation, an order granting her maintenance is bad. AIR (Vol 31) 1944 Lah 392 : 45 Cr LJ 254 : 211 Ind Cas 77.

——**S. 488 — Income of wife's tavazhi properties little — Wife and infant child, held entitled to maintenance.**

Where the marriage between the parties has not been dissolved before the Madras Marumakathayam Act of 1932 came into force, the marriage should be deemed to be a legal marriage and where the income of the tavazhi properties of the wife is very little, the infant son is also entitled to maintenance. AIR (Vol 28) 1941 Mad 940 (2) : (1941) 2 MLJ 254 : 1941 MWN 674 : 54 LW 387 (1).

### 28. Appeal and revision.

——**Ss. 488 and 489 — New case — Application for cancellation of maintenance order — Failure to prove case of adultery alleged — New case in revision as ground — If open.**

Where the husband against whom an order for maintenance in favour of his wife has been made applies to the magistrate to vacate that order on the ground of his wife's adultery, and fails to prove his case, it is not open to him in revision to set up a new case in support of his application which was never pleaded by him and on which no evidence was given by either party. AIR (Vol 35) 1948 Pat 285 : 49 Cr LJ 323.

——**Ss. 488 and 490 — Revision — Decree of a Civil Court on the question of marital or final relationship — Effect on Magistrate's order.**

The jurisdiction conferred on a Magistrate to settle the maintenance under S. 488 of the Cr. P. C. is only auxiliary to that possessed by the Civil Courts, and a Magistrate ought to take the judgment of a competent Civil Court into consideration, if it settles the question of relationship and finally places the matter out of all discussions. A High Court in revision can set aside a previous order of a Magistrate in view of the subsequent decree of the Civil Court. AIR (Vol 2) 1915 Oudh 113 : 2 OLJ 251 : 16 Cr LJ 609 : 30 Ind Cas 433.

——**S. 488 — Appeal — Order granting maintenance.**

An order awarding maintenance under the section is an order passed in a criminal trial and is not appealable under Cl. 15 of the Letters Patent. AIR (Vol 3) 1916 Mad 632 : 39 Mad 472 : 17 MLT 330 : 28 MLJ 483 : 16 Cr LJ 326 : 28 Ind Cas 662 (DB).

——**Ss. 488 and 489 — Revision — Power of District Magistrate to take evidence.**

Where a Joint Magistrate has rejected a petition for maintenance, the District Magistrate has no power to take evidence under S. 488 except for recommendation to the High Court. AIR (Vol 1) 1914 All 373 (1) : 12 ALJ 684 : 15 Cr LJ 575 : 25 Ind Cas 327.

——**S. 489.**

See also Cr. P. C., S. 488.

1. **Application to Court.**
2. **Cancellation of order.**
   See N. 3.
3. **Change of circumstances and alteration of allowance.**
4. **Civil Court decision — Sub-section (2).**
5. **Powers of Magistrate.**
6. **Revision.**

### 1. Application to Court.

——S. 489 — Application to increase the allowance of maintenance is not maintainable where the father privately makes an arrangement for maintenance of his child by setting apart a portion of his property. 1941 NLJ 622.

——**S. 489 — Wife insane — Her brother appointed manager under S. 71, Lunacy Act to collect maintenance payable to her by husband — Husband's application for reduction of maintenance amount.**

In the case of an application under S. 489, Criminal P. C., for reduction of maintenance, the Court may properly require that the point of view

of the wife or child, should be properly placed before it. There is no need for the appointment of a guardian ad litem.

Where due to the insanity of the wife, her brother was appointed under S. 71, Lunacy Act, to manage her estate mainly for collecting the amount of maintenance payable by the husband, he is the proper person to state the case for the wife. Nor is there anything in the Code which requires that any additional or different evidence should be produced or that the wife should be otherwise represented. AIR (Vol 24) 1937 Bom 454 : 39 Bom LR 626 : ILR (1937) Bom 674 : 39 Cr LJ 53 : 171 Ind Cas 899.

——S. 489 — An arbitrator who has made an award on application by a husband to reduce maintenance allowance awarded to his wife, cannot review his award subsequently. AIR (Vol 21) 1934 All 940 : 4 AWR 216 : 36 Cr LJ 186 : 152 Ind Cas 822.

**2. Cancellation of order.**

See N. 3.

——S. 489 — Section 489 was not intended to encourage applicants to resort to Criminal Courts up to the very time when an order is passed by a competent Civil Court. AIR (Vol 19) 1932 Sind 210 : 27 SLR 1 : 34 Cr LJ 548 : 143 Ind Cas 207 (DB).

**3. Change of circumstances and alteration of allowance.**

**——S. 489 (1) — "Change in the circumstances" — What would be included in.**

The expression "change in the circumstances" occurring in S. 489 (1), Cr. P. Code, is wide enough to cover a case where the husband persistently refuses to allow the lady to cultivate the field which was given to her in lieu of her maintenance by an order under S. 488, Cr. P. Code. Where the lady finds it impossible to cultivate the fields by the action of the husband, this is a circumstance which has changed the situation as it existed when the order under S. 488 was passed entitling the Magistrate to change or modify his previous order. AIR (Vol 37) 1950 A 454 : 1950 ALJ 351 : 1950 AWR 420 : 51 Cr LJ 961.

**——S. 489 — Change in circumstances — Meaning.**

Change in the circumstances mean change in the existence of circumstances and not change in the proof of circumstances. AIR (Vol 37) 1950 Mad 153 : 1950 MWN 221 (2) : 51 Cr LJ 455 : 62 LW 760 (2) : (1949) 2 MLJ 557.

——S. 489 — Cancellation — Circumstances justifying. See AIR (Vol 34) 1947 Mad 423 : (1947) 1 MLJ 34 : 48 Cr LJ 302.

——S. 489 — The advance in age of the child is a change of the child's circumstances. AIR (Vol 26) 1939 Rang 95 : 1938 Rang LR 673 : 40 Cr LJ 440 : 180 Ind Cas 584.

**——S. 489 — Keeping mistress with two children, if calls for reduction.**

Before the order of maintenance can be altered, it must be shown that there has been, if not a change in the circumstances of the husband, then a change in the circumstances of the wife. The mere fact that the wife is living in a different manner than before does not necessarily constitute a change in her circumstances. Similarly, if the husband has a mistress and two children by her to maintain, that would be no reason for reducing the allowance awarded to his legal wife. AIR (Vol 25) 1938 Rang 42 : 39 Cr LJ 274 : 173 Ind Cas 135.

**——Ss. 489, 488 — Maintenance of Rs. 25 — Petitioner securing job of Rs. 6 per month — Respondent's income same, reduction from 25 to 20 not justified.**

Where there has been no application by the husband under S. 489, Criminal P.C., for reduction of the maintenance, the order reducing the rate for the months of which arrears were claimed retrospectively is improper.

When the maintenance order of Rs. 25 per mensem was passed, the petitioner had two children. Their expenses were presumably increased. The income of the respondent was what it was. The petitioner had found a job of Rs. 6 per month in a school:

Held, that the Magistrate had no justification for reducing maintenance from Rs. 25 to Rs. 20 per mensem. AIR (V 22) 1935 Lah 24: 37 Cr LJ 68: 159 Ind Cas 310.

——S. 489 — The parties to a maintenance order can always move the Magistrate again when there is a change of circumstances. AIR (V 20) 1933 Lah 1026: 35 Cr LJ 473: 35 PLR 320: 147 Ind Cas 719.

——S. 489 — Order for maintenance — Alteration in allowance can be ordered only if circumstances of husband change. AIR (V 15) 1928 Bom 224: 30 Bom LR 617: 29 Cr LJ 908: 111 Ind Cas 668: 11 AI Cr R 103 (DB).

**——S. 489 — 'Alteration.'**

The reduction of the maintenance to nothing i.e., cancellation of the order granting maintenance, would also come within the meaning of the word 'alteration'. AIR (V 12) 1925 Mad 491: 86 Ind Cas 220: 26 Cr LJ 732: 48 Mad 503: 21 MLW 142: 1925 MWN 67: 48 MLJ 183.

——S. 489 — Order for maintenance — Subsequent divorce — Magistrate must refuse to enforce order. 5 All. 226 and 19 All 50 Dissented from—AIR (V 8) 1921 Nag 7: 17 NLR 92: 22 Cr LJ 633: 63 Ind Cas 329.

**4. Civil Court decision — Sub-section (2)**

**——Ss. 489 (2) and 488 (5) — Order in favour of wife — Cancellation — Duty of Court — Decree subsequently passed ex parte for restitution of conjugal rights.**

Where after an order for maintenance passed in favour of a wife under S. 488, Cr. P. Code, the husband obtains a decree for restitution of conjugal rights from a competent Civil Court, the decree, though passed ex parte, is equivalent to a decision that the wife has no sufficient reason for refusing to live with her husband. Unless other circumstances have arisen since that decree was passed which would entitle a Criminal Court to come to any other conclusion, it is its duty to cancel the order of maintenance under Ss. 488 (5) and 489 (2), Cr. P. Code. AIR (Vol 36) 1949 Cal 87: 52 CWN 166: 49 Cr LJ 757.

**——S. 489 — Application under — Duty of Court — Scope of the discretion given by sub-S. (2) of S. 489.**

On an application being filed under S. 489, Cr. P. Code, it is the duty of the Court to consider whether a decision of the Civil Court leads to the consequence that the order passed by the Criminal Court under S. 488 should be cancelled or varied. There is no question of the magistrate considering whether the decision of the Civil Court has altered the circumstances of the case. For the purpose of S. 489 (2), the Criminal Court should take the decision as it stands and consider the necessary effect of it upon the order passed by the Criminal Court under S. 488. If the consequence is that it should be varied or cancelled effect must be

given to it by cancelling the order or varying it accordingly. The discretion that is given in sub-S. (2) of S. 489 is only for this limited purpose. AIR (Vol 34) 1947 Mad 425: (1947) 1 MLJ 321: 60 LW 289: 1947 MWN 604.

——Ss. 489, 488 — Decree for restitution of conjugal rights — Effect of.

Under S. 489 (2), Criminal P. C., the Magistrate has a discretion to cancel or modify his order in consequence of the Civil Court's decision.

The Magistrate is not bound to cancel the maintenance order in favour of the wife under S. 488 because a Civil Court has made an order for restitution of conjugal rights in favour of the husband. The Magistrate is entitled to satisfy himself that the husband is bona fide prepared to give effect to the order of the Civil Court; that he is prepared to offer the wife a home which she sought to accept. The Magistrate is entitled to decline to revoke the order under S. 488 when there is no evidence before him as to what home the husband is prepared to offer the wife. AIR (Vol 31) 1944 Bom 11: 45 Bom LR 897: 45 Cr LJ 271: 210 Ind Cas 478 (DB).

——S. 489 — Under S. 489 (2), Criminal P. C., Magistrate can vary or alter the order of maintenance if circumstances so require. AIR (V 24) 1937 Cal 334: 39 Cr LJ 381: 173 Ind Cas 915.

——S. 489 — Maintenance order passed — Subsequent decree of Civil Court granting restitution — Decree does not ipso facto cancel maintenance order. Case law discussed. AIR (Vol 12) 1925 Rang 268: 89 Ind Cas 317: 26 Cr LJ 1341: 3 Rang 150.

——S. 489 — Civil and Criminal — Order for maintenance against father by Criminal Court — Civil Court can make declaration as to paternity of child — Cr. P. Code, S. 489.

The jurisdiction of the Civil Courts to grant a declaratory decree cannot be affected by the provisions of the Cr. P. Code relating to the maintenance of wives and children. The Civil Court no doubt have no jurisdiction to cancel an order for maintenance or to grant an injunction against a Criminal Court, but there is no reason why the Civil Court having issued a declaration the party who has obtained it should not apply to the Criminal Court, under the provisions of S. 489 of the Cr. P. Code or otherwise, for an order to stay the payment of maintenance. AIR (Vol 9) 1922 UB 20: 1 Bur LJ 82: 70 Ind Cas 897: 4 UBR 120.

### 5. Powers of Magistrate.

**——S. 489 — Alteration in allowance — Power of Magistrate to give retrospective effect.**

Under S. 488 (2), Cr. P. Code, the Legislature has given the Magistrate a power to date back the order for maintenance in the first instance to the date of the application. It has not given the Magistrate a corresponding power on the alteration in the allowance under S. 489, Cr. P. Code. A Magistrate has, therefore, no jurisdiction to direct that the increased rate of maintenance awarded by him under 489, Cr. P. Code, should be paid from the date of the application asking for the increase. AIR 1925 Bom 419 & AIR 1935 Lah 24 not foll. AIR (Vol 36) 1949 Cal 584: 50 Cr LJ 1006: 53 CWN 465.

**——S. 489 — Scope of discretion given by sub-s. (2) of S. 489.**

For the purpose of S. 489 (2) the Criminal Court should take the decision as it stands and consider the necessary effect of it upon the order passed by the Criminal Court under S. 488. If the consequence is that it should be varied or cancelled effect must be given to it by cancelling the order or varying it accordingly. The discretion that is given in sub-s (2) of S. 489 is only for this limited purpose. 60 LW 289: 1947 MWN 604: AIR (Vol 34) 1947 Mad 425: (1947) 1 MLJ 321.

**——S. 489 — Order varied in revision — Jurisdiction of Magistrate to act under S. 489.**

The provisions of S. 489, Criminal P. C., are comprehensive and empower a Magistrate having jurisdiction to vary the amount of allowance fixed under the preceding section not only by himself but by his predecessor-in-office; and more so, to vary his own order which has been corrected on revision. AIR (Vol 19) 1932 Sind 59: 33 Cr LJ 646 (1): 138 Ind Cas 624 (1) (DB).

——S. 489 — The amended section does not take away the discretion of Magistrates in maintenance orders. AIR (Vol 13) 1926 Sind 270: 20 SLR 145: 27 Cr LJ 876: 96 Ind Cas 124 (DB).

### 6. Revision.

——S. 489 — In cases where the Magistrate has passed a wrong order under S. 489, sub-Cl. (2) it is right and proper that it should be corrected by the High Court in revision. AIR (V 13) 1926 Sind 270: 20 SLR 145: 27 Cr LJ 876: 96 Ind Cas 124 (DB).

**——S. 490.**

See also Criminal P. C. S. 488.

**——Ss. 490, 488 — Order for maintenance, if can be enforced by any Magistrate.**

Section 490, Criminal P. C., gives an alternative remedy by an application for execution to be made direct to the Magistrate within whose jurisdiction the person against whom the order is passed may be, as well as to the Magistrate who passed the original order, or his successor. Such a Magistrate need not be Magistrate of the categories or have the power prescribed in S. 488. All that the Magistrate is required to do is to execute the order after being satisfied as to identity and non-payment. AIR (Vol 28) 1941 Rang 247: 1941 Rang LR 403: 43 Cr LJ 30: 196 Ind Cas 563.

**——Ss. 490, 488 — Power to order imprisonment.**

It is incorrect to say that the power to enforce an order of maintenance does not necessarily include the power to sentence to imprisonment. Section 488 (3) shows that the power to levy a distress warrant and where that fails, to sentence to imprisonment are the only two methods of execution. The Magistrate, however, cannot exceed his ordinary powers conferred by S. 32 of the Code. AIR (Vol 28) 1941 Rang 247: 1941 Rang LR 403: 43 Cr LJ 30: 196 Ind Cas 563.

**——S. 490 — No provision for costs.**

Section 490, Criminal P. C., does not contain any provision such as that in sub-cl. (7), S. 488, which would enable the Court to grant costs. AIR (Vol 26) 1939 Rang 67: 40 Cr LJ 241: 179 Ind Cas 643.

—S. 491.
1. Appeal.
2. Applicability and scope.
See also N. 5.
3. Burden of proof.
4. Costs.
5. Jurisdiction.
See also N. 10.
6. Legality of detention.
7. Minors.
8. Nature of proceedings.
9. Other remedies.
10. Powers of High Court.
See also N. 3 & 5.
11. Procedure.
12. Sub-section (3).
See also N. 2, 5 and 10.
13. Successive applications.
14. Time for application.
15. Who can apply.

### 1. Appeal.

**——Ss. 491, 404 — Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), S. 205 — Habeas corpus, writ of — Powers of High Court — Appeal, competency of.**

According to a well-settled principle of the English law, a discharge, or an order directing discharge, under a writ of habeas corpus is final and not subject to appeal.

According to the law in India, as it now stands, the High Court cannot grant the writ of habeas corpus at common law independently of S. 491, Criminal P. C.

But as regards appeal, the position under the Criminal Procedure Code as to proceedings under S. 491, is in effect, the same as the position in England.

But under S. 205, Government of India Act, which relates both to civil and criminal jurisdiction of the High Court, an appeal lies to the Federal Court and Privy Council. The section provides one of the exceptions referred to in S. 404, Criminal P. C., by the expression "by any other law for the time being in force." A I R (Vol 32) 1945 PC 156 : 1945 MWN 546 : (1945) 2 MLJ 325 : 12 BR 142 : 50 CWN 25 : 48 Bom LR 1 : 72 IA 241 : 221 Ind Cas 243.

——S. 491 — Appeal — Order made under — Appeal to Federal Court — Competency. See AIR (Vol 36) 1949 Mad 578 : (1948) 2 MLJ 513 : 50 Cr LJ 792.

——S. 491 — Appeal — Dismissal of application under — Appeal to Federal Court — Competency. See AIR (Vol 36) 1949 Mad 192 : (1948) 2 MLJ 76.

——S. 491 — Appeal — Order of discharge or directing discharge upon application for writ of habeas corpus — Appeal to Federal Court and to privy Council — Competency — English Law — Government of India Act (1935), S. 205. See AIR (Vol 32) 1945 PC 156 : 72 IA 241 : ILR (1945) Kar (PC) 371 : 48 Bom LR 1.

**——S. 491 — Rejection of application under S. 491 for a writ in the nature of habeas corpus — Appeal not competent — Court exercises criminal jurisdiction.**

When an application under S. 491, Criminal P. C., for a writ in the nature of habeas corpus is rejected by an order of a Single Judge of the High Court, no Letters Patent Appeal can lie against that order as the Single Judge, in disposing of application under Ss. 491 and 491-A, arising out of criminal matters, exercises a criminal jurisdiction and not a civil jurisdiction. ILR (1945) Lah 573 (DB).

——S. 491 — Conviction and sentence by competent Court cannot be reviewed. AIR (Vol 31) 1944 Nag 286 : 1944 NLJ 280 : 46 Cr LJ 598.

——S. 491 — Power exercised under S. 491 is to be exercised on the criminal side of the jurisdiction of the Court and Cl. 10, Letters Patent expressly debars an appeal from an order passed in the exercise of criminal jurisdiction. A I R (Vol 21) 1934 All 606 : 1934 ALJ 684 : 150 Ind Cas 740 (DB).

### 2. Applicability and scope.
See also N. 5.

**——S. 491 — Interference by High Court in extradition proceedings — Circumstances.**

It is no doubt true that the High Court should not interfere in extradition proceedings. But the High Court is fully authorised to see whether there is any patent and palpable defect visible in the authority by which the person having custody detains any person. If the authority under which a person is being detained is on the face of it illegal and invalid, the High Court can certainly take notice of it and release the accused. A I R (Vol 37) 1950 Madh B 83 (DB).

**——S. 491 (b) — Applicability — Order under S. 7, Influx from Pakistan (Control) Act, 1949, asking applicant to leave India — Powers of High Court.**

The powers conferred by S. 491 (b), Cr. P. C., cannot be exercised in respect of an applicant who has been ordered by the Deputy Commissioner under S. 7, Influx from Pakistan (Control) Act, 1949, to leave India and to proceed to Western Pakistan, as the applicant is not in detention, actual or constructive, and the question of setting him at liberty does not arise. The words 'detain' and 'custody' imply some sort of confinement of physical restraint on the liberty of movements of the detenu. AIR (Vol 37) 1950 Nag 161 : ILR (1950) Nag 361 : 51 Cr LJ 817 : 1950 NLJ 308 (DB).

**——S. 491 — Application under — When lies and when does not.**

The mere fact that an illegal order had been passed against a prisoner does not give him a right to apply for a writ of habeas corpus unless he had been taken in custody, or his movements had been restricted by reason of that order. A writ of habeas corpus can only be asked for on the ground that a person has been kept under illegal detention. If there is no illegal detention there is no right to move the High Court under S. 491, Cr. P. Code, for determination of the question whether a particular order is valid or invalid. AIR (Vol 37) 1950 All 4 : 1949 ALJ 303 : 1949 AWR 399 : 51 Cr LJ 212 (DB).

——S. 491 — The Courts should not countenance any encroachment on the liberty of subject unless the same be absolutely justified in law. The liberty is in existence in so far as it is sanctioned & controlled by law. The legislature has full power to enact measures which would encroach upon the liberties of subjects. The principle is that all individual liberty might give way to considerations of national safety. AIR (Vol 33) 1946 Bom 65 (76, 85) : 47 Bom LR 681 : 47 Cr LJ 1048.

**——S. 491 — Conviction under Ordinance II of 1942 — Validity of Ordinance challenged — Remedy of accused.**

Where the accused who are tried and convicted by the Special Magistrate under Special Criminal Courts Ordinance, II of 1942, challenge the validity of the Ordinance and the authority of the Special Magistrate to try and convict them, the remedy of the accused lies by an application under S. 491 and not by revision under S. 439. A I R

(Vol 32) 1945 PC 48 : 11 BR 417 : 47 Bom LR 260 : 49 CWN 178 : 1945 ALJ 258 : 46 Cr LJ 589 : 26 PLT 137 : ILR (1945) Kar (PC) 97 Sup : 1945 MWN 41 : (1945) 1 MLJ 76 : 58 MLW 64 : 72 IA 57 : 219 Ind Cas 263.

**——S. 491 — Detention under Ordinance III of 1944.**

Under Cl. 10 of Ordinance III of 1944, no Court has power to make any order under S. 491, Criminal P. C., in respect of any order made or having effect, under the Ordinance or in respect of any person the subject of such an order. AIR (V 32) 1945 Bom 533 : 47 Cr LJ 297 : 47 Bom LR 669 : 222 Ind Cas 267 (DB).

**——Ss. 491, 476 — Applicability.**

Custody under S. 476, before recording finding and before deciding to make a complaint is illegal and calls for action under S. 491. AIR (Vol 31) 1944 Lah 328 : 45 Cr LJ 768 : 46 PLR 188 : 215 Ind Cas 58.

**——S. 491 — If substantive right.**

Section 491, Criminal P. C., though remedial in form, postulates the existence of a substantive right.

Great importance of the writ of habeas corpus lies in the fact that it confers upon a person, even when he is in public custody, the right to have tested and determined in the High Court the legality of the order by which he is kept in custody. AIR (Vol 30) 1943 Nag 36 : ILR (1943) Nag 73 : 1943 NLJ 16 : 44 Cr LJ 237 : 205 Ind Cas 161 (DB).

**——S. 491 — Person detained under Defence of India Act can come to High Court.**

The rights conferred by S. 491 subsist and will continue to subsist until either the section is expressly or by necessary and express implication, abrogated, or the rights are expressly taken away. Some limit must be placed upon claims to the arbitrary exercise of absolute power in matters connected with the restraint of a man's liberty, and unless such powers are unmistakably conferred either expressly or by necessary implication — and by "necessary" is meant when no other construction is reasonably possible — they must be taken, at the very least, to be subject to the right of a person detained to come before the High Court under S. 491 and demand that he be either dealt with according to law or be set at liberty; and this notwithstanding that the Defence of India Act is a war measure, particularly so when the very arbitrary powers are exercisable not only by the Provincial Government, by some responsible Minister, or Member of Council, or Adviser, but by any District Magistrate and even by certain Sub-Divisional Magistrates. A I R (Vol 30) 1943 Nag 26 : 1943 NLJ 1 : ILR (1943) Nag 154 : 44 Cr LJ 345 : 205 Ind Cas 5 (DB).

**——S. 491 — Object.**

The High Court has no power to issue the writ of habeas corpus. The powers conferred by S. 491, Criminal P. C., are not as wide as those under the Habeas Corpus Act. But one matter is common, namely, the right of any person detained within the limits of the Court's appellate jurisdiction, whether by Government or by any one else, to apply to the High Court and demand, either that he be "dealt with according to law" or that he be "set at liberty". Fundamentally, the principles which underlie both provisions are the same. The object of both is to safeguard the liberty of the subject against excesses of the executive and against an abuse of power. The right is prized in India no less highly than in England, or indeed any other part of the Empire, perhaps even more highly here than elsewhere. AIR (Vol 30) 1943 Nag 26 : 1943 NLJ 1 : ILR (1943) Nag 154 : 44 Cr LJ 345 : 205 Ind Cas 5 (DB).

**——S. 491 — Release on bail — Effect on jurisdiction.**

The mere fact that after his arrest, the accused was temporarily released on bail pending further enquiry does not oust the jurisdiction of the High Court under S. 491, Criminal P. C. AIR (Vol 21) 1934 All 148 : 56 All 409 : 1934 ALJ 556 : 35 Cr LJ 1296: 4 AWR 1526: 151 Ind Cas 279 (DB).

**——S. 491 — Writ of habeas corpus displaced by S. 491.**

Section 491, Criminal P. C., which displaces the writ of habeas corpus, is not illegal in so far as it displaces the writ. AIR (Vol 21) 1934 Cal 259 : 38 CWN 299 : 59 CLJ 185 : 61 Cal 197 : 35 Cr LJ 1466 : 151 Ind Cas 1028 (DB).

**——S. 491, sub-s. (1), cl. (b) — Applicant prevented from seeing certain persons — Whether detention.**

It cannot be said that a person is detained in custody because he is prevented from seeing certain people whom he wants to see. Clause (b) of sub-s. (1) of S. 491, Criminal P. C., which provides that a High Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction be set at liberty, has no application to the case.

Disputes between the parties as regards the possession or ownership of the movable or immovable properties are outside the purview of S. 491, Criminal P. C. AIR (Vol 21) 1934 Oudh 301 : 35 Cr LJ 1052 : 11 OWN 799 : 10 Luck 87 : 149 Ind Cas 991.

**——S. 491 — Lahore Conspiracy Case Ordinance III of 1930 — Special Tribunal under, passing sentence of death — Stay of sentence — Tribunal ceasing to exist before execution — Custody of prisoners, held not illegal and application under S. 491, Criminal P. C., held should be rejected.** AIR (Vol 18) 1931 Lah 359 : 33 PLR 1024 : 33 Cr LJ 126 : 135 Ind Cas 189.

**——S. 491 — Bengal Criminal Law Amendment Act, S. 491.**

Bengal Criminal Law Amendment Act is an Act which was intended to supplement the ordinary criminal law in Bengal and the question whether or not a particular person is legally detained under it has to be dealt with, if at all, under the Code of Criminal Procedure. AIR (Vol 14) 1927 Cal 496 : 31 CWN 593 : 8 AI Cr R 121 : 54 Cal 727 : 102 Ind Cas 647 (DB).

**——S. 491 — Warrant under Goondas Act.**

Goondas Act (1 B C of 1923), S. 4 — Warrant — Secretary to Local Government issuing warrant is not Court subordinate to High Court — High Court can interfere only if case falls under S. 491. AIR (Vol 13) 1926 Cal 961 : 53 Cal 962 : 30 CWN 791 : 28 Cr LJ 10 : 99 Ind Cas 42 (DB).

**——S. 491 — Application.**

It is doubtful whether S. 491 applies to a case where there has been a conviction and sentence.

Per Chowdhuri, J. — Writs under the section are not granted to persons convicted or in execution under legal process or in execution of a legal sentence after conviction or indictment in the usual way. They are not granted when the effect would be to review the judgment of a Superior Courts, which might have been reviewed on a writ of error or when they would falsify the record of a Court showing jurisdiction on the plea of it. AIR (Vol 4) 1917 Cal 149 : 44 Cal 723 : 21 CWN 167 : 18 Cr LJ 311 : 38 Ind Cas 423 (FB).

**3. Burden of proof.**

——S. 491 — Burden of proof — Order under Bombay Public Security Measures Act, S. 2 (1) (b) — Application by detenu — What applicant has to prove — Contravention of order — Prosecution for — Onus — Difference. See AIR (V 36) 1949 Bom 387 : 51 Cr LJ 47.

**——S. 491 — Application by person detained under S. 2 (1) (a) of the C. P. & Berar Public Safety Act — Power of High Court to question propriety of Act — Matters to be considered by it.**

The expression "improperly" in S. 491, Cr. P. Code, cannot include any consideration of the question whether the legislation in question is proper, for it is beyond the province of a Court to consider any such matter. It can only refer to cases in which, although the forms of law have been observed, there has been a fraud on an Act or an abuse of the powers given by the legislature. Thus, on an application under S. 491, Cr. P. C., by a person detained under S. 2 (1) (a) of the C. P. and Berar Public Safety Act, 1947, under the orders of the Provincial Government, the High Court has to see whether the order is legal, that is to say, that it complies with all the forms of law and is passed by an authority empowered by the Act and whether there is any abuse of the powers given by the Act and thus a fraud upon it.

The sufficiency of the material on which the "satisfaction" of the Provincial Government is based cannot be the subject of scrutiny by the Court. The presumption that the order of detention is in fact based upon proper materials is a strong one and a heavy burden lies upon the detenu which he cannot displace by mere denial or by asserting that he is not aware of any reasons.

A valid order showing on its face that the power has been properly exercised is a good return and raises a presumption that the action was validly and properly taken. To get rid of this presumption the person detained must allege facts tending to show that there has been a mistaken identity or fraud on the statute or other misuse of the powers. If he fails to allege and prove facts he is not entitled to be released. On the other hand, the Court must be satisfied that the proper authority has considered the matter. Any error or mistake which shows that due care and attention was not paid to the case might prove fatal to the order. AIR (Vol 36) 1949 Nag 50 : ILR (1949) Nag 488 : 50 Cr LJ 165.

**——S. 491 — Burden of proof — Detention under Punjab Public Safety Act (1947) — Application for writ of habeas corpus — Onus — Facts to be proved by applicant and by Government — Presumption of legality and good faith as to official acts.**

The object of a writ of habeas corpus under S. 491, Cr P. Code, is to enable the Court to inquire into and determine the legality of the detention of a person who is restrained of his liberty. As normally every person is entitled to be at liberty unless he is restrained by process of law, the officer or authority having custody of the person detained must state the grounds for his detention. A duty is thus at once cast on the custodian to establish by evidence or otherwise before the Court that he has lawful authority for the detention. Initially, therefore the onus is on the custodian to establish that the detention is under legal process. If he fails to make out a prima facie case, the detenu has to be released. Where he produces an order which prima facie shows that the detention is legal, the onus shifts on to the detenu who must then prove all facts necessary to show that the restraint is illegal.

Where, therefore, in answer to an application on behalf of a person detained under S. 3 of the Punjab Public Safety Act, the Provincial Government produced an order made by the Governor containing a declaration that the Provincial Government was satisfied with respect to the person detained that with a view to prevent him from acting in a manner prejudicial to the public safety or the maintenance of the public order it was necessary to order his arrest under S. 3 of the Act, and a direction that the detenu be committed to a certain specified jail for a specified period that order would be a complete answer to the writ, as the Provincial Government must be presumed to have complied with the fundamental requirements of law having regard to the rule that all official acts are presumed to have been done rightly and that the facts set out in the return are presumed to be true, unless the detenu successfully impugns the good faith of the Government and rebuts the presumption as to the legality and good faith of the order of the Governor. If the Court is satisfied from the order produced and other statements made by responsible officers of the Government that the Governor did satisfy himself before making the order of detention as to the necessity for the arrest and detention of the person in question, and the detenu fails to establish any mala fides in the case, the Court has to refuse a writ and dismiss the application. In the absence of proof to the contrary, credit should be given to public officers, who have acted prima facie within the limits of their authority, for having done so with honesty and discretion. AIR (Vol 35) 1948 Lah 87 : 49 Cr LJ 161.

——S. 491 — Burden of proof — "Illegally" detained — Arrest and detention under S. 3, Punjab Public Safety Act—Application for habeas corpus — Onus — Duty of Court — Presumption as to regularity of official acts — When to be raised — Failure of Crown to produce record of official act — Effect. See AIR (Vol 35) 1948 Lah 84 : 49 Cr LJ 156.

**——S. 491 — Application on behalf of detenu under R. 129 of D.O.I. Rules — Affidavit on behalf of Crown — Necessity for.**

If an issue of fact is raised in an application under S. 491, Cr. P. Code, on behalf of a person detained under R. 129 of the Defence of India Rules, then an affidavit in reply refuting the facts or explaining them away by the Crown is necessary ; otherwise the truth of the facts alleged will normally be accepted. AIR (Vol 33) 1946 Lah 36 : 47 Cr LJ 212 : 47 PLR 416 : 221 Ind Cas 577 (DB).

**——S. 491 — Orders under R. 26, Defence of India Rules (1939) and S. 3, Restriction and Detention Ordinance (3 (III) of 1944) — High Court cannot sit in judgment as Court of appeal for scrutinising correctness of exercise of discretion — Orders can be attacked only on ground that they constitute fraud on statute.**

A Court of law empowered to exercise jurisdiction under S. 491, Criminal P. C., cannot sit in judgment as a Court of appeal for scrutinising the correctness or otherwise of the exercise of discretion by the Provincial Government or the Governor in making orders under R. 26 of Defence of India Rules (1939) or under S. 3 of Restriction and Detention Ordinance (3 (III) of 1944). The only ground upon which it is permissible to attack the aforesaid orders is that they constitute a fraud upon the statute, in other words, that though they say that the authority mentioned therein was satisfied, it did not in fact entertain

the belief that it is said to have entertained. The burden of substantiating the plea as to the fraudulent nature of the orders rests on the applicant under S. 491, Criminal P. C. Though it is a burden difficult to discharge, the difficulty cannot be availed of for relaxation of the ordinary rules of proof. AIR (Vol 33) 1946 Oudh 183 : 1945 OWN 217 : 20 Luck 535 (DB).

——S. 491 — Direction of Court to produce order of detention — Duty of Crown. See AIR (Vol 32) 1945 Nag 203 : 47 Cr LJ 429 : 222 Ind Cas 343.

**——S. 491 — Cases where liberty of subject is at stake — Right of Court.**

In cases where liberty of subject is at stake, the responsibility of the High Court is great and it has right to expect that the Crown will place all the facts frankly, or at any rate so much of the facts as will, without disclosing secret information, enable the Court to reach a conclusion on the issues raised. AIR (Vol 32) 1945 Nag 3 : I L R (1945) Nag 6 (DB).

**——S. 491 — No evidence that order was not bona fide.**

If a man is detained under R. 26, Defence of India Rules it is useless for the Court to make an order under S. 491, Criminal P. C., for his production in Court. It is, however, open to a person detained under that rule to challenge the bona fides of Government and to show that Government was not really of the opinion stated in their order, but were induced by some different reason to detain the detenu. But normally the Court will require definite evidence that a charge of lack of bona fides can be preferred against Government in the matter.

The Court, however, will not normally make an order under S. 491, Criminal P. C., unless there is evidence before it to suggest that the order of Government under R. 26 of the Defence of India Rules, was not made bona fide. AIR (Vol 30) 1943 Bom 194 : 45 Bom LR 316 : 44 Cr LJ 661 : ILR (1943) Bom 433 : 207 Ind Cas 450 (DB).

### 4. Costs.

**——S. 491 — Costs in applications under — Complaint against detention under Madras Act XXIII of 1949 — High Court holding detention under the Act illegal after 26th January, 1950 — Power of Court to direct the State to pay the detenu the costs of the habeas corpus application.**

In an application under S. 491, Criminal Procedure Code, complaining against a detention under Madras Act XXIII of 1949, the High Court held that the detention under that Act was illegal after the 26th of January, 1950. On the question whether the High Court had under such circumstances power to direct the State to pay the detenu the costs of the application.

Held : The High Court has no inherent power to award costs in such a proceeding which is of a criminal nature.

Desirability of High Court framing rules similar to O. 35 of the Supreme Court Rules in regard to procedure to be followed in applications under Art. 226 of the Constitution, pointed out. ILR (1951) Mad 70 · 63 LW 769 : 1950 MWN 608 : (1950) 2 MLJ 186: AIR (V 38) 1951 Mad 267 (DB).

**——S. 491 — Costs — Jurisdiction under — Nature of — Criminal or civil — Award of costs — Power of High Court.**

Proceedings under S. 491, Cr. P. Code, are criminal in their nature and therefore no costs can be ordered in such proceedings unless rules are framed under S. 491 (2), providing for such costs. AIR (Vol 36) 1949 All 513 : 1949 ALJ 397 : 50 Cr LJ 798 (FB).

**——S. 491 — Application under — High Court cannot grant costs.**

Per Agarwala, J. and Meredith, J. — The High Court has no power to grant the costs of an application under S. 491, Criminal P. C.

Per Sinha, J. — In a case where the authorities concerned with the administration of the Restriction and Detention Ordinance (III of 1944) think fit to release a person detained u/s. 3 of the Ordinance, it cannot be said that the person is entitled to costs. No question of awarding costs in favour of the person can arise on the merits of the case unless it is shown that his detention was illegal. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

### 5. Jurisdiction.

See also N. 10.

——S. 491 — Jurisdiction — Default in payment of Income-tax — Order of detention by Collector under S. 46 (2), Income-tax Act — Application for Habeas Corpus — Maintainability. See AIR (Vol 37) 1950 Bom 33 : 51 Cr LJ 306 : 51 Bom LR 589.

**——S. 491 — Jurisdiction of High Court — Detention outside limits of its appellate criminal jurisdiction.**

The words of S. 491 (1) (b), Cr. P. Code, are absolutely clear, and admit of no doubt that the High Court has no jurisdiction to issue a writ of habeas corpus in case of persons not detained within the limits of its appellate criminal jurisdiction. AIR (Vol 37) 1950 Pesh 18 : 51 Cr LJ 1002.

**——S. 491 — Person detained in Rajahmundry Jail (out of appellate jurisdiction of Nagpur High Court) — Nagpur High Court cannot take action under S. 491.**

Section 491 authorizes the High Court to issue in a proper case an order under that section only with reference to persons who are within its appellate criminal jurisdiction and whom it regards as having been illegally detained. That section does not authorize the High Court to deal with persons who are so detained or alleged to have been so detained beyond its jurisdiction. Hence the Nagpur High Court has no jurisdiction under S. 491 to take any action regarding a person detained in the Rajahmundry Jail. AIR (Vol 33) 1946 Nag 20 : ILR (1945) Nag 862 : 1945 NLJ 573 (DB).

**——S. 491 — Petition under, by detenu — High Court not precluded by S. 10. Restriction and Detention Ordinance from considering.**

Section 10 of the Restriction and Detention Ordinance does not preclude the High Court from considering a petition by the detenu under S. 491, Criminal P. C., on the ground that the order of detention was unlawful and mala fide. AIR (Vol 32) 1945 Oudh 222 : 1945 AWR (CC) 91 (2) : 1945 OWN (CC) 119 : 20 Luck 504.

——S. 491 — To attract the application of S. 491, Criminal P. C., the person must be within the limits of the appellate criminal jurisdiction of the Court at the time of hearing of the application. AIR (Vol 32) 1945 Oudh 117 : 20 Luck 338 : 1944 OWN (CC) 415 : 1944 AWR (CC) 274 (1) : 218 Ind Cas 135: 46 Cr LJ 419 (DB).

**——S. 491 — Greek seaman coming to India — Forcibly removed for being re-patriated to Egypt.**

One S, a Greek, came to Calcutta a sick seaman. He, as well as the agents of the ship's owners, thought that he had a claim against the owners of the ship in respect of his illness. S began proceedings in the Calcutta High Court. He was forcibly removed for being repatriated to

Egypt by a Greek steamer leaving Calcutta :

Held, the Central Government alone could order this man's removal from this country to Egypt. Perhaps the Provincial Government or a proper Court of Law might have ordered it. Each one of these authorities would, no doubt, have taken into consideration the state of this man's health and the fact that he had a claim which he was prosecuting against the owners of a ship in respect of damage of his health. The Greek Consul, the ship's agents and the Police had no right to order his removal from Calcutta unless they did it under an authority from the Central Government or perhaps the Provincial Government or a proper Court of Law. This was a piece of lawlessness on the part of the ship's agents, the Police and the Greek Consul. But the High Court was not in a position to help this man as he was out of the jurisdiction (the ship having left). AIR (Vol 31) 1944 Cal 76 : 45 Cr LJ 380 : 211 Ind Cas 373 (DB).

——S. 491 — Section 491, Criminal P. C., has not been abrogated in any respect by S. 2 (5) and R. 26 (f), Defence of India Act. AIR (Vol 30) 1943 Nag 26 : 1943 NLJ 1 : ILR (1943) Nag 154 : 44 Cr LJ 345 : 205 Ind Cas 5 (DB).

——S. 491 — Since only High Court can act under S. 491, Criminal P. C., S. 26 of the Special Criminal Courts Ordinance, II of 1942 must have been designed to exclude interference by all other Courts including High Courts. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 BR 193 : 45 Cr LJ 177 : 209 Ind Cas 482 (SB).

——S. 491 — Madras High Court Appellate Side Rules, Rr. 2 and 2-A, held intra vires the powers of High Court — Order by Single Judge issuing writ of habeas corpus in matters contemplated by S. 491, Criminal P. C., held is not within jurisdiction. AIR (Vol 26) 1939 Mad 120 : 1938 MWN 1289 : 40 Cr LJ 320 : (1939) 2 MLJ 135 : ILR (1939) Mad 708 : 180 Ind Cas 216 (FB).

**(Overrules AIR (Vol 9) 1922 Mad 499 : 23 Cr LJ 614: 68 Ind Cas 838 (FB).)**

**(Reverses AIR (Vol 26) 1939 Mad 115 : 40 Cr LJ 297).**

——S. 491 — Single Judge issuing writ.

An order of a Single Judge directing a writ of habeas corpus to be issued is an order passed without jurisdiction and it must be disregarded and the application filed under S. 491, Criminal P. C., must be dealt with by the Bench dealing with criminal matters. AIR (Vol 26) 1939 Mad 120 : 1938 MWN 1289 : 40 Cr LJ 320 : ILR (1939) Mad 708 : (1939) 2 MLJ 135 : 180 Ind Cas 216 (FB).

**——S. 491 — Arrest under S. 10, Sind Encumbered Estates Act.**

The Judicial Commissioner's Court cannot interfere under S. 491, Criminal P. C., with the order of the manager of an estate ordering arrest of a person under S. 10, Sind Encumbered Estates Act. AIR (Vol 26) 1939 Sind 155 : 40 Cr LJ 710 : 182 Ind Cas 963 (DB).

**——S. 491 — Jurisdiction — Martial Law — Declaration of — Necessity for — Power of the Court to consider — Sholapur Martial Law Ordinance IV of 1930 — Government of India Act (5 & 6 Geo. V, c. 61), S. 72.**

In May 1930, riots broke out in Sholapur following the arrest of Mr. Gandhi. On May 12, the military took charge of the town from the civil authorities and proclaimed martial law and published certain regulations. On May 15 the Government of India promulgated Ordinance No. IV, which was proclaimed in Sholapur on May 18. Ss. 2 and 4 dealt with the powers of the Military. S. 7 provided that all offences should be dealt with by the ordinary Criminal Courts and S. 11 provided that "all sentences passed by the military shall be deemed to be as valid as if passed under the ordinance". The validity of the ordinance and the sentences passed by the military was questioned by the petitioners, who were wives or relatives of persons sentenced to varying terms of imprisonment, by an application under S. 491.

Held, (i) The High Court has jurisdiction, after the restoration of normal conditions, to decide how far the martial law was justified. (ii) The question whether martial law was properly declared did not, however, arise since the effect of S. 11 of the Ordinance was to validate all sentences properly or improperly passed. (iii) The High Court has also jurisdiction to inquire whether there was an emergency within the meaning of S. 72 of the Government of India Act. But having regard to the fact that the Governor-General may be in possession of information which he may not be willing, or be compelled, to disclose, all that the Courts can do is to see if there is evidence upon which the Governor-General may reasonably conclude that an emergency exists. (iv) The opinion of the District Magistrate as disclosed in his affidavit coupled with the fact that the military had been placed in charge of the town constituted an emergency which justified the Governor-General in taking action under S. 72 of the Government of India Act. The sentences of the military are not subject to the usual rules as to appeal and revision. AIR (V 18) 1931 Bom 57 : 32 Bom LR 1613 : 1931 Cr C 65 : 32 Cr LJ 403 (FB).

——S. 491 — Where the person wanted is in custody of a Native State power to issue directions under S. 491 (1) cannot be exercised. AIR (V 16) 1929 All 347 : 119 Ind Cas 527 : 1929 ALJ 520: 10 LRA Cr 84 : 12 AI Cr R 1 : 30 Cr LJ 1083.

**——S. 491 — Power to issue.**

For any of the purposes mentioned in what is now S. 491 it is not open to an applicant to say that he will make his application independently of that section altogether for the prerogative writ of habeas corpus on the civil side of the High Court. AIR (V 14) 1927 Cal 496 : 54 Cal 727: 31 CWN 593 : 102 Ind Cas 647 : 8 AI Cr R 121 (DB).

——S. 491 — Special tribunal exercising powers under the Act creating it — High Court has no jurisdiction to issue writ of habeas corpus. AIR (V 14) 1927 Sind 123 : 7 AI Cr R 345 : 28 Cr L J 194 : 99 Ind Cas 930 (DB).

——S. 491 — As a result of the amendment introduced by Act XII of 1923 the High Court on its Criminal Appellate Side is vested with jurisdiction to deal with an application under S. 491 of the Code. AIR (V 12) 1925 Cal 278 : 85 Ind Cas 913 : 40 CLJ 489 : 29 CWN 98 : 52 Cal 319 : 26 Cr LJ 625 (DB).

**——S. 491 — Haebeas Corpus — Extradition Act.**

A fugitive criminal cannot apply for a writ of Habeas Corpus under the Extradition Act, if the Magistrate commits him to prison. If neither the arrest nor the detention is within the jurisdiction of the High Court, it has no jurisdiction to order his discharge. High Court's right to issue a writ of Habeas Corpus is not taken away by S. 3 (6) and (7), Indian Extradition Act. AIR (V 5) 1919 Cal 509 : 46 Cal 52 : 20 Cr LJ 257 : 50 Ind Cas 17.

**——S. 491 — Application lies to High Court.**

An application under S. 491 lies to the High Court in its ordinary original criminal jurisdiction. AIR (V 4) 1917 Cal 253 : 44 Cal 76 : 20 C WN 1233 : 18 Cr LJ 73 : 37 Ind Cas 57.

**6. Legality of detention.**

(a) General.

(a-1) Scope of enquiry.

See also Note 3.

(b) Defects in procedure.

See also Note 11.

**(a) General.**

——S. 491 — "Illegally detained" — Detention under Madhya Bharat Maintenance of Public Order Act — Application by detenu — Interference by High Court — Grounds. See AIR (V 37) 1950 Madh B 26 : 51 Cr LJ 797.

——S. 491 — **Applicability — Illegal or improper detention — Applicant released on bail pending inquiry — If in custody — Right to apply under section.**

The mere fact that after an applicant's arrest he was temporarily released on bail pending further inquiry, does not oust the jurisdiction of the High Court to act under S. 491, Cr. P. Code. All that the section requires is "illegal" or "improper" detention in public or private custody. Even if a person is temporarily released on bail he must be considered to be detained in the constructive custody of the Court through the surety, as his liberty is subject to restraint. He can therefore still invoke S. 491 in his aid. AIR (V 37) 1950 Madh B 17 : 51 Cr LJ 731 (DB).

——S. 491 — **"Illegally detained" — Person already in custody — Order of detention under S. 3, Punjab Public Safety Act — Original arrest and detention unauthorised — If fatal.**

From the fact that the initial arrest and detention of a detenu was wrong and unauthorised it does not follow that the subsequent detention under S. 3 (1) of the Punjab Public Safety Act was wrong and illegal, though regularised and brought within the provisions of the Act. The Court, in judging of the validity of the detention in an application under S. 491, Cr. P. Code, is concerned not with the original order of detention but with the order of detention passed under the Act, which alone is relevant to the decision of the application. AIR (Vol 36) 1949 Ajmer 58: 1948 AM LJ 22: 51 Cr LJ 90.

——S. 491 — "Illegally detained" — Detention under Maintenance of Public Order (Temporary) Act (1947) — Power of High Court to set aside — Principles. See AIR (Vol 36) 1949 Oudh 20: 50 Cr LJ 260.

——**S. 491 — Application under — Maintainability —Release of prisoner from jail under bogus order — Rearrest and committal to jail without fresh warrant — If illegal.**

Where a person is committed to jail under a warrant of detention to serve out a sentence of imprisonment awarded to him on conviction by a Court, he has to remain in jail and serve out his sentence. The fact that before serving out the sentence he is released under a bogus order of release, which has no basis in law or fact, does not lead to the result that the original warrant of committal to jail has spent its force. He may therefore be arrested and detained in jail again to serve out the sentence without a fresh warrant, and his detention after re-arrest cannot be held to be illegal within the meaning of S. 491, Cr. P. Code. It is immaterial how he is brought back to jail. AIR (Vol 36) 1949 Pat 41: 49 Cr LJ 668: 29 PLT 401 (DB).

——**S. 491 — Application under — Maintainability — Prisoner released as result of bogus order re-arrested.**

The release obtained of a prisoner who was serving a sentence of imprisonment as a result of a bogus order issued by some one interested in him, is not an unconditional release, and his re-arrest for serving the unexpired portion of his sentence is, therefore, not wrongful. The fact that it has not been established that he himself was a party to the plot does not affect the issue, nor does the fact that the perpetrator of the fraud has not been caught and convicted for the fraud in a Court of law. Such a person on rearrest is legally in custody, and no application under S. 491, Cr. P. Code, for his production before the Court and release can be entertained. AIR (Vol 35) 1948 Nag 83: ILR (1947) Nag 627: 49 Cr LJ 127: 1947 NLJ 396.

——**S. 491 — Applicability — Illegally or improperly detained — Persons detained by Magistrate pending inquiry under S. 20, Sind Frontier Regulation — Power of High Court to order release.**

The provisions of S. 491, Cr. P. Code, are wide and empower the High Court to give relief to any person within the limits of its appellate jurisdiction, who is illegally or improperly detained in public or private custody.

Where a District Magistrate, in exercise of his powers under S. 20, Sind Frontier Regulation detains a person in custody pending inquiry on a notice under S. 20, such detention is illegal or improper, and the High Court in such a case is justified in acting under S. 491, Cr. P. Code. AIR (Vol 35) 1948 Sind 1: 229 Ind Cas 298: 48 Cr LJ 372 (DB).

——S. 491 — Where the petitioner's affidavit set out allegations that the action of the Commissioner of Police of Bombay was the result of the desire of the U. P. Police to apprehend the detenu and that it was not the bona fide act of the Commissioner of Police himself, being the result of any reasonable suspicion entertained by himself but with the motive of handing over the detenu to the custody of U. P. Police and these allegations were not traversed in the counter-affidavit filed by the prosecution, and there was also an order of the Bombay Government directing that the detenu be removed to Lucknow and delivered to U. P. Police :

Held, that what the Commissioner of Police of Bombay purported to do was not bona fide; that the arrest was actuated by indirect motives and was a fraud on the power invested in the Commissioner of Police under R. 129 (1), Defence of India Rules, and therefore, the orders of detention passed by the Bombay Government were illegal. AIR (Vol 33) 1946 Bom 65: 47 Bom LR 681: 47 Cr LJ 1048.

——**S. 491 — Directing its mind under Criminal Tribes Act.**

Where the detaining authority directed its mind, not on the question of the security of the state or the efficient prosecution of war but to the limited question as to whether Criminal Tribes Act should be used or not against the applicant, the order of detention under Cl. 3 of Ordinance III of 1944 passed by the Government on such satisfaction cannot be said to be valid. Detention under such order is illegal and the person detained must be set free. AIR (Vol 33) 1946 Bom 32: 47 Bom LR 675 (DB).

——**S. 491 — Application under, by person charged with offences under Ss. 121 and 302, Penal Code, before Court-martial — Plea that provisions of S. 196, Criminal P. C., have not been complied with in respect of former charge cannot be raised.**

Where a native officer charged of offences under Ss. 121 and 302, Penal Code, in a trial before a Court-martial applies for a writ of habeas corpus under S. 491, Criminal P. C., the plea that he cannot be tried for offence under S. 121, without presentation of complaint by a Provincial Gov-

ernment under S. 196, Criminal P. C., cannot be raised. As the applicant is also charged under S. 302, Penal Code, he can be kept in custody without any such complaint and the custody cannot be regarded as improper or illegal detention.

Per Sale, J.—The question of the applicability of S. 196, Criminal P. C., as indeed of the Criminal Procedure Code in general, to Court-martial proceedings is not a proper subject for investigation in application under S. 491, Criminal P. C. The Court is not sitting in appeal or revision from any finding of the Court-martial, but having been constituted to deal with an application under S. 491, is concerned solely with the question of legality of detention of the accused person for the purpose of trial by the Court-martial convened under the Indian Army Act. AIR (Vol 33) 1946 Lah 158: 47 Cr LJ 645 (FB).

**——S. 491 — Admission of wrong evidence by Court-martial is no ground for order under S. 491.**

The admission of evidence, whether right or wrong, by Court-martial is clearly a matter within the jurisdiction of the Court and cannot possibly be made a ground for an order under S. 491. AIR (Vol 33) 1946 Lah 112: 47 Cr LJ 687.

**——S. 491 — S. 16 (1), Defence of India Act (XXXV of 1939) is no bar to inquiry by Court of good faith in arrest — Abuse of power under R. 129, Defence of India Rules — Court can grant relief under S. 491, Criminal P. C.**

In spite of S. 16 (1) of Defence of India Act, 1939, the Court is competent to determine whether the arrest has really been made under R. 129 of the Defence of India Rules or has been made in bad faith for a collateral purpose and is, for that reason, an abuse of power and fraud upon the statute. If the Court arrives at the conclusion that R. 129 does not apply, it can afford the relief prayed for under S. 491, Criminal P. C. AIR (Vol 33) 1946 Lah 36: 47 PLR 416: 47 Cr LJ 212: 221 Ind Cas 577 (DB).

**——S. 491 — Person arrested under extradition warrant — Application under S. 491 — Assurance that Court trying such person would not be biassed is not sufficient ground for rejecting application.**

Where a person arrested under an extradition warrant applies under S. 491, the fact that the High Court is assured that the tribunal by which he would ultimately be tried is not likely to be biassed against him is a matter of quite secondary importance for rejecting the application. The real question at issue is whether or not sufficient grounds have been made out for depriving him of his liberty and sending him out of British India to answer a charge before a state tribunal. AIR (Vol 33) 1946 Pat 196: 24 Pat 699: 12 Cut LT 1: 48 Cr LJ 40.

**——S. 491 — 'Improperly detained', meaning.**

A person cannot be said to be 'improperly detained' within S. 491, Criminal P. C., unless the judgment convicting him can be reviewed. AIR (Vol 23) 1936 Nag 132: ILR (1936) Nag 99: 38 Cr LJ 390: 167 Ind Cas 465.

**——S. 491 (b) — Temporary release — Subsequent rearrest and re-confinement.**

Where a prisoner is released temporarily to be at the bedside of his wife who is seriously ill, the release does not amount to a remission of the sentence. Consequently, the arrest and re-confinement without fresh trial is competent. In such cases, the High Court has no power to question the manner in which the Government exercises its prerogative of mercy. AIR (Vol 22) 1935 All 181: 36 Cr LJ 325: 4 AWR 1154: 153 Ind Cas 351.

**——S. 491 — Person detained under S. 10, Extradition Act for over two months.**

The detention of a person becomes illegal where he is arrested and kept in custody under S. 10, Extradition Act, for a period extending over two months, if no extension has been granted by the Local Government under sub-s. (3) and under the circumstances, the only order the High Court can pass is that the prisoner should be discharged from custody. AIR (Vol 22) 1935 Pat 419: 16 PLT 551: 2 BR 32 (2): 36 Cr LJ 1500: 158 Ind Cas 981 (DB).

**——S. 491 — Arrest under Extradition Act, S. 7.**

Arrest of person under warrant issued by Political Agent without all the three conditions in S. 7, Extradition Act having been fulfilled, is illegal — High Court under S. 491, Criminal P. C., can take action. AIR (Vol 22) 1935 Sind 244: 29 SLR 60: 37 Cr LJ 312: 160 Ind Cas 115 (DB).

**——S. 491 — Legality of detention.**

A arrested and remanded to police custody on suspicion of being connected with offence under S. 302 read with S. 120-B — Order of Magistrate not sufficiently clear — Existence of grounds for believing that A was connected with serious conspiracy — Custody in which A was detained held not to be "illegal". AIR (Vol 17) 1930 Lah 945: 31 PLR 780: 1930 Cr C 1041: 32 Cr LJ 339.

**(a-1) Scope of enquiry.**

See also N. 3.

**——S. 491 — Scope of enquiry under.**

An enquiry whether a Political Agent who has issued a warrant of extradition has acted in good faith and has followed the proper procedure before issuing the warrant is not within the scope of an enquiry under S. 491, Cr. P. Code. AIR (Vol 37) 1950 All 342: 51 Cr LJ 947.

**——S. 491 — Habeas corpus — Application for — Detention of person under Madras Maintenance of Public Order Act, 1947 — Grounds of detention — Disclosure to person detained — Bona fide exercise of power — What constitutes — Interference by Court — When justified — Membership of political party not declared illegal — Effect — Acts done in immediate past to be taken into account — Non-compliance with formalities prescribed in Ss. 2 (2) & 3 — Effect.**

Under S. 2 of the Madras Maintenance of Public Order Act of 1947, the satisfaction of the detaining authority is a subjective state of mind and not an objective fact. It is not open to the Court to go into the question whether the detaining authority could or could not be so satisfied on the grounds subsequently disclosed to the detenu, nor is it open to the Court to compel the Government or the detaining authority to disclose the facts or the material or the grounds on the basis of which the order was made. There is no doubt a duty cast upon the Executive Government under S. 3 of the Act to disclose the grounds; but so far as satisfaction is concerned it is the satisfaction of the Provincial Government or the empowered authority as the case may be, and not that of the Court. If some of the grounds are good and some are vague and indefinite and uncertain, the grounds which are uncertain and vague may be ignored and the order of detention may be justified on the grounds which are definite and certain. If the grounds are vague and uncertain it would be open to the Government to supplement them by giving particulars to enable the persons concerned to make a proper representation. If the grounds furnished are no grounds at all in the sense that they convey no information to the person detained or even if they are grounds outside the purview of

the Act the continuance of the detention cannot be justified.

Even if a party is declared illegal the mere association of a person with that party would not justify the inference that the person was acting in a manner prejudicial to public safety.

Per Viswanatha Sastri, J.—If the detaining authority has acted in good faith and has come to a decision on relevant materials placed before it that detention is necessary, the Court cannot enquire into the sufficiency of the materials or reasonableness of its satisfaction.

If there is sufficient material before the Court for holding that the recital in the order is inaccurate and that the order is merely a routine order mechanically passed or the mere outcome of police recommendation and not of a decision of the detaining authority the Court would interfere under S. 491, Cr. P. Code.

Antecedent conduct may furnish reasonable ground for coming to a conclusion that the person is likely to act in a manner prejudicial to public safety or maintenance of public order. But in this connection acts done in the approximate and immediate past and not in the remote past should alone be relied on to obtain the satisfaction that is required under S. 2 (1) of the Act.

Substantial compliance with the formalities prescribed by S. 2 (2) and S. 3 (1) is quite essential to sustain the legality of the continuance of the detention. They are not merely directory provisions whose non-observance would constitute a mere irregularity in procedure. If the non-compliance with the provisions of S. 2 (2) and S. 3 is substantial and serious, it would render the continuance of the detention illegal even though it might have been legal ab initio.

Where the delay in communicating the grounds under S. 3 (1) or in submitting the case to the Advisory Council under S. 3 (2) or in passing final orders under S. 3 (5) is unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground.

If in the opinion of the Court the grounds furnished are so vague, indefinite and insufficient that the detenus could not fairly be expected to make an effective representation against the legality or propriety of the order then, it must be held that their detention is illegal or improper. If activities which are normally unobjectionable are considered to be objectionable and therefore relied on as a ground for detention then the circumstances in which or the reasons why those activities are looked upon as objectionable must be indicated to the detenu. The grounds and particulars together form a sort of substitute for a charge. AIR (Vol 37) 1950 Mad 162: 51 Cr LJ 525: 1949 MWN 549: (1949) 2 MLJ 310 (DB).

**——S. 491 — Scope of inquiry — Question for decision — Legality of prior arrest or detention or otherwise — Relevancy and materiality of.**

The question for decision under a habeas corpus application under S. 491, Cr. P. Code, is whether the detention of which the detenu (applicant) complains, that is to say, the detention at the time when he seeks to take out a writ of habeas corpus, is valid or not. The question therefore involves itself into the question whether at the moment there is for his detention a valid order in existence; and if there be such an order, then no writ of habeas corpus can be issued in his favour, notwithstanding that his arrest and original detention were illegal. What the Court is concerned with in the case is not whether the arrest of the applicant was legal or illegal but whether the detention under the order of detention is legal or illegal. It is immaterial whether his prior arrest and his prior detention were or were not legal. AIR (Vol 36) 1949 Bom 319: ILR (1949) Bom 508: 51 Cr LJ 184: 51 Bom LR 653 (FB).

**——S. 491 — Scope of inquiry under — Detention — Legality of — If sole question for consideration — Several orders of detention — Validity of each — If to be considered — Duty to produce all existing orders of detention on date of hearing — Non-disclosure — Effect.**

In a proceeding under S. 491, Cr. P. Code, what the High Court has to consider is the legality of the detention of a particular person in public or private custody. The legality of the detention has alone to be considered, but not with reference to a particular order only. If there are more orders than one against one and the same individual on the date on which the detention is under consideration, it is certainly the duty of the detaining authority to produce all the orders of detention in support or in justification of the order of detention. It is not open to the Provincial Government to keep a second or later order of detention up its sleeve, and allow an order of release to be passed on the first or earlier order of detention, and to produce the second or later order of detention for the purpose of detaining the detenue after the order of release is passed. To allow or encourage such a practice would be tantamount to stultifying the order of the High Court. Where, however, a fresh order of detention is made subsequent to the order of release passed by the High Court on fresh or different grounds, different considerations will arise. But where the several orders of detention had been passed against the same person before that date, it is clearly the duty of the Provincial Government to bring to the notice of the High Court all existing orders of detention which might justify the detention of the person whose application for release is being considered by the High Court. Administrative or routine difficulties cannot override the law or the liberty of the subject and no officer however highly placed he may be, can flout or disobey the order of the High Court for the release of an individual, except at his peril. AIR (Vol 36) 1949 Pat 247: 50 Cr LJ 518 (DB).

**——S. 491 — Court Martial proceeding — Evidence — Power of High Court.**

It is extremely doubtful whether a High Court in proceedings under S. 491, can go into the question of evidence before the Court Martial. Whether there is evidence to sustain conviction is a question of law and the members of a Court Martial are the sole Judges of both law and fact. The High Court cannot interfere if they had made a mistake of law and convicting on no real evidence would be pure mistake of law. It would, of course, be different if the Court-martial convicted an accused person without hearing any evidence at all High Court could then hold that the detention of such a man was illegal because the proceedings of the Court Martial would be irregular on the face of them. If, on the other hand, evidence was taken which, in the view of the Court-martial, was sufficient to maintain a conviction, then the proceedings would be regular and the mistake, if any, would be a mistake of law. AIR (Vol 33) 1946 Lah 103: ILR (1945) Lah 419: 47 PLR 423 (FB).

**——S. 491 — Powers under, if nullified by S. 16, Defence of India Act or R. 26, Defence of India Rules.**

Section 16, Defence of India Act or R. 26 Defence of India Rules does not, in any way, nullify the jurisdiction created by S. 491, Criminal P. C. The High Court has the jurisdiction to entertain applications under that section. If, however, after entertaining an application under that section, it transpires that the detention is not illegal or improper, the application will fail on the merits. There are numerous provisions of law which justify the detention of a person, and the Defence of India Rules constitute but an addition to those provisions. The High Court cannot act as a Court of Appeal from the discretionary order passed by the Commissioner under R. 26 and enquire into the grounds which led the Commissioner to pass that order. AIR (Vol 30) 1943 All 277: 1943 AWR 135: 1943 ALJ 336: 44 Cr LJ 722: ILR (1943) All 773: 208 Ind Cas 194 (FB).

**——S. 491 — Conviction by Court-martial — Sufficiency of evidence — Power of High Court to consider.**

The members of a Court-martial are the sole Judges of both law and fact. Whether there is evidence to sustain conviction is a question of law and the High Court cannot, therefore, go into the question of sufficiency of the evidence in proceedings under S. 491, Cr. P. Code. It would of course be different if the Court-martial convicted an accused person without hearing any evidence at all. AIR (Vol 33) 1946 Lah 103: ILR (1945) Lah 419: 227 Ind Cas 216: 47 PLR 423: 47 Cr LJ 1022 (FB).

**——S. 491 — Conviction by Courts-martial — Alleged wrong admission of evidence in Courts-martial — If can be made ground for an order under S. 491 — Sufficiency of evidence — If can be gone into by the Court.**

Admission of evidence right or wrong in a Court-martial under the Army Act cannot possibly be made a ground for an order under S. 491, Cr. P. Code. The Court cannot enquire into the sufficiency of the evidence, so long as there is evidence on which the conviction in Court-martial proceedings is based. AIR (Vol 33) 1946 Lah 112: 225 Ind Cas 102: 47 Cr LJ 687.

**——S. 491 — Application under — Accused detained for trial by Court-martial — Question of necessity for sanction by Government under S. 196 — Whether relevant.**

Sale, J. — The question of the applicability of S. 196, Cr. P. Code, as indeed of the Cr. P. Code, in general, to Court-martial proceedings, is not a proper subject for investigation in an application under S. 491, Cr. P. Code. The High Court constituted to deal with such an application is not sitting in appeal or revision from any finding of the Court-martial but is concerned solely with the question of the legality of the detention of the accused for the purpose of his trial by the Court-martial convened under the Army Act. AIR (Vol 33) 1946 Lah 158 : ILR (1947) Lah 327 : 224 Ind Cas 608: 47 Cr LJ 645 (FB).

**——S. 491 — Status of parties not to be decided.**

It is not proper that questions regarding conversion and validity of marriage which involve the status of parties should be decided in an application for a writ of habeas corpus. Such questions should properly be decided by the Civil Court. AIR (Vol 21) 1934 Lah 647 : 35 PLR 594 : 35 Cr LJ 1397 : 151 Ind Cas 692.

**(b) Defects in procedure.**

See also N. 11.

**——S. 491 — Person detained under Bengal State Prisoners Regulation (3 (III) of 1818) — High Court has no jurisdiction under S. 491, even if it is alleged that person is illegally or improperly detained under Reguation — Proper procedure in such case is that laid down in Ss. 3, 4 and 5 of Regulation.**

Once a Court is satisfied that a person is being detained under the Bengal State Prisoners Regulation (3 (III) of 1818), there is no jurisdiction under S. 491, Criminal P. C., which the Court can exercise in the matter.

The jursdiction under S. 491 is wholly statutory and governed by the terms of the section. Moreover, the very basis of jurisdiction under sub-s. (1) (b) of S. 491, which is the only sub-section under which the Court can be asked to assist the applicant, is expressed to be "illegal or improper detention of public or private custody," and yet by virtue of sub-s. (3) in cases of persons detained under Regn. 3, sub-s. (1) (b) has no application. It, therefore, follows that something more than allegations that a person is being "illegally or improperly" detained under Regn. 3 is necessary before the Court can get over the bar to jurisdiction under the section imposed by sub-s. (3). Complaints as to the illegality or impropriety of detention, if the detention be under Regn. 3, can be dealt with under the procedure laid down in Ss. 3, 4 and 5 of Regn. 3 and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot be sufficient to give the Court jurisdiction under S. 491. If on the facts of the case it is clear that a person is being detained under Regn. 3 even though a Court might think, if it investigated those facts, it might find that the detention was illegal or improper, still the Court cannot interfere under S. 491. The only ground upon which a Court might exercise jurisdiction under S. 491 in such a case is to show that the applicant was a person to whom the provisions of Regn. 3 cannot or do not apply and therefore there was no detention under the Regulation. If the applicant has the status of a ruler of a State it may be that he is a person to whom Regn. 3 has no application whatsoever. But the applicant in this case being admittedly detained under a warrant issued under the Regulation after he was removed from his gadi he was subject to the provisions of the Regulation and, therefore, there was no jurisdiction under S. 491 which the Court could exercise in the case. AIR (Vol 33) 1946 FC 2 : 50 CWN 1 : (1946) 9 FLJ 1 : (1946) 1 MLJ 322 : 224 Ind Cas 60 (FC).

**——S. 491 — Applicability — "Illegally detained" — Arrest and detention under R. 129 (1), Defence of India Rules, 1939 — Allegation that detention was on insufficient material and for ulterior purpose — Officer not traversing allegation and not stating any specific grounds — Effect — Power to release detenu.**

There is no warrant for the contention that if an order under R. 129 (1) of the Defence of India Rules is proved or admitted, it must be taken prima facie to have been properly made. There is nothing in the case of orders under R. 129(1) which would ex facie be proof the conditions therein having been fulfilled and it is therefore incumbent on the officer concerned who arrested the detenu to make an affidavit stating that he reasonably suspected the detenu of having acted in a manner prejudicial, etc., though he is not bound to disclose therein any confidential information or State secret. Where it is specifically alleged on the other side that a certain information was the only information on which the officer acted, the officer concerned must traverse those allegations; and if he does not traverse them and does not state that besides those materials on which he came to entertain reasonable suspicion of the detenu having acted

in a manner prejudicial, etc., the Court would be entitled to presume the correctness of the allegations made on the side of the detenu and to presume that there were no other materials before the officer sufficient to justify him to act under R. 129 (1). It would then be open to the Court to come to the conclusion that the exercise of the power under R. 129 (1) by the officer concerned was not bona fide or was made with indirect or ulterior motives or was a fraud upon the power vested under R. 129 (1). In such a case the arrest and detention would be illegal and under S. 491, Cr. P. Code, the High Court would exercise its powers and order the detenu to be released and set at liberty, he being "illegally detained." AIR (Vol 33) 1946 Bom 65 : ILR (1946) Bom 309 : 47 Bom LR 681.

——S. 491 — **Proceeding under — Legality of arrest — If material.**

Any defects there may be in the procedure by which a person comes to be in custody are immaterial so far as the proceedings under S. 491, Cr. P. Code, are concerned. All that the Court is concerned with is the validity of the detention at the time of those proceedings. ILR (1946) 1 Cal 95 (DB).

——**S. 491 — S. 16 (1), Defence of India Act (1939), is no bar to inquiry by Court of good faith in arrest — Abuse of power under R. 129, Defence of India Rules — Court can grant relief under S. 491, Criminal P. C.**

In spite of S. 16 (1), Defence of India Act, the High Court is competent to determine whether the arrest has really been made under R. 129, Defence of India Rules, or has been made in bad faith for a collateral purpose and is, for that reason, an abuse of power and fraud upon the statute. If the High Court arrives at the conclusion that R. 129 does not apply it can afford the relief prayed for under S. 491, Criminal P. C. AIR (Vol 33) 1946 Lah 36 : 47 Pun LR 416 : 221 Ind Cas 577.

——**S. 491 — Frontier Crimes Regulation, Ss. 40 and 47 — Scope — Arrest under.**

According to S. 47 of the Frontier Crimes Regulation, the proceedings for taking security under S. 40 of that Regulation shall be taken according to the provisions of Chap. VIII of Criminal P. C. Section 114 of Criminal P. C., provides that the only way in which persons can be brought before the Court under arrest is by means of a warrant issued by a Magistrate.

Where, therefore, no warrant was ever issued by the Magistrate, and the petitioners who were released on bail in a case under the Gambling Act, were arrested by the Police, their arrests cannot be held to be under the Frontier Crimes Regulation, but were solely with the object of defeating the order of bail. The detention was, therefore, illegal. AIR (Vol 32) 1945 Pesh 12 : 1945 Pesh LJ 12.

——S. 491 — **Enquiry into conduct of Political Agent's issuing warrant of arrest under S. 7, Extradition Act.**

The powers of the High Court under S. 491, Criminal P. C., are limited and they do not authorize the High Court to enter, as it were, upon an enquiry into the conduct of the Political Agent before issuing a warrant of arrest under S. 7, Extradition Act. All that the High Court is concerned with while exercising its power under S. 491, is to see that the authority under which a person is being detained is, on the face of it, legal and valid. If there are any formal defects in the warrant under which the applicant is arrested, the High Court can certainly take notice of them and can, upon that basis, hold that the warrant is, on the face of it, invalid. AIR (Vol 26) 1939 All 730 : 1939 AWR 737 : 1939 ALJ 695 : 41 Cr LJ 152 : ILR (1940) All 23 : 185 Ind Cas 302.

——**Ss. 491, 83 — Warrant by Nasirabad Magistrate under S. 83, if can be executed in British India.**

Nasirabad lies outside British India and so a warrant of arrest of a person residing in British India cannot be issued by a Nasirabad Magistrate. Such warrant, if issued, cannot be executed in British India, and if executed, the proceedings can be quashed by the High Court under S. 491, Criminal P. C. AIR (Vol 25) 1938 Sind 46 : 39 Cr LJ 298 : 32 SLR 134 : 173 Ind Cas 322 (DB).

**7. Minors.**

——**S. 491 — Powers under — If can be used when remedy under Guardians and Wards Act is more suitable.**

Though a Court would interfere under S. 491, Cr. P. Code, when a minor is illegally and improperly detained, it has also to bear in mind that the interest of the minor must be a paramount consideration and where a remedy under the Guardians and Wards Act is more suitable the High Court should not use the powers under S. 491, Cr. P. Code. AIR (Vol 39) 1952 Madh B 54 : 1952 Cr LJ 578.

——**S. 491 — Scope of remedy under — Boy under 14 years of age detained with his free will in his maternal grandfather's house — If illegal detention — Application under S. 491 by father for custody — Sustainability — Considerations — Availability of remedy by way of guardianship proceedings — If bar to remedy under S. 491, Cr. P. Code.**

A minor under 14 years of age has no will of his own and his detention against his father's will is unlawful. Where the attitude of such a minor boy (in preferring to stay with his maternal grandfather and being unwilling to go back to his father) is induced by his maternal grandfather, and as even otherwise the minor's opinion is not entitled to any weight, the maternal grandfather's custody with the minor's free will must be deemed to be illegal as against the father and natural guardian who seeks his custody. It cannot be contended that in so far as it is open to the father to apply for being appointed as guardian of the person of the minor under the Guardians and Wards Act and so long as such remedy is avaliable, S. 491, Cr. P. Code, is not a proper remedy to be invoked. It did not matter how many remedies were open to a person; he is entitled to avail himself of any one of them.

It cannot be said that the father by carrying a second wife or even by his ill-treating the child's mother during her lifetime (assuming the ill-treatment alleged to be true) has rendered himself unfit to have the custody of his child. AIR (Vol 35) 1948 Mad 294 : 61 LW 136 : 1948 MWN 161 : 49 Cr LJ 369 : (1948) 1 MLJ 125 (DB).

——**S. 491 — Application by husband for custody of minor wife — Maintainability, when other remedy available — Minor wife not fit for consummation of marriage — Considerations to be borne in mind in giving directions for custody.**

A husband seeking to recover custody of his minor wife alleged to be illegally detained by others is entitled to proceed under S. 491, Cr. P. Code, and the Court will not hear any party to say that there is another remedy provided for under the law, by way of proceedings under the Guardians and Wards Act.

Where a minor wife was taken away from the custody of her husband by the mother of the girl

on the ground that the girl, just coming of age, was not fit for consummation of the marriage and the husband applied under S. 491, Cr. P. Code, for the production of the girl to be restored to his lawful custody.

Held, that though the husband was entitled to her custody, in the circumstances, as the girl was admittedly a minor the Court should have, as the paramount consideration, her interest and welfare. Hence, the surrender of the minor to the husband on condition of his arranging to have her in some public institution for a period of one year would be a proper order in the case. AIR (Vol 35) 1948 Mad 103 : 60 LW 494 : 1947 MWN 527 : 49 Cr LJ 60 : (1947) 2 MLJ 153.

**——S. 491 — Guardians and Wards Act, 1890, application under, more convenient.**

The power under S. 491, Cr. P. C., is a general power of the nature of a habeas corpus. The power under the Guardians and Wards Act is a power under a special Act, dealing with a suecial subject, that is, the subject of minors. Where there is a Special Act dealing with a special subject, resort should be had to that Act instead of to a general provision.

A Muhammadan lady was divorced by her husband and their son aged four years remained with the husband. She applied to the High Court under S. 491, Criminal P. C., for the minor to be brought before the Court and delivered to her as she was entitled under the Muhammadan law to guardianship of the child, he being under seven years of age :

Held, that she should seek her remedy under the Guardians and Wards Act, by an application before the District Court and that the High Court would not exercise their discretionary powers under S. 491, as it was more convenient that the case should be considered under the special Act. AIR (Vol 22) 1935 All 55 : 1934 ALJ 946 : 4 AWR 1406 : 36 Cr LJ 554 : 154 Ind Cas 638.

**——S. 491 — U. P. Court of Wards Act, 1912, Ss. 8, 15 — Guardians and Wards Act, 1890, Ss. 39, 41 — Court of Wards assuming superintendence of persons and property of minor sons of deceased Raja — Right of Court of Wards to custody of children — Relief under S. 491, Criminal P. C., if can be granted.**

Section 39, Guardians and Wards Act, allows the Court to remove a guardian appointed by will or other instrument and to appoint another guardian in his place. The Court of Wards can, therefore, be invested with authority to assume superintendence of the person of a minor in spite of the existence of a guardian appointed by will or other instrument.

Section 41 of the Act is not confined to the case of a guardian appointed by Court, but applies to persons who claim to be guardians appointed by an instrument. Consequently, under S. 41 (1) (b), the rights of the guardian appointed by an instrument come to an end by the Court of Wards assuming superintendence of the persons of the minors and the action of the guardian under the instrument in withholding the minors from the Deputy Commissioner who is the legal guardian by virtue of the notification under S. 15 of the Court of Wards Act, constitutes an illegal detention justifying the issue of directions by the High Court under S. 491, Criminal P. C. AIR (Vol 21) 1934 Oudh 392 : 35 Cr LJ 1108 : 11 OWN 803 : 10 Luck 141 : 150 Ind Cas 706.

**——S. 491 — Application by rival guardian — Guardians and Wards Act, 1890, S. 30.**

When a Court of competent jurisdiction has declared a person to be guardian over an infant, the custody of that person cannot be said to be either illegal or improper and it is not open to another person to seek to obtain custody of the infant by applying for a writ of habeas corpus. AIR (Vol 18) 1931 Mad 773 : 1931 MWN 768 : 34 MLW 171 : 61 MLJ 219 : 54 Mad 759 : 33 Cr LJ 49 : 134 Ind Cas 1215 (DB).

——S. 491 — Person keeping minor married girl with her consent in spite of another legally entitled to her custody is guilty of illegal detention. AIR (Vol 16) 1929 Mad 834 : 53 Mad 72 : 1929 Cr C 482 : 1929 MWN 689 : 30 MLW 685 : 31 Cr LJ 187 : 2 M Cr C 254 : 57 MLJ 642 : 120 Ind Cas 892 (DB).

**——S. 491 — Consent — Weight of.**

In the case of a Hindu girl of only 13 years of age her consent or otherwise to go and stay with her husband is quite immaterial. What the Court has to consider is the welfare of the minor wife and in so doing the fact that she prefers to reside elsewhere than with her husband although had she been old enough to form a good opinion, this would have been a very important circumstance for consideration, should not be entitled to any weight at all. AIR (Vol 16) 1929 Mad 834 : 53 Mad 72 : 1929 Cr C 482 : 1929 MWN 689 : 30 MLW 685 : 31 Cr LJ 187 : 2 M Cr C 254 : 57 MLJ 642 : 120 Ind Cas 892 (DB).

——S. 491 — Father, motor-driver, applying for writ of habeas corpus to get custody of his son aged 7 or 8 — Nobody in his house to look after such child — Court must look to child's interest — High Court should not interfere in such case — Proper course is under Guardians and Wards Act, S. 25. AIR (Vol 16) 1929 Mad 33 : 2 Mad Cr C 58 : 31 Cr LJ 985 : 126 Ind Cas 111 (FB).

——S. 491 — Habeas corpus — Hindu minor in charge of his mother — Mother likely to be converted to Christianity — No writ would be issued, but proceedings can be had under Guardians and Wards Act. AIR (V 15) 1928 Mad 1087 : 1 M Cr C 307 : 29 Cr LJ 1048 : 112 Ind Cas 472 : 11 A I Cr R 323.

——S. 491 — Minor applicant's nephew, going on a visit to his sister — No suggestion as to the sister or her husband not being proper persons — No improper detention — Order under S. 491 ought not to be made. AIR (V 14) 1927 Rang 329 : 6 Bur LJ 111 : 9 AI Cr R 28 : 28 Cr LJ 865 : 104 Ind Cas 705 (DB).

——S. 491 — Powers of habeas corpus may be exercised for restoration of child to its natural guardian. AIR (V 13) 1926 Rang 76 : 4 Bur LJ 269 : 95 Ind Cas 65 : 27 Cr LJ 737.

**——S. 491 — Proceedings for habeas corpus in respect of child — Welfare of the child is the dominant question — The opinion of an intelligent grown-up child will weigh in the estimation of the Court.**

On an application by the de jure guardian for habeas corpus in respect of a child detained against its will the dominant question is what conduces to the interests and welfare of the infant and the Court must dispose of the application with reference to it. The moral, the religious and the physical welfare and the ties of affection as also the opinion of the child if it is capable of forming an intelligent opinion are to be taken into consideration. The opinion of the child is an important element and the degree of the child's mental development must to a certain extent weigh with the Court. The age of the infant is also an important factor. There is no inflexible rule in England that a boy over 14 and a girl over 16 will have the final voice and that the wishes of the infant have

to be given effect to. Even if such a rule exists, it is too artificial to be applicable in India. AIR (V 11) 1924 Mad 873 : 47 MLJ 614 : 85 Ind Cas 840 : 1924 MWN 870 : 20 MLW 902 : 48 Mad 299: 26 Cr LJ 616.

——S. 491 — Habeas Corpus — Writ — Person illegally or improperly detained — Powers of Court under S. 491 (2).

M, the father of two girls aged about 14 and 16 years, applied for a writ against N, his younger brother, for their surrender. M. became a Sanyasi in 1901 relinquished his rights as head of the family to N. became a Brahmo in 1906 and between 1906 and 1910 again began to live with his wife and children and also begot some more children. The elder sons of M, had all along been living with N. and were educated by him. The wife died in April 1910. The object of the writ was to prevent the marriage of the girls before they attained the age of 16, and there was no question of morality or corruption. Held, (1) that the petitioner was quite free to keep his daughters unmarried till their sixteenth year or even after that age though he may put his daughters not only to great inconvenience, but also to danger of excommunication and the fact of his becoming a Brahmo did not affect the matter. (2) That as the petitioner became a Sanyasi previously, he was not in 1906 , when he became a Brahmo, the guardian in Hindu Law of his children. (3) That though the De Facto guardianship of the petitioner, from 1906 to 1910 of the minors may give him a right to sustain a prosecution under S. 391, I. P. C. against strangers, it would not entitle him to an order under S. 491, Cr. P. C. (1911) 21 MLJ 195: 8 M LT 300 : 1911-1 MWN 36 : 11 Cr LJ 641 : 8 Ind Cas 393.

——S. 491 — Discretion — Welfare of minor the sole factor.

The underlying principle of every unit of Habeas Corpus (and proceedings under S. 491 Cr. P. C.) is the welfare of the person brought before the court. Difficulties in the construction of S. 491, Cr. P. C., pointed out. (1910) 12 Bom LR 891 (896): 8 Ind Cas 618 : 11 Cr LJ 687.

——S. 491 — Applicant having no interest in the infants.

If in a suit for the custody of minor children the defendant has no personal interest in the children on their services and no right to their custody, and his object is only to send back the children to their parents or natural guardian, the proceedings are on Habeas Corpus under S. 491 for determining the custody of the children. (1910) 33 Mad 288 : (1910) MWN 187 : 8 MLT 47 : 6 Ind Cas 754.

——S. 491 — Mahomedan Law — Habeas Corpus.

On the death of a Shiah Mahomedan father, in the absence of any circumstances disqualifying a mother, she becomes entitled as a matter of right to the custody of her minor son as against everybody including the father's executor. (1909) 11 Bom LR 75: 9 Cr LJ 214: 1 Ind Cas 309.

### 8. Nature of proceedings.

——S. 491 — Function of Court in dealing with application under.

It is not the function of the Court hearing a habeas corpus application to sit in appeal or judgment over the conclusion reached by the District Magistrate on the materials placed before him, for S. 491 cannot be stretched to imply that the Court can substitute its own judgment for the judgment of the District Magistrate. All that the Court can do in proceedings under S. 491 is to see whether the District Magistrate did in fact act on the basis of material that was placed before him, whatever its nature may be, or whether he acted arbitrarily on no material whatever. AIR (V 38) 1951 Ajmer 61 : 1948 AMLJ 46.

——S. 491 — Proceedings under S. 491 are, in essence, civil proceedings. AIR (V 32) 1945 Cal 107: ILR (1944) 1 Cal 489 : 47 CWN 854 (SB).

——S. 491 — Habeas corpus proceedings are proceedings calling upon a person to demonstrate his authority to hold another in custody — If his authority is legitimate Court cannot interfere. AIR (V 13) 1926 Sind 126 : 20 SLR 128 : 27 Cr LJ 37 : 91 Ind Cas 69 (DB).

### 9. Other remedies.

——S. 491 — An application under S. 491, Criminal P.C., to set at liberty a lunatic is misconceived. The proper procedure is under S. 33 of Lunancy Act. AIR (V 23) 1936 Sind 156: 29 SLR 431: 37 Cr LJ 1082: 165 Ind Cas 119 (DB).

——S. 491 — Order, if final.

An order by the High Court under S. 491, Criminal P.C., would not debar a party from making an application to the District Judge under the Guardians and Wards Act. It is not desirable that the High Court should take proceedings which are not final unless there is such urgency in the matter that a remedy does not exist otherwise. AIR (V 22) 1935 All 55: 1934 ALJ 946: 4 AWR 1406: 36 Cr LJ 554: 154 Ind Cas 638.

——S. 491 — Other remedy — Whether prevents relief under.

The mere fact that it is possible for the applicant to seek other remedies is no reason to refuse the expeditious relief provided by S. 491, Criminal P.C., if the provisions of that section are satisfied. AIR (V 21) 1934 Oudh 392: 35 Cr LJ 1108: 11 OWN 803: 10 Luck 141: 150 Ind Cas 706.

——S. 491 — Same remedies under different Acts—Person aggrieved may resort to any remedy he chooses.

There is no rule of law that where there is a remedy provided by law, no other remedy should be resorted to because there is another remedy less expensive and less threatening. Thus the remedy under S. 491, Cr. P. Code is open to the husband who prays for an order directing to hand over his minor wife to him though he can as well have recourse to the provisions of the Guardians and Wards Act. AIR (V 16) 1929 Mad 834: 57 MLJ 642: 53 Mad 72: 1929 Cr C 482: 31 Cr LJ 187: 1929 MWN 689: 30 MLW 685: 2 M Cr C 254: 120 Ind Cas 892 (DB).

——S. 491 — The investment of the extraordinary powers of habeas corpus in a High Court does not take away from litigants the ordinary rights which they previously had under the civil law. AIR (V 13) 1926 Rang 76: 4 Bur LJ 269: 27 Cr LJ 737: 95 Ind Cas 65.

——S. 491 — Loss of freedom — Custody.

Difference between imprisonment and loss of freedom pointed out.

A person who is released on bail cannot be regarded as under imprisonment so long as he is out on bail. Hence a suit by such a person for compensation for false imprisonment must be brought within one year of the date on which his imprisonment ends; since nothing short of actual detention and complete loss of freedom can support an action for false imprisonment. (1903) 5 Bom LR 490 (493): 30 C. 872: 30 IA 154: 7 CWN 729 (PC).

### 10. Powers of High Court.

See also N. 3 and 5.

——S. 491 — Scope of jurisdiction of High Court in application under.

The High Court has the power when an application is made under S. 491, Cr. P. Code, to enquire whether a person has been legally arrested by the executive. If the detention is an abuse of power and a fraud on the enactment, the Court is bound to interfere and set at liberty the person concerned even though the forms of law in regard to the detention might have been correctly observed. AIR (V 37) 1950 All 342: 51 Cr LJ 947.

**——S. 491 — Illegal arrest or detention — Relief in damages — Jurisdiction of High Court to grant.**

The Court acting under S. 491, Cr. P. Code, has no jurisdiction to give a relief in damages for a tort that may have been committed. (1949) 53 CWN 545 (DB).

——S. 491 — Powers of High Court under— If enlarged by S. 561-A, Cr. P. Code. See AIR (V 36) 1949 Mad 307: 50 Cr LJ 405: ILR (1949) Mad 377: 62 MLW 51: (1949) 1 MLJ 1 (FB).

**——S. 491 — Power of High Court to issue writ of habeas corpus.**

It is now well-established that the Courts in India have no longer the jurisdiction to issue the common law writ of habeas corpus and to exercise the powers which the Courts in England exercise. The powers of the Courts are now controlled and circumscribed by S. 491, Cr. P. Code. AIR (V 35) 1948 Bom 326: 49 Cr LJ 460: ILR (1948) Bom 288: 50 Bom LR 188 (FB).

**——S. 491 — Conviction by Court-martial — High Court cannot enquire into sufficiency of evidence.**

The High Court cannot enquire into the sufficiency of the evidence on which a conviction can be based by the Court-martial, so long as there is evidence. AIR (V 33) 1946 Lah 112: 225 Ind Cas 102: 47 Cri LJ 687.

——S. 491 — Powers of High Court — Detention beyond its appellate criminal jurisdiction. See AIR (V 33) 1946 Nag 20.

**——S. 491 — High Court, if can issue prerogative writ.**

High Courts in India cannot issue prerogative writ of habeas corpus and their powers are entirely contained in Ss. 491 and 491-A, Criminal P.C. ILR (1945) Lah 573 (DB).

**——S. 491 — Power to issue writ apart from S. 491.**

A High Court in India has no power to issue the Common law writ of habeas corpus. AIR (V 32) 1945 Nag 8: ILR (1945) Nag 6.

**——S. 491 — Person detained under Defence of India Rules, R. 129 can come to High Court.**

The power of the High Court to issue a direction under S. 491, Criminal P.C., has not been taken away in regard to persons detained under R. 129, Defence of India Rules. AIR (V 32) 1945 Nag 8: ILR (1945) Nag 6.

**——S. 491 — Merits of arrest and detention.**

The High Court cannot enquire into the merits of his arrest and detention once the person detained has been set free. AIR (V 31) 1944 Lah 196: 46 Cr LJ 174: 217 Ind Cas 78 (SB).

**——S. 491 — Extent of High Court's power.**

The High Court can order that a person detained "be dealt with according to law," and release him altogether in case he is "improperly detained" and enquire into the good faith of any detention. AIR (V 31) 1944 Nag 221: ILR (1944) Nag 629: 1944 NLJ 38.

**——S. 491 — Discretion vested under S. 2, Defence of India Act, in Central Government cannot be questioned in any Court.**

High Court's powers under S. 491, Criminal P.C., are very wide and it is High Court's duty to protect the liberty of His Majesty's subjects. That power and duty has, however, to be exercised on certain fixed judicial principles. The jurisdiction vested by cl. (b) can be exercised only if the High Court is satisfied that the detention is illegal or improper. In the consideration of this question, it is not within the province of the Court to embark on an enquiry as to whether the enactment under which a person is detained is a proper and well-advised legisiation. It is, however, clear that, in cases in which, even though the forms of law have been observed, the detention constitutes a clear fraud on an enactment or amounts to an abuse of the powers given to the executive by the Legislature, it is the duty of the Court to step in and to order that the person detained be set at liberty. As by s. 2, Defence of India Act, the discretion vested in the Central Government is absolute and unfettered, the exercise of that discretion, even though capricious or perverse, cannot be questioned in any Court of law. AIR (V 30) 1943 All. 277: 1943 ALJ 336: 44 Cr LJ 722: ILR (1943) All. 773: 1943 AWR 135: 208 Ind Cas 194 (FB).

**——S. 491 — Power to issue writ apart from S. 491.**

The High Court in India do not possess the power to issue the prerogative writ of habeas corpus like the King's Bench Division of the High Courts in England and whatever Common law power of such a nature was assumed to exist in the Chartered High Courts, was abrogated by S. 491, Criminal P.C., High Court's powers under S. 491, Criminal P.C., are purely statutory and in no way enlarged by Letters Patent or by the Government of India Act. They have, apart from S. 491, Criminal P.C., no power to set a subject at liberty. AIR (V 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 NLJ 16: 44 Cr LJ 237: 205 Ind Cas 161 (DB).

**——S. 491 — High Court or any Judge, if can issue Common Law writ.**

High Court or any Judge of it cannot issue the Common Law writ of habeas corpus in any of the cases covered by S. 491, Criminal P. C. By Acts of Legislature lawfully passed in 1875 and subsequent years, the Legislature has taken away the power to issue the prerogative writ of habeas corpus in matters contemplated by S. 491, Criminal P.C. AIR (V 26) 1939 Mad 120: 1938 MWN 1289: (1939) 2 MLJ 135: ILR (1939) Mad 708: 40 Cr LJ 320: 180 Ind Cas 216 (FB).

**(Overrules AIR (V 9) 1922 Mad 499: 23 Cr LJ 614: 68 Ind Cas 838 (FB).)**

**(Reverses AIR (V 26) 1939 Mad 115: 1938 MWN 1161: 40 Cr LJ 297: 179 Ind Cas 917).**

——S. 491 — The power of the High Court to interfere in a case of illegal arrest by extradition warrant, under S. 491, is untouched, for it is a power not created by the Extradition Act or exercisable by way of revision. AIR (V 21) 1934 All 148: 35 Cr LJ 1296: 4 AWR 1526: 56 All 409: 1934 ALJ 556: 151 Ind Cas 279 (DB).

**——S. 491 — Exercise of Powers.**

The power under S. 491 (1) (b) is to be exercised in matters of urgency, where, for instance the father is suddenly deprived of the custody of his sons and there is danger to the life of the sons in the transferred custody. It is a remedy for a person deprived of his liberty. The power therefore has to be exercised with caution and not in a case where there is a dispute merely as to who should be guardian of particular minors. AIR (V 17) 1930 All 260: 124 Ind Cas 728: 31 Cr LJ 719: 52 All 491: 1930 Cr C 372: 1930 ALJ 615.

**——S. 491 — Revision.**

Extradition Act. S. 7 — Order of District or Chief Presidency Magistrate executing warrant under S. 7 can on proper proceedings being taken, High Court

can also interfere under S. 491; 42 Cal. 793 held too widely stated; AIR (V 16) 1929 Bom 81: 117 Ind Cas 321: 31 Bom LR 62: 53 Bom 149: 30 Cr LJ 772. (DB).

——**S. 491 — High Court can grant the writ in the mofussil — Its powers are not confined to cases coming under Ss. 491 and 456, Cr. P. Code.**

The High Court of Madras is competent to grant the writ of habeas corpus. That it has such or other similar powers in the Presidency town of Madras is clear from S. 491, Cr. P. Code but that Code makes no provision for the exercise of that power in the mofussil. The High Court has however succeeded under Act 24 and 25 Vic., c. 104 and the Letters Patent issued thereunder to all the powers of the Supreme Court of Madras, which had, by its Charter of 1800, Art. 8 given to it the powers over "all the Territories which now are, or hereafter may be, subject to, or dependent upon the Government of Madras aforesaid; and to have such jurisdiction and authority as Justices of Our Court of King's Bench have, and may lawfully exercise, within that Part of Great Britain called England, as far as circumstances will admit". These words include the right usually exercised by the King's Bench in England of issuing the writ of habeas corpus. It cannot be taken to have been the intention of the Legislature to confine the powers of the High Court to such cases as come under Ss. 491 and 456 and the power to issue the writ in the mofussil which has been established in Ameer Khan's case (6 Beng. L.R. 392) must be taken to have been impliedly taken away. AIR (V 9) 1922 Mad 499: 43 MLJ 396: 16 MLW 349: 31 MLT 304: 68 Ind Cas 838: 45 Mad 922: 23 Cr LJ 614 (FB).

——**S. 491 — High Court — Habeas corpus — Power to issue, is not excluded by O. 2 of 1921.**

Apart from S. 491, Cr. P. Code the High Court has power to issue a writ of habeas corpus and S. 16 of the Ordinance No. 2 of 1921 does not exclude interference of other Courts especially where a summary Court acted without jurisdiction.

Per Spencer J.—The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law and a police officer outside the Martial Law area has authority to arrest without warrant an offender who has committed cognizable offence within such area. An offender cannot slip out of the Martial Law area to be immune from arrest and trial for acts done by him inside that area. AIR (V 9) 1922 Mad 215: 68 Ind Cas 26: 45 Mad 14: 23 Cr LJ 490: 41 MLJ 441: 14 MLW 465: 1921 MWN 708 (DB).

——**S. 491 — Habeas Corpus — Power of High Court to issue — Detention under the Indian Extradition Act (XV of 1903).**

The High Court has jurisdiction to issue a writ of Habeas Corpus and to see whether the person detained under the Indian Extradition Act is legally detained. The jurisdiction is not divested because the Government of India have issued the warrant of surrender. The Government of India issuing the warrant must conform to the strict provisions of the Act else its action may be challenged. The accused must not needs be within the Magistrate's jurisdiction provided he is competent to inquire in other respects and the accused is in Court. The Government may issue order to any such Magistrate. (1912) 39 Cal 164: 15 CWN 1053: 14 CLJ 375: 12 Cr LJ 505: 12 Ind Cas 273.

### 11. Procedure.

——**S. 491 — Earlier order of detention illegal — Valid order subsequently passed — High Court, if can release detenu.**

If at any time before the High Court directs the release of a detenu, a valid order directing his detention is produced, the High Court cannot direct his release merely on the ground that the earlier order of detention was illegal. AIR (V 38) 1951 East Punj 216: 52 PLR 60. (DB).

——**S. 491—Jurisdiction to make an order under—Detention on satisfaction by the authority concerned.**

Where it is clear that the authority concerned has fully satisfied himself as to the necessity for the passing of an order of detention it is not open to the High Court in a habeas corpus application to go behind such orders and substitute its own judgment for the judgment of the authority concerned. AIR (V 37) 1950 Ajmer 25 (1): 51 Cr LJ 1069.

——**S. 491 — Application under by detenu—Grounds not supplied to detenu or furnished to Court — Effect.**

Where an application under S. 491, Cr. P. Code is made by a detenu detained under the Saurashtra Public Safety Measures Ordinance, who has not been supplied the grounds of his detention, the grounds must be sent to the High Court before whom the application is pending as soon as the application is admitted and notice is given to the Government. If at the time of the final hearing of such an application the grounds are not still sent to the High Court, the High Court will have to seriously consider whether the application should be allowed on the ground that no grounds of detention are forthcoming. AIR (V 37) 1950 Sau. 12: 3 Sau LR 48 (DB).

——**S. 491 — Application under in the case of a detenu under the U.P. Maintenance of Public Order Act — Scope of the matters that can be gone into.**

In dealing with habeas corpus applications under S. 491, Cr. P. Code in the case of detention under the U.P. Maintenance of Public Order Act, the High Court cannot go into the questions of fact to ascertain whether the allegations of the detenu are correct or whether there existed in fact sufficient and valid grounds for the detaining authority to pass the order of detention. Once the detaining authority was satisfied of the necessity of passing the detention order, the High Court cannot go behind it. AIR (V 36) 1949 A. 748: 1949 A. Cr. C. 67: 1949 AWR 340: 1949 ALJ 246.

——**S. 491 — Difference of opinion among Judges hearing application under — Duty to formulate the point on which they differed in the reference to a third Judge — Letters Patent, Cl. 36 and not Cr. P. Code, S. 429, applicable.**

The Judges who differ in their opinions in regard to an application under S. 491, Cr. P. Code, should state in the reference to a third Judge the point upon which they differ as the proceedings under that section are governed when there is such a difference of opinion, by Cl. 36 of the Letters Patent and not by S. 429, Cr. P. Code. AIR (V 36) 1949 Mad 596: 50 Cr LJ 843: (1949) 1 MLJ 78: 62 LW 103: 1949 MWN 105. (DB).

——S. 491 — Procedure — Application by detenu under Maintenance of Public Order Act for writ—Proper return — Mere production of order impugned — Sufficiency — Necessity for affidavit of Authority making order of detention or other responsible official. See ILR (1949) 1 Cut 244.

——**S. 491 — Order of detention — Two interpretations possible — One favourable to applicant should be preferred.**

Where possibly two interpretations can be put on the order under which a person applying under S. 491 is detained the Court shall be included to give preference to the interpretation which is in

the applicant's favour. AIR (V 33) 1946 Bom 333: 48 Cr LJ 24 (DB).

**——S. 491 — Person detained under R. 129, Defence of India Rules — Affidavit on behalf of Crown.**

On an application under S. 491 on behalf of persons detained under R. 129, Defence of India Rules, when no issue of fact requiring an answer is raised, it is not necessary to file an affidavit in the first instances if the return is good on the face of it. But it is always wise to do so. It assists the Court. It avoids unnecessary waste of time and it obviates attacks on Government's good faith. Candour and frankness are always appreciated. But if an issue of fact is raised in the application, then an affidavit in reply refusing the facts or explaining them away is necessary and should be filed always along with the return so as to obviate unnecessary delay. Otherwise the truth of the facts alleged will normally be accepted. AIR (V 33) 1946 Lah 36: 47 PLR 416: 47 Cr LJ 212: 221 Ind Cas 577 (DB).

**——Ss. 491, 549(1) and (2) — Person handed over to military authorities without statement under S. 549 (1) or requisition under S. 549 (2) — Rule under S. 491 — Military authorities deciding not to have trial by Court Martial.**

Military authorities filed a complaint against one of their employees under Ss. 406-384, I. P. C., before a Magistrate who took cognizance of the office and remanded the accused to custody. The accused was released on bail by the High Court. When the accused appeared before the Magistrate for his trial, he was re-arrested as he was claimed by the Officer Commanding and handed over to military authorities without a statement under S. 549 (1) or requisition under S. 549 (2). A rule was issued by the High Court on an application under S. 491. The military authorities then desired not to proceed against the accused before a Court-Martial but allow the trial in Civil Court to proceed and released him on bail.

Held, that the rule having become infructuous, should be discharged, as the accused was to be tried by ordinary Civil Court. AIR (V 32) 1945 Cal 340 : 79 CLJ 213 : 47 Cr LJ 125 : 221 Ind Cas 241 (DB).

**——S. 491 — Application under, alleged to be defective in form — No authority other than High Court can decide question of rejecting the petition**

It is undesirable that the question of rejecting a petition under S. 491, Criminal P. C., addressed to the High Court on the ground of alleged defects in its form should be left to any authority other than the High Court. AIR (V 32) 1945 Pat 44 : 23 Pat 968 (FB)

**——S. 491 — Habeas corpus — English practice.**

Under the English practice, on an application for a writ of habeas corpus, the respondent might state his reasons in justification of the detention, either when showing cause on the order nisi or when making a return to the writ of habeas corpus. When the justification depends upon the validity of a regulation, the question of its validity may be allowed to be discussed at the hearing of the rule nisi itself. AIR (V 30) 1943 FC 72 : (1943) FCR 88: 1943 MWN 377: 44 Cr LJ 719: 10 BR 1 : 24 PLT 214 : 48 CWNFC 32: ILR (1943) Kar (FC) 97 Sup : 207 Ind Cas 345 (FC).

**——S. 491 — Rules under S. 491, framed by Bombay High Court, Rr. 62 and 63.**

Rule 63 framed by Bombay High Court under S. 491, Criminal P. C., suggests that all matters of defence or justification with regard to the detention of the applicant for the writ of habeas corpus, are to be considered at the time cause is shown by the respondent against the rule nisi issued on a prima facie case being made out by the applicant for the writ of habeas corpus. AIR (V 30) 1943 FC 72 : (1943) FCR 88 : 1943 MWN 377 : 44 Cr LJ 719 : 10 BR 1 : 24 PLT 214 : 48 CWNFC 32 : ILR (1943) Kar (FC) 97 Sup : 207 Ind Cas 345 (FC).

**——S. 491 — Detention illegal — Proper order.**

Where detention of person in jail as convict is improper and indeed illegal, it, by no means necessarily follows, that they are entitled to be set at liberty. If there is a charge against them and there is substance therein, they should be remanded for trial before proper Court. AIR (V 30) 1943 Pat 288 : 24 PLT 85 : 10 BR 53 : 44 Cr LJ 777 : 208 Ind Cas 322 (DB).

**——S. 491 — — Application under, if can be heard by Single Judge of High Court — Madras High Court Appellate Side Rules — Rules 2 and 2-A, if ultra vires — Extradition Act, 1903, Ss. 22, 7, 8-A — Criminal P. C., S. 491.**

The common law writ of habeas corpus does not run in British India. Assuming that the Court formerly had the power to issue a writ of habeas corpus, that power has been taken away by S. 491, Criminal P. C.,

Rules 2 and 2-A, Appellate Side Rules of the Madras High Court made under S. 491 (2), Criminal P. C., are intra vires the Court's powers. Therefore, the application filed under S. 491, Criminal P. C., must be dealt with in accordance with the rules of the Court which means that it must be dealt with by the Criminal Bench.

The warrants under the Extradition Act against the accused were in the following terms: "To the Chief Presidency Magistrate, Madras. Whereas Mr. C. P. Matthen, Director of the Travancore National and Quilon Bank Ltd., who is now reported to be residing at Marble Hall, Sterling Road, Nugumbakam, Madras, stands charged with offences punishable under Ss. 410, 419, 421, 480 and also Ss. 99 and 104 of the Travancore Penal Code corresponding to Ss. 409, 418, 420, 477-A, 109 and 114, Penal Code, committed in the Travancore State, you are hereby directed to apprehend the said Mr. C. P. Matthen and surrender him to the Frontier Police Station of the Travancore State for production before the District Magistrate, Trivandrum. Herein fail not. (Sgd.) C. P. Skrine, Resident for the Madras States." The accused obtained a writ of habeas corpus from the Single Judge of the High Court, whereupon the District Magistrate, Trivandrum, presented a petition to the High Court, under S. 561-A, Criminal P. C., and S. 223, Government of India Act, 1935, praying that the orders of the Single Judge should be quashed as having been made without jurisdiction. It was contended on behalf of the accused that the applicant had no locus standi in the matter raised in the accused's petition for the issue of the writ and that, for the same reason, his petition was incompetent and that the warrants were illegal and invalid for the following reasons : (a) that there was definite jurisdiction in the High Court to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made thereunder for issue of the warrants had been complied with, (b) that, in any event, the warrants were ex facie invalid, in respect that — (i) they did not show that the conditions had been complied with, (ii) that they did not show sufficiently with what offences the accused were charged, or when they were committed, (iii) that they did not sufficiently show where and to whom the accused were to be delivered up, and (iv) that they were undated :

Held, that the applicant was entitled to intervene the accused's petition for the issue of the writ.

Held, also that R. 4 made under S. 22, Extradition Act, provides that the Political Agent shall, in all cases, before issuing a warrant under S. 7 of the Act, satisfy himself, by preliminary inquiry or otherwise, that there is a prima facie case against the accused person. The accused did not suggest that the Resident did not so satisfy himself in the present case. But if such a suggestion were to be made, it would not be properly the subject of inquiry by the Court, but should be stated to the Magistrate on an appliction to him to report to the Local Government under S. 8-A, Extradition Act.

Held, further that no form of warrant is prescribed by the Extradition Act or the rules, and the warrants clearly described the offences with which the accused were charged, which was all that was required by the ordinary form of warrant of arrest prescribed by S. 75 and Form 11 of Sch. V, Criminal P. C. Similarly, S. 7 (1), Extradition Act, uses the words, "for the arrest and delivery at a place and to a person or authority indicated in the warrant," and all that was required was that the place and person should be sufficiently indicated to enable the Chief Presidency Magistrate, to whom the warrants were addressed, to act in pursuance of such warrants and to give directions accordingly. If there were any doubt, the matter was placed beyond doubt by the Government of Madras (Home Department) Order No. 1293, March 10, 1938, under which the Government directed that in future all persons extradited should be handed over at "the nearest Frontier Police Station in the Travancore States".

Held, further that while it undoubtedly would be the usual and better practice to date the warrants, no provision in the Act or the rules requires directly or implicitly that the warrants must be dated; no period was expressed as running from the date of the warrants. AIR (V 26) 1939 PC 213 : 5 BR 841 : 40 Cr LJ 675 : 50 LW 48 : 1939 OWN 602 : 43 CWN 981 : 1939 MWN 744 : 20 : PLT 597 : 1939 AWR 141 : (1939) 2 MLJ 406 : 70 CLJ 270 : 1939 ALJ 836 : 41 Bom LR 1119 : ILR (1939) Bom 744 : ILR (1939) Kar (PC) 324 Sup : 66 IA 222: 182 Ind Cas 551 (PC).

——**S. 491 — Rejection of application — Second application — Maintainability — Allahabad High Court — General Rules, Chap. I, Rule 8.**

The rules of English Common Law which govern the procedure relating to an application for a writ of habeas corpus, cannot expressly or by implication be considered applicable to the exercise of the statutory powers conferred upon the High Court under S. 491, Criminal P. C. Prima facie, an application for the exercise of powers conferred under S. 491 should be regulated by the procedure governing an application for the exercise of powers conferred under any other section of the Code, e. g., an application for bail. It is open to the High Court under S. 491 (2), to make special rules permitting successive identical applications for a direction under S. 491, Criminal P. C. In the absence of special rules, Rule No. 8, Chap. I, Allahabad High Court Rules, must be considered to govern such cases, the language of the rule being wide enough to include applications under S. 491. Under this rule, the presentation of an application to the same effect and with the same object as a prior application which has been rejected, is expressly prohibited. AIR (V21) 1934 All 22 : 1933 ALJ 1410 : 35 Cr LJ 493 : 56 All 271 : 147 Ind Cas 820 (DB).

——**S. 491 — Forum.**

Quaere. — Whether when a person has been detained under an order of a High Court, an application in the nature of habeas corpus will lie to a Bench of the same Court. AIR (V 21) 1934 Mad 55 : 38 MLW 987 : 1933 MWN 1481 : 35 Cr LJ 511 : 57 Mad 259 : 66 MLJ 383 : 147 Ind Cas 929 (DB).

——S. 491 — It is not reasonable, or normal procedure, to make applications to the High Court under S. 491, or for bail, while applications by the same petitioners for bail are still pending in the Sessions Court. AIR (V 16) 1929 Lah 522 : 114 Ind Cas 444 : 30 Cr LJ 301 : 1929 Cr C 81.

——S. 491 — It is wrong that the High Court should under S. 491 re-try for itself a question which has already been determined by the same Court in its ordinary original criminal jurisdiction, or to pass an order overriding an order already made by the same High Court. AIR (V 15) 1928 Cal 367 : 56 Cal 32 : 32 CWN 889 : 114 Ind Cas 132 : 12 AICrR 145 : 30 Cr LJ 254 (DB).

——**S. 491 — Bombay High Court Rules, R.794.**

The underlying principle of every writ of Habeas Corpus (proceedings under S. 491 Cr. P. C.,) is to ensure the protection and well-being of the person brought before the Court under that writ. By S. 491 Cr. P. C., it is left entirely to the discretion of the Court whether it should direct the person brought before it to be dealt with according to law, but R. 794 of the Bombay High Court Rules commands that, in the absence of cause being shown against the rule, which is a very different thing from allowing the Court to exercise its discretion, the Court shall pass an order that the person or persons improperly detained shall be delivered to the person entitled to their custody. (1908) 12 Bom LR 891: 11 Cr LJ 687: 8 Ind Cas 618.

——**S. 491 — Court to which application is to be made — Nature of the jurisdiction exercised.**

Applications for habeas corpus are according to the practice of the Calcutta High Court made to the judge sitting to exercise original criminal jurisdiction. Quaere :—Per Maclean, C. J. :—Whether it is the proper Court ?— (1902) 6 CWN 254 (261) : 29 Cal 286 (FB).

**12. Sub-section (3).**

See also N. 2, 5 and 10.

——S. 491 — The Bengal State Prisoners Regulation (Adaptation) Order 1947, dated August 26 1947, is not ultra vires of the powers of the Governor General. It follows, therefore that the Bengal State Prisoners Regulation, 1818, as adapted by the aforementioned order, is perfectly valid. By reason of sub-section (3) of Section 491, Cri. Pro. Code the detention of applicant cannot be questioned in proceedings under Section 491, Criminal Procedure Code. AIR (Vol 37) 1950 All 11: 1949 ALJ 587: ILR (1950) All 845: 51 Cr LJ 269 (FB).

——S. 491 — Power of High Court — "Illegal detention" — Detention under Madhya Bharat Maintenance of Public Order Act — Application by detenu — Interference by High Court — Grounds. AIR (Vol 37) 1950 Madh B 26.

——S. 491 (3) — Applicability and scope — Detention under warrant under S. 2, Bengal Regulation III of 1818 — Legality after 15th August, 1947 — Power of High Court to consider. See AIR (Vol 36) 1949 Bom 161: 51 Bom LR 108: ILR (1949) Bom 28: 50 Cr LJ 591.

——S. 491 — Powers of the High Court to interfere in cases of detention under the Madras Maintenance of Public Order Act, I of 1947. See AIR (Vol 36) 1949 Mad 307: ILR (1949) Mad 377: 1948 MWN 853: 50 Cr LJ 405: (1949) 1 MLJ 1 (FB).

**——S. 491 — Jurisdiction to act under in case of detention under Bengal State Prisoners Regulation (III of 1818) — Detention under the Regulation of deposed ruler of Native State — Remedy of detenu.**

B, who had been for sometime the Rana of the State of Bajji and duly recognised as the ruler thereof was deposed on the 8th September, 1940, and was by a warrant dated 9th September, 1940, issued under the Bengal State Prisoners Regulation (III of 1818), directed to be detained and was so detained. On an application on the detenu's behalf for direction in the nature of habeas corpus under S. 491, Cr. P. Code.

Held, once the Court is satisfied that a person is being detained under Regulation III of 1818, there is no jurisdiction under S. 491, Cr. P. Code, which the Court can exercise in the matter. The jurisdiction under S. 491 is wholly statutory and governed by terms of the section. Moreover the very basis of jurisdiction under sub-S. (1) (b) of S. 491 is expressed to be "illegal or improper detention in public or private custody, "but by virtue of sub-S. (3) in cases of persons detained under Regulation III of 1818, sub-S. (1) (b) has no application. It therefore follows that something more than allegations that a person is being "illegally or improperly" detained under Regulation III of 1818 is necessary before the Court can get over the bar to jurisdiction under section imposed by sub-S. (3). Complaints as to the illegality or impropriety of the detention, if the detention be under Regulation III, can be dealt with under the procedure laid down in Ss. 3, 4 and 5 of Regulation III and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot be sufficient to give the Court jurisdiction under S. 491. The only ground which could possibly enable the Court to exercise jurisdiction under S. 491 in such a matter would be that in fact the detenu was a person to whom Regulation III did not and could not apply. Neither on the date of his detention, nor at any date since, has the detenu had the status of a ruler of a State and he was subject to and has since that date been a person detained under Regulation III. Therefore there is no jurisdiction under S. 491, Cr. P. Code which the Court can exercise in this case. AIR (Vol 33) 1946 FC 2: ILR (1946) Lah 96: 224 Ind Cas 60: 1946 MWN 265: 12 BR 529: 81 CLJ 86: 47 Cr LJ 583: 59 LW 630: 48 Bom LR 493: 1946 OA (FC) 3: 50 CWN (FR) 1: (1946) FLJ 1: 1946 AWR (FC) 3: ILR (1947) Kar (FC) 12: 1946 1 MLJ 322.

——S. 491 — Powers of High Court — Competency to scrutinise correctness or otherwise of the exercise of discretion by the Provincial Government or Governor in cases of detention under R. 26 of the Defence of India Rules or S. 3 of Ordinance III of 1944. See AIR (Vol 33) 1946 Oudh 183 : 20 Luck 535.

**——S. 491 — Direction under.**

The jurisdiction of the High Court to give a direction under S. 491 has not been affected by S. 10 of the Restriction and Detention Ordinance, (III of 1944). AIR (Vol 32) 1945 Nag 203: 1945 NLJ 206: ILR (1945) Nag 731: 47 Cr LJ 429: 222 Ind Cas 343 (DB).

**——S. 491 — High Court is disabled by S. 26 of the Special Criminal Courts Ordinance II of 1942 from granting writ of habeas corpus to persons brought before Special Court.**

Per Shearer, J.— In enacting S. 26 of the Special Criminal Courts Ordinance, the Legislature intended that the High Court should be disabled from granting the writ of habeas corpus to certain classes of His Majesty's subjects, namely, to those who had been brought before one or other of the Special Courts. The High Court is not entitled to make any order under S. 491, Criminal P. C., in respect of a person who has been regularly tried and convicted by a Special Court unless a complete absence of jurisdiction on the part of the Special Court to try him has been conclusively shown and the order which ought to be made is that he be remanded to custody as an under-trial prisoner and brought without delay before a Court competent to try him unless there are circumstances which would justify his being enlarged on bail.

When a prisoner is serving a sentence of imprisonment under a judgment of one of the established Courts of the land, there rests on him a very heavy onus to show that the judgment is a nullity and he does not satisfactorily discharge that onus by showing merely that some doubt may exist as to whether he ought not to have been tried, not by that Court, but by some other Court. He must show affirmatively that the Court had no jurisdiction to render the judgment against him at all. AIR (Vol 32) 1945 Pat 98: 11 BR 249: 46 Cr LJ 399: 26 PLT 120: 218 Ind Cas 122 (FB).

**13. Successive applications.**

——S. 491 — Successive applications — Competency. See AIR (Vol 36) 1949 All 147: ILR (1949) All 455: 50 Cr LJ 212 (FB).

**—•—S. 491 — Successive applications on same grounds — Maintainability.**

Successive applications on identical grounds do not lie to every Judge of the Court. They however lie to the Court, i.e., only to those Judges who are sitting on the Criminal Side Single Bench and there is no bar to the maintainability of those applications, because of the final decision made by the Court on a former application on identical facts. AIR (Vol 36) 1949 EP 67: 50 PLR 225: 50 Cr LJ 271 (FB).

**——S. 491 — Presentation of amended petition — If renders original petition infructuous — Petition, if may be presented directly to Judge — Successive petitions on identical grounds — Maintainability.**

The presentation of an amended petition under S. 491, Cr. P. Code, on behalf of a person in detention makes the original petition infructuous in a case where cognizance has been taken of the amended petition, by a Judge and notice on it issued. The Judge before whom the original petition is laid has certainly power to pass an order for its return or consolidation.

The pendency of the first petition in the High Court of which cognizance has not been taken by any Judge, does not in any way affect the jurisdiction of a Judge to pass orders on an amended petition presented later on.

A petition under S. 491, Cr. P. Code, can be made to a Judge of the High Court direct.

Successive applications on identical grounds do not lie to every Judge of the Court. They, however, lie to the Court, i.e., only to those Judges who are sitting on the Criminal Side Single Bench and there is no bar to the maintainability of those applications, because of the final decision made by the Court on a former application on identical facts. AIR (Vol 36) 1949 EP 67: 50 PLR 225: 50 Cr LJ 271 (FB).

**——S. 491 — Successive applications under — Maintainability — "Whenever it thinks fit' — Meaning and effect of.**

S. 491, Cr. P. Code, confers a wide discretion on a High Court to issue a direction of the nature of haveas corpus and the phrase "whenever it thinks fit" has been used to emphasize that it may be done at any time without any limitation of time

and not in the sense that it may be exercised as often as it may be required. The High Court has a discretion in the matter as regards the nature of the order to be passed, and it may pass an order at any time. But the High Court has no power to review the order passed on an application and to entertain a fresh application under the section for reconsideration of the matter arising out of the same order of detention. AIR (Vol 36) 1949 Nag 201: ILR (1948) Nag 953: 50 Cr LJ 492 (DB).

——**S. 491 — Successive applications by same detenu on same grounds — Jurisdiction of High Court to entertain — Cr. P. Code, S. 369 — Bar of.**

The High Court has no jurisdiction to entertain successive applications under S. 491, Cr. P. Code, on the same grounds on behalf of the same detenu. An order dismissing a prior application on the merits operates as a bar to a second application under S. 369, Cr. P. Code. (1928) PC 300, dist. AIR (Vol 36) 1949 Pat 262: 28 Pat 49: 50 Cr LJ 528 (DB).

——**S. 491 — Successive applications for writ — Maintainability.**

An order once made under S. 491, Cr. P. Code, is not open to review. There is no provision in the Code which permits the Court to review an order once made under S. 491. Successive applications cannot therefore be made for a writ of habeas corpus on behalf of a detenu. AIR (Vol 35) 1948 Bom 326: ILR (1948) Bom 288: 50 Bom LR 188: 49 Cr LJ 460 (FB).

——**Ss. 491 and 369 — Successive applications — Maintainability.**

An order of a Judge of the High Court rejecting an application under S. 491, Cr. P. Code, is a judgment, and the entertaining of a second application on the same facts, whether by him or by any other Bench of the Court, would clearly be a review of that judgment. Such a review is barred by S. 369, Cr. P. Code. ILR (1945) Lah 573 (DB).

——S. 491 — Each Judge of the Supreme Court of Nigeria has jurisdiction to entertain an application for a writ of habeas corpus in term time or In vacation, and he is bound to hear and determine such an application on its merits notwithstanding that some other Judge of the same Court has already refused a similar application. AIR (Vol 15) 1928 PC 300: 113 Ind Cas 273: 26 ALJ 1169: 28 MLW 874: 30 Cr LJ 113: 12 AI Cr R 36.

### 14. Time for application.

——**S. 491 — Petition under — Delay in forwarding — Impropriety.**

Petitions under S. 491, Cr. P. Code, must be forwarded to the Court with utmost expedition. They demand urgency, and laxity in these matters cannot be countenanced. The fact that the officer concerned was of the opinion that such an application does not lie is irrelevant because the power to decide whether it is competent or not vests in the Court alone. AIR (Vol 33) 1946 Oudh 183: ILR 20 Luck 535: 1945 OA (CC) 157: 1945 OWN 217: 1945 ALW (CC) 202: 1945 A Cr C 115: 1945 AWR (CC) 157 (DB).

——**S. 491 — Valid order of detention passed before directing release — Effect.**

The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked in criminal proceedings. If, at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage, there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether, in the face of the later valid order, the Court can direct the release of the petitioner. AIR (Vol 32) 1945 FC 18: 24 Pat 187: 49 CWN (FR) 56: (1945) 1 MLJ 365: 47 Bom LR 396: 46 Cr LJ 559: 80 CLJ 1: 1945 MWN 445: (1945) FCR 81: ILR (1945) Kar (FC) 13 Sup: 219 Ind Cas 287: 47 Pun LR 90 (FC).

### 15. Who can apply.

——**S. 491 — Petition on behalf of detenu by stranger — If competent.**

The language of S. 491, Cr. P. Code, places no limit on the class of person or persons who can move a High Court with relation to a person in custody. There is therefore no legal bar to the filing of a petition on behalf of a detenu under the section by a stranger who is not a relation or even a friend of the detenu. AIR (Vol 38) 1951 East Punj 216: 52 PLR 60 (DB).

——**S. 491 — Right to apply under — Person released on bail.**

Though a person after his arrest may be released on bail, he can nevertheless apply under S. 491, Cr. P. Code, because his liberty is subject to restraint according to the nature of the bail bond. AIR (Vol 37) 1950 MB 17: 51 Cr LJ 731 (DB).

——**S. 491 — Applicability — Jurisdiction — Applicant detained under Orissa Maintenance of Public Order Act absconding since filing application — Power to order release on ground of illegality of order.**

The relief under S. 491, Cr. P. Code, is one available to a person under alleged illegal custody. If the applicant for relief is not in custody and is not available, the Court cannot pass an order under S. 491. Where an applicant alleged to have been detained under the Orissa Maintenance of Public Order Act of 1948, absconds and does not make himself available for receiving the orders of the High Court, the Court will not merely examine the legality of the order of detention or set aside the order of detention on the ground of illegality. AIR (Vol 37) 1950 Orissa 146: ILR (1949) Cut 723: 51 Cr LJ 626 (SB).

——S. 491 — Right to apply under — Nature of — If and how affected by Madras Ordinance II of 1948. See AIR (Vol 36) 1949 Mad 307: ILR (1949) Mad 377: 1948 MWN 853: 50 Cr LJ 405: 1 MLJ 1 (FB).

——**S. 491 — Petition by complainant — If competent.**

The language of S. 491, Cr. P. Code, places no limit on the class of person or persons who can move a High Court with relation to a person in custody and if the High Court on hearing the petition thinks fit to do so, may make an order that he be dealt with according to law. Such petition at the instance of a complainant is therefore competent. AIR (V 35) 1948 Lah 33: ILR (1947) Lah 274: 48 Cr LJ 984 (FB).

——S. 491 — Petition under by detenu from jail — Impropriety of withholding them. See AIR (Vol 31) 1944 Lah 142: ILR (1946) Lah 147: 45 Cr LJ 711.

——**S. 491-A.**

——**S. 491-A — Appeal.**

Order of single High Court Judge directing issue of writ of habeas corpus is appealable. AIR (Vol 13) 1926 Bom 332:50 Bom 616: 28 Bom LR 471: 27 Cr LJ 721: 95 Ind Cas 49 (DB).

——**S. 491-A — Power to issue writ.**

High Court is not deprived of its jurisdiction to issue writ of habeas corpus by S. 491-A. AIR (Vol 13) 1926 Bom 332: 50 Bom 616: 28 Bom LR 471 : 95 Ind Cas 49 : 27 Cr LJ 721 (DB).

——S. 492.

——S. 492 and Government of India Act (1935), S. 49 — Competency of Governor to appoint Advocate-General a Public Prosecutor.

It is part of the executive authority of a Province to make appointments to the post of Public Prosecutor under S. 492, Cr. P. Code and the executive authority of the Province being vested by S. 49 of the Government of India Act, 1935 in the Governor, he is entitled to appoint the Advocate-General a Public Prosecutor. AIR (Vol 36) 1949 PC 263: 62 LW 560: 1949 ALJ 325: 50 Cr LJ 886: 1949 MWN 755: 51 PLR 410: 1949 AWR 528: 51 Bom LR 970: (1949) 2 MLJ 447.

——Ss. 492, 494 and 495 — "Public prosecutors" — Law Officers of Crown.

Reuben, J.— It is clear that the Law Officers of the Crown mentioned in S. 495 (1), namely, Advocate-General, standing counsel and Government pleader, are not public prosecutors for purposes of Ss. 492, 494 and 495, Cr. P. Code. AIR (Vol 36) 1949 Pat 344: 28 Pat 70: 50 Cr LJ 699 (DB).

——S. 492 — Government should act directly through Public Prosecutor.

Whenever the trying Magistrate is dealing with a criminal case, he must deal with it according to law. He ought to be subjected to nothing which could favour of an instruction from an outside source. When he is told that the Government wish a certain thing and express their wish through his superior officers, it is very difficult for him, unless he is a very strong-minded person, to deal with the matter strictly in accordance with law. The procedure of sending instructions from the Government through the District Magistrate and the Sub-Divisional Officer to the Public Prosecutor and having those instructions reported in the Court of the trying Magistrate who is subordinate to the District Magistrate and the Sub-Divisional Officer, is open to the gravest objection. It is not a procedure contemplated by the Criminal P. C. Those who issue instructions in that way, those who forward those instructions, and those who obey them do not act according to law. The Government may have certain functions in connection with prosecutions and for the purpose of the Government conducting prosecutions under S. 492, Criminal P. C., the office of Public Prosecutor was created. A Public Prosecutor represents the Crown in prosecutions. If the Government desire to put in a petition or request to the Court, they can do so directly through the Public Prosecutor who is the proper officer to put the matter before the Court and not through the superior officers of the trying Magistrate. AIR (Vol 29) 1942 Cal 219: 45 CWN 768: ILR (1941) 2 Cal 281: 43 Cr LJ 539: 199 Ind Cas 269 (DB).

——S. 492 — Services should be sought in complicated cases.

In a complicated case, the services of the Public Prosecutor, or, if necessary, of a special Public Prosecutor, should be requisitioned at the trial or to investigate the case. AIR (Vol 25) 1938 Lah 634: 39 Cr LJ 851: 40 PLR 870: 177 Ind Cas 278.

——S. 492 — Withdrawal of case.

Case conducted almost to its finish by one Public Prosecutor — Then transfer of case to another place and no Public Prosecutor being available appointment of Sub-Inspector of Police to be Public Prosecutor by District Magistrate under S. 492 — On application by accused, District Magistrate orders the Sub-Inspector to withdraw case and the application of the Sub-Inspector to withdraw case was granted — Contention that District Magistrate alone had no power to withdraw case without consulting Public Prosecutor in charge of case from its commencement — Question raised is for executive authorities to decide and not legal. AIR (Vol 17) 1930 Sind 156: 24 SLR 377: 124 Ind Cas 378: 31 Cr LJ 684: 1930 Cr C 620 (DB).

——S. 492 — Interpretation — "In the absence of the Public Prosecutor" explained.

The words "in the absence of the Public Prosecutor" are very wide and include temporary absence of Public Prosecutor at the place and in the Court where the case is proceeding. AIR (Vol 17) 1930 Sind 156: 24 SLR 377: 124 Ind Cas 378: 31 Cr LJ 684: 1930 Cr C 620 (DB).

——S. 492 — When a private complaint is filed and then the complainant is given permission to conduct the prosecution and be responsible for its conclusion, it is highly improper that after he has closed his evidence and the charge has been framed the prosecution should suddenly drop without even consulting him. AIR (Vol 11) 1924 All 203: 81 Ind Cas 618: 46 All 88: 21 ALJ 855: 5 LR A Cr 1: 25 Cr LJ 970.

——S. 492 — Duty of Public Prosecutor — Public Prosecutor should not be too eager to grasp at conviction.

There should be on the part of Public Prosecutor no "unseemly eagerness for or grasping at, conviction". He is not to aggravate the case against the prisoner but has "to perform his duties with that calmness and impartiality which should ever characterise a Public Prosecutor". He has to "aid the Court in discovering the truth" and also in the discharge of its duty to do justice as between the Crown and the accused. AIR (Vol 11) 1924 Nag 243: 83 Ind Cas 723: 7 NLJ 155: 26 Cr LJ 163.

——S. 493.

——S. 493 — Appeal by Crown — Crown absent — Court, if can allow complainant's counsel as such or amicus curiae to place facts before it.

(Per Division Bench in final order).— The Court can always ask any lawyer practising in that Court to assist it in the decision of a matter before it. Where the Crown is not before the Court and whether as complainant's counsel or as amicus curiae the Court considers it desirable to obtain the assistance of a counsel in placing the facts before the Court, it can so allow the counsel to appear. AIR (Vol 29) 1942 Lah 296 : ILR (1942) Lah 241: 44 Cr LJ 14: 203 Ind Cas 501 (FB).

——S. 493 — Interpretation.

The word "act" in S. 493 does not mean something other than examining or cross examining witnesses or addressing the Court. The word is not used in a technical sense in distinction from "appear and plead" in the opening words of the section. 1930 MWN 769.

——S. 493 — Alteration of charge.

Petition to change charge need not necessarily be made by Public Prosecutor. AIR (Vol 16) 1929 Lah 127: 112 Ind Cas 480: 29 Cr LJ 1056.

——S. 493 — Prosecution under Railways Act — Representative of Railway appointed under S. 145 (2) of Railways Act, cannot insist to lead prosecution in presence of Public Prosecutor.

S. 145 (2) only entitles a person authorised by the Agent of a railway to conduct prosecutions on behalf of the railway administration without the permission of the Magistrate, which would, except for the provision, be required under S. 495, Cr. P. Code, prima facie neither S. 145 (2) of the Railways Act, nor S. 495, Cr. P. Code, affects S. 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge, is under trial. Where the Public Prosecutor has charge of the prosecution the

pleader instructed by a private person, including the agent of a railway administration, shall, it is enjoined, act under the directions of the Public Prosecutor. AIR (Vol 12) 1925 Pat 755: 92 Ind Cas 697: 7 PLT 343: 27 Cr LJ 313: 1926 PHCC 74.

——S. 494.

See also, Criminal P. C., Ss. 333 and 337.

1. **Applicability and scope.**
2. **Consent of Court.**
   See also N. 3.
3. **Discretion of Court.**
   See also N. 2.
4. **Discretion of Public Prosecutor.**
5. **Effect of order.**
6. **Power and duty of Court.**
7. **Procedure.**
8. **Prosecution, when can be withdrawn.**
9. **Reasons for consent.**
10. **Revision.**
11. **Stage for withdrawal.**

**1. Applicability and scope.**

**——Ss. 494, 107, 119 — S. 494, if applies to proceedings under Chap. VIII.**

Section 494, Criminal P. C., has no application to proceedings under Chap. VIII of the Code because such proceedings are not prosecutions. The Public Prosecutor has no authority to apply for the withdrawal of proceedings taken under S. 107, Criminal P. C. However, if, after having made his preliminary order under S. 107, the Magistrate is convinced by evidence, or other materials of which he is permitted to take judicial notice, that the person is no longer likely to do anything which might lead to a breach of the peace, it is open to him to make an order under S. 119 discharging the person. Proceedings under S. 107 cannot be brought to an end by the Crown withdrawing from the enquiry. AIR (V 27) 1940 Rang 189: 1940 Rang LR 226: 41 Cr LJ 853: 190 Ind Cas 196.

**——S. 494 — Ss. 337 and 494 distinction.**

The proceedings under S. 337, Criminal P. C., are different in character from those under S. 494. The former deals with the action of judicial, the latter with that of an executive officer. Section 494, says nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which, no doubt, is that the person in respect of whom the charge is withdrawn, may be willing to give evidence. But the whole procedure and various consequences under S. 494, differ from those under S. 337. AIR (Vol 25) 1938 PC 266: 1938 OWN 809: 19 PLT 717: 42 CWN 1252 : 40 PLR 876 : 4 BR 850 : 1938 AWR 170 : 40 Cr LJ 360 : 32 SLR 937 : 65 IA 388 : 1938 MWN 969 : 48 LW 537 : (1938) 2 MLJ 780 : 68 CLJ 328 : 40 Bom LR 1254 : ILR (1938) Lah 628 : 176 Ind Cas 898.

**2. Consent of Court.**

See also N. 3.

**——S. 494 — Withdrawal by Public Prosecutor — Consent of Court — If necessary.**

The mere withdrawal of the prosecution of a person by the Public Prosecutor is of no effect; the consent of the Court must also be given, in order that the result provided by statute, namely, an acquittal should follow. AIR (Vol 35) 1948 Lah 74: 49 PLR 305: 49 Cr LJ 106 (DB).

——Ss. 494 and 337 (1) — Offences covered by S. 337 (1) — Consent for withdrawal — If may be given. See AIR (Vol 32) 1945 Nag 72: 46 Cr LJ 731 : ILR (1945) Nag 515.

**——S. 494 — Magistrate must not surrender his authority to District Magistrate.**

The Public Prosecutor acts with grave impropriety in showing the instructions received by him from the District Magistrate for the withdrawal of the case, to the trial Magistrate and the Magistrate acts with equal impropriety in looking at them. The fact that the District Magistrate has instructed the Public Prosecutor to apply for withdrawal is no reason for a Magistrate giving his consent to such withdrawal. The Magistrate must not surrender his authority to the District Magistrate, but must act judicially and come to his own independent conclusion. AIR (Vol 27) 1940 Rang 189: 1940 Rang LR 226: 41 Cr LJ 853: 190 Ind Cas 196.

**——S. 494 — Reasons extraneous to case.**

Reasons extraneous to the case are not proper for the withdrawal of the case. AIR (Vol 27) 1940 Sind 233: 42 Cr LJ 182: ILR (1941) Kar 32: 191 Ind Cas 440 (DB).

**——S. 494 — "Consent" meaning.**

"Consent" in S. 494, Criminal P. C., means a consent freely given by a free and independent Magistrate. The Magistrate must not surrender his authority to the District Magistrate, but must act judiciously and come to his own independent conclusion as to whether withdrawal ought to be permitted or not upon a consideration of all the relevant circumstances. The Magistrate must not surrender his discretion to the Executive Government. AIR (Vol 27) 1940 Sind 233: ILR (1941) Kar 32 : 42 Cr LJ 182 : 191 Ind Cas 440 (DB).

**——Ss. 494, 436 — Accused charged under Ss. 193, 467, 477, Penal Code — Withdrawal should be quashed.**

Where a deed deposited in the Registry is alleged to have been tampered with whilst it was in the custody of a Registrar, it is necessary that matters of that kind should be proved to the full and that if anyone has been guilty of any offence against the law in connection with it, he should be punished.

A document had been tampered with while it was in the custody of the Sub-Registrar. Thereupon, the opposite party and the Sub-Registrar were prosecuted under Ss. 193, 467, 477, 109 and 120-A, Penal Code. After some evidence for the prosecution had been recorded, the Government called for the record which was not returned back for six months. After it was received back, the Government Pleader filed a petition for withdrawal of the case under S. 494, Criminal P. C., on grounds not substantial. The trying Magistrate, although holding that there was substantial evidence to show that the offence had been committed, passed an order of discharge. The District Judge upheld the order. It was found that some of the accused were related to one of the Ministers:

Held, that consent of the Magistrate was not properly given and the orders of withdrawal and discharge which followed upon it should be quashed. The action of the Government in calling for the records of the case and retaining them for six months was illegal. AIR (Vol 26) 1939 Cal 220: 43 CWN 301: 40 Cr LJ 349: ILR (1939) 1 Cal 407: 180 Ind Cas 384 (SB).

**——S. 494 — Ground of expenses.**

Where prosecution for forgery has been launched by an experienced Civil Judge after a full trial on the merits and the accused does not appeal against the order, it would be allowing an undesirable precedent if such a prosecution were to be, unless for every cogent reasons, cut short by the prosecuting authorities. The Judge must have considered the question of the probability of a conviction, and his opinion is entitled to respect. The fact that the prosecution case is a weak one is not sufficient to justify its withdrawal and the Magistrate in con-

senting thereto. The fact that the prosecution would entail a great deal of expense in calling handwriting experts is also no reason for withdrawing it. It is in the public interest that offenders in forgery cases should be brought to book in spite of expense necessarily involved in such trials. If the case is thought to be beyond the capacity of the Prosecuting Inspector, then the services of the Public Prosecutor should be secured. AIR (Vol 25) 1938 Nag 334: 39 Cr LJ 458: 1938 NLJ 12: ILR (1939) Nag 393: 174 Ind Cas 510.

——S. 494 — The Court is concerned only with the question whether the ground for the proposed withdrawal is such as would justify it in giving its consent. AIR (Vol 23) 1936 Cal 356: 40 CWN 876: 37 Cr LJ 758: ILR (1937) 1 Cal 711: 63 CLJ 307: 163 Ind Cas 9 (FB).

——S. 494 — The failure to obtain Court's consent would amount to a mere irregularity. 6 Pat 208: 97 Ind Cas 364: 8 PLT 12: 27 Cr LJ 1100: 7 AI Cr R 164: AIR (Vol 14) 1927 Pat 13 (DB).

**——S. 494 — Withdrawal — Validity.**

Where the Public Prosecutor withdrew a charge and the Sessions Judge approving of it discharged the accused, the High Court could not set it aside even though the Sessions Judge recorded no reasons for the action he took, and the Public Prosecutor offered no reasons for the withdrawal. (1909) 5 MLT 216: 11 Cr LJ 193: 4 Ind Cas 1126 (DB).

**3. Discretion of Court.**

See also N. 2.

**——S. 494 — Withdrawal — Grounds for — Duty of Public Prosecutor to satisfy Court that withdrawal is in best interest of justice.**

A criminal case should not be allowed to be withdrawn under S. 494, Cr. P. Code, unless for a very good reason. The fact that one of several accused in a case is likely to give material evidence in the case against the other accused is not a sufficient reason for allowing withdrawal of the case against him. Consent to the withdrawal cannot be given as a matter of course. It is the duty of the Public Prosecutor who applies for permission for withdrawal to give cogent reasons and to satisfy the Court that the withdrawal is in the best interest of justice. AIR (Vol 36) 1949 Cal 223: 50 Cr LJ 444.

**——S. 494 — Discretion — Exercise of — Duty of Magistrate — Order of discharge passed without exercise of proper discretion and in furtherance of order of superior authority — Legality.**

The granting of consent to the withdrawal of a prosecution under S. 494, Cr. P. Code, is a matter of discretion. But it is well-established that the discretion has to be exercised judicially and not arbitrarily. The magistrates must consider the case well and should not merely regard themselves as instruments for recording such orders as they may receive from the superior authority without considering the propriety of such orders. An order of discharge passed without any judicial exercise by the magistrate of his discretion is illegal and must be set aside. AIR (Vol 36) 1949 Pat 449: 50 Cr LJ 992: 30 PLT 152. (DB).

**——S. 494 — Discretion under — Grounds for withdrawal — Inexpediency of prosecution for reasons of state — Sufficiency or propriety.**

S. 494, Cr. P. Code, is expressed in very general terms and no fixed rule can be laid down as to the reasons for withdrawal of a prosecution. The inexpediency of a prosecution for reasons of state may be a good ground for withdrawal under S. 494, and a Magistrate does not act improperly or arbitrarily in giving his consent to withdrawal on such ground. 28 Pat 49: AIR (Vol 36) 1949 Pat 262: 50 Cr LJ 528 (DB).

**——S. 494 — Withdrawal of prosecution — Discretion of Court — Exercise of — Interference by High Court.**

S. 494, Cr. P. Code, merely authorises the Public Prosecutor to withdraw from the prosecution, and that only with the consent of the Court. As the effect of the withdrawal of the Public Prosecutor with the consent of the Court is either discharge or acquittal of the accused, as the case may be, the giving or withholding of consent is a judicial act and the discretion conferred on the Court must be exercised judicially. If the public prosecutor intimates to the Court that Government does not propose to proceed with the prosecution, the Court has to exercise its judicial discretion before deciding what to do. If the Court makes no attempt to exercise its discretion, the High Court may interfere but it would be reluctant to direct the prosecution of persons against whom Government does not desire to proceed, unless there is evidence which requires judicial consideration. AIR (Vol 36) 1949 Pat 222: 50 Cr LJ 474 (FB).

**——Ss. 494, 435, 436, 561-A — Petition to Magistrate to recommend to District Magistrate for withdrawal of prosecution — Refusal by Magistrate is proper.**

The petitioner who was acquitted of three charges was subsequently prosecuted for remaining five similar charges. It was found that the evidence in the remaining case was identical with that in the three cases in which he was acquitted. The petitioner put in an application in the Court of the Magistrate asking him to recommend to the learned District Magistrate that those cases be withdrawn. The Magistrate wrote an order, saying that it was not for him to decide whether the cases should be prosecuted or not, and saying that the petitioner could apply either to the District Magistrate or to the High Court; on this the petitioner put in a petition to the Sessions Judge in respect of this order which was entitled a revision petition:

Held, that it was doubtful whether the revision to Sessions Judge was competent under S. 435 or S. 436.

Held, also, that the order which the Magistrate was asked to make and refused to make, was one which he had no legal power to make at all. His refusing to make it, therefore, was clearly correct and there would be no grounds for revising it even if it were revisable.

Held, however, that it amounted to an abuse of the process of the Court for the petitioner to be further prosecuted in those cases and the High Court could, under S. 561-A, make an order quashing the trial of the petitioner in the five cases. AIR (Vol 30) 1943 Lah 304: 45 Cr LJ 162: 46 PLR 120: 209 Ind Cas 598.

**——S. 494 — "Interest of administration" or "ground of public policy" is no reason.**

The phrases "in the interest of administration" and "on ground of public policy" constitute no reason at all for permitting a withdrawal. AIR (Vol 30) 1943 Sind 161: 44 Cr LJ 795: 208 Ind Cas 533 (DB).

**——S. 494 — "Public policy" held no ground.**

The ground of 'public policy' is not a sufficient ground for withdrawal of a case. Where it is quite clear that a case must fail because there is no evidence on which it can succeed, that may be good ground for withdrawal from the prosecution and the Public Prosecutor can say so and it will not be necessary to invoke the loose and spacious term 'public policy' which is as meaningless as it is high sounding.

Ordinarily, however, it should be left to the trial Magistrate to dismiss a complaint and it would be imporper for a District Magistrate to decide at the beginning of a case, before the trial Court has

even heard the witnesses that the witnesses are false, that the case is false and thus to usurp the function of trial Court. ILR (1943) Kar 13: AIR (Vol 30) 1943 Sind 109: 44 Cr LJ 612: 207 Ind Cas 192 (DB).

——S. 494 — The habit of the Junior Magistracy and others, of accepting applications and recommendations of the Police without exercising their judicial discretion in any way commented upon. AIR (Vol 25) 1938 Nag 76: 39 Cr LJ 65: JLR (1939) Nag 35: 172 Ind Cas 130.

**——Ss. 494 (a), 337 — Use of S. 337 or S. 494 (a), which proper.**

There is nothing in S. 494, Criminal P. C., which prevents a Public Prosecutor if he thinks it is in the interests of the administration of justice, from withdrawing the case as against one of the accused for the purpose of calling him as a witness against the others. It may well be that the Court ought to give its consent to such withdrawal. Section 337, Criminal P. C., which only applies to the offences of a more serious character therein specified, provides safeguards in the interests, both of the Crown and the accused. In cases where that section is available, it is better that the accused should be dealt with under that section. Even where S. 337 can be applied, it is not contrary to law to discharge the approver under S. 494(a). The approver dealt with under S. 337, gives his testimony with a contingent charge hanging over his head; the evidence of an accomplice whether dealt with under S. 337, or discharged under S. 494(a), or acquitted under S. 494(b), is the evidence of an approver, and as such, open to suspicion.

If the prosecution, in order to avail of the evidence of an accused as against his co-accused, consider it necessary to withdraw from the prosecution as against him, S. 494 would warrant such a course on the ground of public policy. But the withdrawal is dependent on the consent of the Court; and, therefore, the Court, in order to see whether it should consent or not will have to enquire into the reasons which prompt the withdrawal. And if the Court finds that S. 337, with its statutory safeguards, is open to be availed of, it will be a sound exercise of its discretion to withhold consent.

The discretion under S. 494, however, is a judicial discretion, and in cases, where it is open to the prosecution to obtain the approver's evidence by applying for the tender of a conditional pardon under S. 337(1), the Magistrate must keep the provisions of that section before him when he exercises his discretion. As a general rule, the discretion will be wrongly exercised in such cases if the consent is given before the charge is framed. AIR (Vol 23) 1936 Cal 356: 40 CWN 876: 37 Cr LJ 758: 63 CLJ 307 : ILR (1937) 1 Cal 711 : 163 Ind Cas 9 (FB).

——S. 494 — Mukerji, J.— A withdrawal under S. 494, Criminal P. C., either under cl. (a) or under cl. (b), is a simple withdrawal unconditioned and unconditional. The Court is concerned only with the question whether the ground for the proposed course is such as would justify it in giving its consent. If the Court finds that the object of withdrawing from the prosecution is to avail of the evidence of the particular accused and the circumstances of the case are such that it would further the ends of justice to have his evidence and that S. 337 is inapplicable, the Court will not be wrong in giving its consent. What the Public Prosecutor will or will not do thereafter, in a case in which the withdrawal has been under cl. (a) with the effect of discharge, is a matter which is no concern of the Court. AIR (Vol 23) 1936 Cal 356: 40 CWN 876: 37 Cr LJ 758: 63 CLJ 307: ILR (1937) 1 Cal 711: 163 Ind Cas 9 (FB).

**——Ss. 494, 337 — Withdrawal to get evidence of accused against co-accused.**

Prosecution can be withdrawn under S. 494, only with the consent of the Court and in exercising his discretion, the Judge must act judicially. The section is only intended to be applied in cases where either the evidence is insufficient to secure a conviction, or in cases of compromise. It is not intended to be used by the prosecution to get the evidence of an accused against his co-accused and so escape the safeguards laid down with regard to such evidence under S. 337.

Where a prosecution is withdrawn before the charge is framed, the accused is discharged and when another prosecution is launched subsequently the evidence of the co-accused in the first prosecution, though admissible against the accused, in practice no weight should be given to it without corroboration.

The witness discharged under S. 494 can only be considered a competent witness in the sense that his evidence is not inadmissible in respect of the facts to which it relates. In practice no weight should be given to it without corroboration. AIR (Vol 22) 1935 Cal 473: 39 Cal WN 1082: 36 Cr LJ 1248: 157 Ind Cas 840 (DB).

**——S. 494 — Withdrawal for making accused witness against co-accused.**

A Magistrate trying a case has a discretion to permit the Public Prosecutor to withdraw from the prosecution of one of the accused in order that his evidence might be available for the charge against the other accused tried jointly with him. AIR (Vol 20) 1933 Cal 148: 34 Cr LJ 675: 144 Ind Cas 74.

——Ss. 494, cls. (1) and (2), 215, 333 — It is not a correct view of the law to say that after a commitment to the Court of Session, a concurrence of opinion between the Judge and the Public Prosecutor that the prosecution case is a weak one and is not likely to end in a conviction is by itself sufficient to justify the Public Prosecutor in making an application for withdrawal and the Judge in according his consent thereto. On the other hand S. 494, Criminal P. C., contemplates action to be taken more often than not upon circumstances extraneous to the record of the case, inexpediency of a prosecution for reasons of State, necessity to drop the case on grounds of public policy, credible information having reached the Government, as to the falsity of the evidence by which the prosecution is supported and other matters of that description. AIR (Vol 19) 1932 Cal 699: 56 CLJ 79: 36 CWN 928: 34 Cr LJ 433 (2): 60 Cal 233: 142 Ind Cas 891 (DB).

——S. 494 — There is no provision in the Criminal P. C. that there should be any formal enquiry under S. 494, before a complaint is withdrawn.

Where the discretion is exercised by a Court of competent jurisdiction under S. 494, which is not on the face of it arbitrary, the practice of the High Court is that as a Revisional Court, it will neither enquire into the reasons nor interfere with the exercise of such discretion. AIR (Vol 19) 1932 Sind 92: 26 SLR 67: 33 Cr LJ 449: 137 Ind Cas 344 (DB).

——S. 494 — Under S. 494, Criminal P. C., the Public Prosecutor may apply to withdraw from the prosecution at any stage of the case so long as the judgment is not pronounced or the Jury have not given their verdict and it is quite independent of the possibility that at the time of the application, the Court has come to the conclusion that the prosecution case is true and that the accused has committed the offence. In a suitable case, the Court may still give consent to the Public Prosecutor to withdraw from the prosecution

if it finds that there are good reasons for doing so. Consent is not to be given as a matter of course, neither is it to be unreasonably withheld.

The terms of S. 494 are very wide and the Court has been given a discretion. The test is whether, in giving consent for withdrawal of prosecution, the Court has been influenced by circumstances which ought not to have been considered.

Per S. K. Ghose, J.— An application for withdrawal of prosecution by the Public Prosecutor, who is not in charge of the case before but appears in the case only to withdraw the prosecution is not regular and is open to objection, but the application does not amount to an illegality.

Per Lort-Williams, J.— The action of the Public Prosecutor in entering appearance simply for the purpose of withdrawal is neither illegal nor irregular but merely unusual.

A "prima facie" case only means that there is ground for proceeding. It is not the same thing as "proof" which comes later when the Court has to find whether the accused is guilty or not guilty and is nothing but belief according to the conditions laid down in the Evi. Act. AIR (Vol 18) 1931 Cal 607 : 54 CLJ 253 : 33 Cr LJ 3 : 36 CWN 16 : 59 Cal 275 : 134 Ind Cas 1045 (DB).

**——S. 494 — Propriety of order.**

Order under — Propriety of — Test is whether extraneous circumstances are considered. AIR (Vol 16) 1929 Cal 319: 121 Ind Cas 678: 33 CWN 468: 56 Cal 1023: 31 Cr LJ 315 (DB).

**——S. 494 — Allowing withdrawal is discretionary.**

The language of S. 494 is very wide and gives a discretion to the Magistrate as to whether he would consent to the withdrawal of a prosecution by the Public Prosecutor — Such discretion to be exercised not arbitrarily but must be based on correct legal principles. AIR (Vol 16) 1929 Cal 319: 33 CWN 468 : 56 Cal 1023 : 121 Ind Cas 678 : 31 Cr LJ 315 (DB).

**——S. 494 — Co-accused discharged under S. 494 (a) instead of pardon being tendered under S. 337 is competent witness against his co-accused.**

Where in a trial for offence under S. 401 the case against an accomplice had been withdrawn on the ground that he had aided materially in bringing to light the operations of the gang and he was discharged under S. 494(1) instead of tendering a pardon under S. 337 and then he was examined as a witness against his co-accused.

Held, that there was nothing illegal in the procedure adopted and that the accomplice was a competent witness in the case. AIR (Vol 13) 1926 Nag 426 : 95 Ind Cas 471 : 27 Cr LJ 807 (DB).

**——S. 494 — Withdrawal of criminal prosecution — Right of Public Prosecutor and complainant.**

An order passed under S. 494 Cr. P. C. by a Magistrate is a judicial order and if the discretion vested in that section is arbitrarily exercised, the High Court is entitled to interfere and justified in passing the order, which ought to have been passed by the Magistrate. A Court Sub-Inspector is the 'public prosecutor' under S. 4 (t) Cr. P. C. When the case has been started upon a police report, if the Court Sub Inspector wants to withdraw the case, the Court acts without jurisdiction in rejecting the prayer for the withdrawal simply because the complainant wants to proceed with the case, the complainant having no locus standi to control the proceedings. AIR (Vol 7) 1920 Pat 362: 1 Pat LT 400: 57 Ind Cas 657: 21 Cr LJ 641.

**——Ss. 494, 537 — Prosecution of co-accused — Withdrawal — Co-accused examined as a witness — Admissibility of evidence — Irregularity.**

The prosecution against an accused person was withdrawn and he was tendered as a witness against the other accused. Objection was taken and the Magistrate ruled that the witness was no longer an accused person and could be examined as a witness.

Held, that there was an effective, though informal, compliance on the part of the Magistrate, with the provisions of S. 494 (a) of the Criminal Procedure Code. The mere omission of the formal order of discharge was only an irregularity curable by the provisions of S. 527 of the Criminal Procedure Code. (1910) 11 Cr LJ 21: 7 ALJ 86 (88): 5 Ind Cas 21.

**4. Discretion of Public Prosecutor.**

**——S. 494 — Withdrawal on surmises and under pressure.**

When the prosecution case is clearly capable of proof, the withdrawal of a case on the mere surmises of the Public Prosecutor that the prosecution case was difficult to prove and under improper pressure outside the Court is grossly improper. AIR (Vol 30) 1943 Sind 162: ILR (1943) Kar 100: 45 Cr LJ 169: 210 Ind Cas 14.

——S. 494 — To the Public Prosecutor is entrusted discretion to withdraw from the prosecution with the consent of the Court and his withdrawal puts an end to the case. It may often be proper for him to consult the District Magistrate or other authorities before exercising that discretion, but the discretion is his alone, subject to the consent of the Court. AIR (Vol 26) 1939 Mad 190: 1938 MWN 582: 40 Cr LJ 437: 180 Ind Cas 605.

**——S. 494 (a) (b) — Prosecuting Inspector stating no case — Whether withdrawal.**

A withdrawal by a Public Prosecutor is withdrawal from the prosecution of any person for any act or omission made punishable by any law; that is, the Public Prosecutor states that he does not want to prosecute for certain alleged acts or omissions. Where there was no such statement by the Prosecuting Inspector, but he merely stated that there was no case under S. 218, Penal Code:

Held, that he did not state that there was any act or omission for which he did not desire prosecution of the accused. He only gave his opinion that the evidence produced for the prosecution would not show a case under S. 218, Penal Code. Therefore there was no withdrawal by the Public Prosecutor. AIR (Vol 22) 1935 All 366: 1935 ALJ 653: 1935 AWR 134: 36 Cr LJ 1103: 157 Ind Cas 205.

——S. 494 — The District Magistrate has no authority under the Criminal P. C. to interfere during the course of the trial with the discretion of the Public Prosecutor or the Court in the matter of withdrawal of the prosecution under S. 494, Criminal P. C. AIR (Vol 19) 1932 Lah 611: 33 PLR 793: 33 Cr LJ 912: 140 Ind Cas 25.

**——Ss. 494 and 495 (2) — Withdrawal of prosecution — Joint application of Police Sub-Inspector and Vakil — Discharge — Examination as witness.**

The prosecution against an accused was withdrawn with the consent of the Court, after the opening of the Crown case, by an application signed by the Court by the Court Sub-Inspector and a private Vakil, who was not appointed a Public Prosecutor but was acting for him. The accused was thereupon discharged under S. 494, removed from the dock and examined as a prosecution witness. Held, that the withdrawal was legal as the Court Sub-Inspector, who was a Public Prosecutor within S. 494 of the Cr. P. C. had signed the petition filed for the purpose. AIR (Vol 7) 1920 Cal 300: 46 Cal 710: 21 Cr LJ 5: 30 CLJ 255: 54 Ind Cas 53 (DB).

**——S. 494 — Non-compoundable case.**

Non-compoundable cases can only be withdrawn under Ss. 494, 495, Cr. P. Code, and not by any pri-

vate Prosecutors. AIR (Vol 7) 1920 Low Bur 137: 10 LBR 375: 64 Ind Cas 273: 22 Cr LJ 753: 13 Bur LT 244 (DB)

——S. 494 — **Special Public Prosecutor — His powers.**

When a Special Public Prosecutor is appointed, he is appointed for the whole case and not merely to prosecute this accused or that accused, etc. He has every right to conduct the prosecution as against persons subsequently impleaded or to withdraw with the consent of the Court from the prosecution of any of the accused. AIR (Vol 3) 1916 Bom 229: 18 Bom LR 266: 17 Cr LJ 256: 34 Ind Cas 976 (DB).

——Ss. 494 and 495 (1) — **Officer entitled to withdraw from the prosecution of a case.**

In the course of an inquiry by a Magistrate, an Inspector of Police appeared and said that he withdrew the case against the accused. The Magistrate thereon discharged the accused under S. 494. Held, that the order of discharge was illegal. The officer having the power of withdrawing from prosecution of a case, under S. 494, is the officer referred to in S. 495 (1). (1911) 1 MWN 106: 9 MLT 203: 11 Cr LJ 722: 8 Ind Cas 867 (DB).

**5. Effect of order.**

——S. 494 — **Calendar case — Charge framed — Conversion into a preliminary register case — Withdrawal by prosecution with permission to file fresh charge sheets against accused separately — Withdrawal amounts to acquittal regarding charges already framed — Prosecution can prove other offence for which no charges have been framed.**

During the trial of calendar cases after the charges were framed, the accused applied to the Court to convert the calendar cases into a preliminary register case as the combination of some of the charges would constitute an offence exclusively triable by a Court of Session. The calendar cases were converted into a preliminary register case and during the progress of inquiry into it, the Public Prosecutor applied for permission to withdraw the case stating also that the intention was to file separate prosecutions against the accused differently for various offences. The Court granted the permission for withdrawal and discharged the accused under S. 494 (a) of the Code. Cases were subsequently filed by the prosecution in each of which some of the accused in the preliminary register case were charged with offences under various provisions of the I. P. Code. It was contended for the accused that the result of the withdrawal of the preliminary register case amounted to an acquittal of the accused for such of the offences as were triable by the Magistrate himself.

Held, in revision, that the Code does not provide for the conversion of the category of calendar cases into the category of preliminary register cases. Under S 347 if, after the commencement of an enquiry or trial it appears to the Magistrate at any stage of the proceedings before signing the judgment that the case ought to be tried by a Court of Session or the High Court and if he is empowered to commit for trial, he shall commit the accused under the provisions of the Code. In this case the 1st Class Magistrate converted the calendar cases into a preliminary register case. Without altering the nomenclature if he had committed the case the section would have been satisfied. The alteration of the nomenclature does not legally affect the nature of the proceedings and if the nature of the proceedings is not affected, the withdrawal of a case after the framing of the charge can amount to an acquittal of the accused and nothing else, and therefore the prosecution is not entitled to file fresh charge sheets against the accused for such of the offences for which charges had already been framed. But it is open to the prosecution to show, on the facts proved and on the facts elicited, an offence exclusively triable by a Court of Session for which no charge had been framed before the withdrawal has been committed. AIR (Vol 36) 1949 Mad 508 : 50 Cr LJ 698 : ILR (1949) Mad 946 : 1949 MWN 27 : 62 LW 927 : (1948) 2 MLJ 653.

——S. 494 (a) — **Accused, if can be re-tried.**

Where the case against the accused is withdrawn under S. 494 (a), Criminal P. C., he is discharged from these proceedings and cannot be put back into them. AIR (Vol 23) 1936 Cal 356 : 40 CWN 876 : 37 Cr LJ 758 : 63 CLJ 307 : ILR (1937) 1 Cal 711 : 163 Ind Cas 9 (FB).

——S. 494 — **Injured person, if can bring fresh complaint.**

There is nothing to debar an injured person from filing a complaint against the accused merely because the Crown has chosen to withdraw the case, and Courts are legally entitled to ignore the orders of discharge passed on the withdrawal of the complaint if they are satisfied that the case is otherwise a fit one to be proceeded with. AIR (Vol 21) 1934 Lah 169 : 36 Cr LJ 473 : 37 PLR 150 : 154 Ind Cas 73.

——S. 494 — A charge sheet was filed by the Police against certain persons under Ss. 147 and 323, I. P. C. The Prosecuting Inspector subsequently withdrew from the prosecution under S. 494, Criminal P. C. and the Magistrate signed an order acquitting the accused. A private complaint was subsequently made against the accused under Ss. 147, 323 and 341, I. P. C. :

Held, as the previous case was a warrant case, S. 494 (a) applied and the order of acquittal was really only an order of discharge and a subsequent trial on a private complaint was not barred under S. 403, Criminal P. C. AIR (Vol 20) 1933 Mad 98 : 36 MLW 641 : 1932 MWN 1230 : 34 Cr LJ 12 : 140 Ind Cas 322.

——S. 494 — **Fresh complaint.**

Prosecution against an accused under S. 359, I. P. Code was withdrawn with the leave of the Court and an order under S. 494, Cr. P. Code, was passed, the accused being discharged. Subsequently a fresh complaint was made to the Magistrate.

Held, that the order of discharge could not prevent a fresh complaint being entertained and inquired into. AIR (Vol 17) 1930 Cal 369 : 34 CWN 196 : 127 Ind Cas 63 : 1930 Cr C 568 (DB).

——S. 494 — S. 494 of the Code stands by itself. The effect of the section is that as soon as an accused is discharged under that section he is taken away from the category of an accused person and becomes under the general principles of law a competent witness against his co-accused. AIR (Vol 16) 1929 Cal 319 : 33 CWN 468 : 56 Cal 1023 : 121 Ind Cas 678 : 31 Cr LJ 315 (DB).

——S. 494 — An order of discharge passed on withdrawal of the case by the Public Prosecutor does not amount to an acquittal. There is no difference in law in the case of a person discharged by a Magistrate on a consideration of the evidence tendered against him and of a person discharged at the instance of the Public Prosecutor under S. 494. AIR (Vol 16) 1929 Lah 315 : 114 Ind Cas 50 : 30 PLR 58 : 30 Cr LJ 233 : 12 AI Cr R 113.

——S. 494 — Fresh complaint is not debarred by reason of discharge of accused person under S.

494 (a). AIR (Vol 11) 1924 Pat 797 : 83 Ind Cas 689 : 1924 PHCC 226 : 26 Cr LJ 129.

**——S. 494 — Accused — Withdrawal of case — Witness.**

An accused person is, after a withdrawal under S. 494 Cr. P. C. and discharge, a competent witness. AIR (Vol 7) 1920 Cal 87 : 47 Cal 154 : 31 CLJ 192 : 21 Cr LJ 386 : 55 Ind Cas 994 (DB).

**——S. 494 — An accomplice.**

The prosecution against whom is withdrawn under S. 494 becomes a competent witness in the case and his previous statements made to and verified by a Magistrate can be used by the accused for cross-examination and contradiction. AIR (Vol 2) 1915 Cal 184 : 18 CWN 1213 : 15 Cr LJ 693 : 26 Ind Cas 141 (DB).

### 6. Power and duty of Court.

**——S. 494 — Withdrawal of case — Summons to accused after enquiry by Magistrate under S. 202 and report of prima facie case — Subsequent withdrawal and discharge without examination of witnesses by discharging Magistrate — Legality.**

A complaint of theft under S. 379, I. P. Code, filed before a Sub-Divisional Magistrate was sent for a judicial inquiry to a Magistrate of the first class who reported that a prima facie case had been made out against the accused. Thereupon the Sub-Divisional Magistrate issued summons to the accused. Subsequently before any witnesses were examined, the Public Prosecutor applied for permission to withdraw the case, and the Sub-Magistrate allowed the application and discharged the accused after hearing the Public Prosecutor and the pleaders for the complainant and the accused.

Held: that the order of discharge passed by the Magistrate without himself examining at least some of the witnesses was illegal and should be set aside. AIR (Vol 35) 1948 Cal 246 : 49 Cr LJ 405 (DB).

**——S. 494 — Withdrawal of charge — Powers of Court and those of Public Prosecutor.**

It is the Court which takes the responsibility of deciding whether a charge should be allowed to be withdrawn or not and the Public Prosecutor has no right to attempt to force the Court to accept his view and to drop a certain charge. When the permission is refused by the Court, it is the duty of the Public Prosecutor to place the evidence before the Court even though he may consider it to be insufficient. It is not correct conduct for him to decline to assist the Court. The Court may not accept the ipse dixit of the Public Prosecutor and action is quite proper in the exercise of his discretion under S. 494. AIR (Vol 32) 1945 Cal 488.

**——S. 494 — Extra-judicial withdrawal.**

It is most improper interference with the administration of justice for the District Magistrate sitting outside the Court to call for a case pending before a Sub-Magistrate and to give instructions for withdrawal of the same. AIR (Vol 30) 1943 Sind 161 : 44 Cr LJ 795 : 208 Ind Cas 533 (DB).

——S. 494 — There is a remedy available to an accused labouring in respect of what he considers to be a committal on insufficient evidence and that is provided by S. 494, Criminal P. C., in which, Sessions Judge, on perusal of commitment order and the evidence adduced before committing Magistrate, may invite Public Prosecutor to consider whether he should undertake action under that section. AIR (Vol 22) 1935 Nag 202 : 18 NLJ 227 : 36 Cr LJ 1389 : 31 NLR 360 : 158 Ind Cas 537.

——S. 494 — An accused person cannot summarily be tried in several Courts on the same facts, although the complainants in the several cases may be different. An order of discharge under S. 494 (a) or under S. 253 in a warrant case does not necessarily prevent the Magistrate from taking cognisance of a complaint on the same facts, but an order of discharge cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly. The Succession (Property Protection) Act has a larger scope than S. 145, Cr. P. Code and affords a more appropriate remedy in cases involving disputes regarding succession to large estates involving breaches of the peace. AIR (Vol 9) 1922 Pat 372 : 66 Ind Cas 76 : 23 Cr LJ 236.

**——S. 494 — Sanction for withdrawal.**

Sessions Judge can sanction withdrawal from prosecution when appeal against conviction in respect of one of several charges is pending. (1909) 6 MLT 90 : 9 Cr LJ 495 : 2 Ind Cas 128.

**——S. 494 (b) — Charge — Withdrawal of charge — Charge of robbery.**

Certain persons were charged by a District Magistrate with the offence of robbery. On behalf of the complainant in the case an application was presented to the High Court praying that inasmuch as the charge of robbery was against more persons than five, and was really, or ought to have been, a charge of dacoity, the Magistrate might be directed to commit the accused person to the Court of Session. Before the final hearing of this application the Magistrate permitted the prosecution to withdraw the charge of robbery.

Held, that whether or not the accused ought to have been charged with dacoity, they were in fact charged with robbery, and this being so, the only order which the Magistrate could pass, if he permitted that charge to be withdrawn, was an order of acquittal under S. 494 (b), Cr. P. C., and no order was called for on the application to the High Court. (1904) AWN 277 : 2 ALJ 30 (30, 31) : 2 Cr LJ 21.

### 7. Procedure.

**——S. 494 — Conveying instructions of District Magistrate for withdrawal to Sub-Magistrate is improper.**

It is improper for the Public Prosecutor to show the instructions of the District Magistrate to his Subordinate Magistrate, and thereby bring improper pressure to bear upon the Subordinate Magistrate. AIR (Vol 30) 1943 Sind 161 : 44 Cr LJ 795 : 208 Ind Cas 533 (DB).

**——S. 494 — Right to withdraw — Warrant cases.**

If the trying Magistrate considered that although the charge was not groundless, there was little likelihood of the case being pursued to a successful issue, he could consult the District Magistrate who would, if advisable, instruct the Public Prosecutor under S. 494 of the Cr. P. Code to withdraw the case. The complainant or the accused could similarly move the District Magistrate in the matter. AIR (Vol 14) 1927 Rang 174 : 103 Ind Cas 105 : 5 Rang 136 : 28 Cr LJ 649.

——S. 494 — An order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided by S. 437. One Magistrate of co-ordinate jurisdiction should not, in effect and substance, deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority. But this rule admits of exception. AIR (Vol 9)

1922 Sind 23 : 69 Ind Cas 625 : 15 SLR 131 : 23 Cr LJ 737 (DB).

8. **Prosecution, when can be withdrawn.**

——Ss. 494, 337 — **Withdrawal of prosecution against one of accused to examine him as witness.** The accused were charged with a serious offence which was punishable with transportation or imprisonment for ten years. The prosecution applied for withdrawal of prosecution against one of the accused with a view to examine that person as a prosecution witness :

Held, that withdrawal was improper and the proper procedure was to proceed under S. 337, Criminal P. C. AIR (Vol 32) 1945 Nag 72 : ILR (1945) Nag 515 : 1944 Nag LJ 515 : 46 Cr LJ 731 : 220 Ind Cas 319.

——S. 494 — **Accused admitting guilt.** When a person accused of an offence admits of his guilt, withdrawal of prosecution should not be allowed and he should be convicted and sentenced after trial. AIR (Vol 32) 1945 Nag 72 (73) : ILR (1945) Nag 515 : 1944 Nag LJ 515 : 46 Cr LJ 731 : 220 Ind Cas 319.

——S. 494 — The Criminal P. C., gives certain powers under which the evidence of an accomplice can be made available. He can be granted a conditional pardon by the Magistrate under S. 337, Criminal P. C., or the Public Prosecutor, with the consent of the Magistrate, can withdraw the charge under S. 494, Criminal P. C. AIR (Vol 22) 1935 Bom 186 : 37 Bom LR 179 : 59 Bom 355 : 36 Cr LJ 937 : 156 Ind Cas 392 (DB).

9. **Reasons for consent.**

——S. 494 — **Preliminary register case — Withdrawal — Permission — Power of Court to grant — Recording of reasons for granting such permission — If obligatory.** It is wrong to say that S. 494, Cr. P. Code, does not authorise the Court to grant permission to withdraw a preliminary register case for the reason that in such a case a Sub-Magistrate cannot pronounce "judgment." The words "in other cases" occurring in Cl. (1) merely describe a class of cases and do not imply that the trial has reached any particular stage. The words "in other cases before judgment is pronounced" provide for the extreme limit or the ultimate point of time up to which a case can be withdrawn and not that the Court which is empowered to pronounce final judgment alone, is competent to grant permission. Those words are wide enough to include a preliminary register case as well.

Section 494, Cr. P. Code, does not expressly require the Court to give any reasons for consenting to the withdrawal nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order. It is not the function of the Court to add to the statute by laying down that reasons should be given when S. 494 makes no mention of such a thing. Hence, it is not obligatory upon the Court to record any reasons for granting permission to withdraw. ILR (1949) Mad 64: 61 LW 208: 1948 MWN 285: 49 Cr LJ 540: AIR (Vol 35) 1948 Mad 422: (1948) 1 MLJ 223.

——S. 494 — **Court's duty to record reasons.** The Court is not bound to record reasons in writing in giving consent to the Public Prosecutor to withdraw from the prosecution of any person. AIR (Vol 32) 1945 Bom 147: 46 Bom LR 808: 218 Ind Cas 257: 46 Cr LJ 434: ILR (1945) Bom 141 (DB).

——S. 494 — **Reasons must be given.** Reasons must be given to justify an order permitting the withdrawal so as to enable the High Court to judge whether the Magistrate has exercised his discretion rightly. AIR (Vol 30) 1943 Sind 161: 44 Cr LJ 795: 208 Ind Cas 533 (DB).

——S. 494 — **Reasons must be given.** An order under S. 494, Criminal P. C., consenting to the withdrawal of a case is a judicial order; to be a judicial order, there must be reasons underlying it. It is desirable, in the interest of justice that reasons should be given by a Subordinate Magistrate so that the High Court can judge whether the Magistrate's discretion has been rightly exercised. AIR (Vol 27) 1940 Sind 233: 42 Cr LJ 182: ILR (1941) Kar 32: 191 Ind Cas 440 (DB).

——S. 494 — **Reasons for withdrawal.** Reasons, no doubt, for giving permission to withdraw a criminal case are desirable, but to say that they are essential is over-stating the law. Once the consent of the Court is given, it rests on the party applying to have this decision set aside to show that the consent was given in disregard of the judicial exercise of the discretion which the Magistrate has, to give his consent to the withdrawal. AIR (Vol 25) 1938 Nag 76: 39 Cr LJ 65: ILR (1939) Nag 85: 172 Ind Cas 130.

——S. 494 — An order passed u/s. 494 must be passed like any other considered order and the Magistrate is bound to give his reasons. 'A fortiori' the Magistrate is bound to give his consent to a withdrawal; no tacit assent may be assumed. AIR (Vol 20) 1933 Nag 78: 34 Cr LJ 519: 29 NLR 201: 143 Ind Cas 77.

——S. 494 — **Record of reasons.** In granting permission to withdraw a prosecution under S. 494, Criminal P. C., the Court is not bound to record any reasons for granting any such permission. AIR (Vol 19) 1932 Lah 368: 33 Cr LJ 337: 33 PLR 394: 136 Ind Cas 714.

——S. 494 — **Reasons if should be stated.** Per Percival A. J. C.— It is not "obligatory" on the Court to record reasons for permitting a withdrawal. That is to say the mere fact that the Magistrate has not recorded reasons for withdrawal of itself is not a sufficient ground for setting aside the granting of application for withdrawal and the acquittal of the accused.

Per Rupchand A. J. C.— There is nothing in S. 494 to require the Magistrate to record his reasons at the time of allowing the withdrawal of a case. But it is desirable that where a case is permitted to be withdrawn there should be some materials on the record of the case to satisfy the High Court that prima facie there was some good ground for the withdrawal of the case and that it was not left to the whim of the Public Prosecutor. Where the District Magistrate has been moved by an application from the accused to have the case withdrawn either the original application of the accused or an application from the Public Prosecutor stating briefly the reasons for withdrawal should be placed on the record or in any event the Court should in its own order give an indication as to the circumstances under which it grants its sanction. In the absence of such material on the record it is difficult for Government to decide if an appeal should be preferred or for the High Court to decide if the order sanctioning withdrawal is one which should not be interfered with. 124 Ind Cas 378: 24 SLR 377: 31 Cr LJ 684: 1930 Cr C 620: AIR (Vol 17) 1930 Sind 156 (DB).

——S. 494 — Mitter J.— Order under S. 494 is a judicial order & the Court should record reasons in order to enable the High Court to judge whether the order of the withdrawal has been rightly made. AIR 1924 Pat 283, Not foll.

Suhrawardy J.— It is a matter between the Public Prosecutor and the Magistrate and neither

of them need assign any reason to record. 121 Ind Cas 678: 33 CWN 468: 56 Cal 1023: 31 Cr LJ 315: AIR (Vol 16) 1929 Cal 319 (DB).

——S. 494 — Although a reasoned judgment establishing the propriety of the order, as required by S. 367, is not necessary in the case of the order, passed under S. 494, still there must be something on record to show why the Magistrate consented to the withdrawal. The Court should record its reasons in order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. 118 Ind Cas 63: 25 NLR 6: 30 Cr LJ 872: AIR (Vol 16) 1929 Nag 133.

——S. 494 — Where the only reason given by the Court for allowing withdrawal from prosecution was that on a previous trial in connection with the riot in connection with which the present accused were charged six persons had already been convicted and punished, being sentenced to various terms of punishment. Held, that the imprisonment of the first six cannot be regarded as a vicarious atonement for the sins, if any, committed by the present accused. The order allowing withdrawal was therefore bad. 71 Ind Cas 693: 26 CWN 880: 24 Cr LJ 229: AIR (Vol 11) 1924 Cal 382 (DB).

——S. 494 — S. 494 does not expressly require the Court to give any reasons for consenting to the withdrawal, nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order. S. 494 gives the trial Court full jurisdiction to give or refuse consent and the High Court will only interfere in revision if some question of jurisdiction is involved. 22 CWN 69, 48 Cal 1105, 26 CWN 880, Diss. 77 Ind Cas 734 : 2 Pat 708 : 5 Pat LT 404 : 25 Cr LJ 446: 2 Pat LR Cr 165: 2 Pat LR Cr 187: AIR (Vol 11) 1924 Pat 283 (DB).

**——S. 494 — Court must record reasons when allowing withdrawal — Advocate-General alone can withdraw without giving reasons.**

The only prosecutor who may under the Code withdraw from a prosecution without the consent of the Court and without giving reasons is the Advocate-General. No other Public Prosecutor is placed in that privileged position. When a Court acting under S. 494 gives its consent to a withdrawal from the prosecution, it is acting in a judicial capacity and therefore it should record its reasons in order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. Where the prosecution is so withdrawn and the Court records an order of acquittal, the proper course is to appeal through Local Government and not by way of revision. 81 Ind Cas 930: 1 Rang 756: 2 Bur LJ 287: 25 Cr LJ 1106: AIR (Vol 11) 1924 Rang 168.

**——S. 494 — Non-compliance with is not a ground for revision — Cr. P. Code, S. 439.**

Where the Magistrate should have given his reasons for allowing withdrawal and did not act properly in passing the very brief order, viz., "the case is withdrawn, the accused is hereby discharged", without reference to S. 494 which could have shown him that his consent was necessary and that (under certain authorities) he had to state his reasons for giving that consent.

Held, the absence of any statement of reasons in the particular case did not vitiate that order to such an extent as to make this case a fit case for exceptional treatment and to justify the setting aside of an acquittal on revision in the absence of appeal by Local Government under S. 417. 72 Ind Cas 593: 24 Cr LJ 433: AIR (Vol 10) 1923 Lah 163.

——S. 494 — In according or withdrawing consent to an application by the Public Prosecutor for withdrawal under S. 494 (a) the Court acts in a judicial capacity and for its order, as for every order judicially made, the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. 72 Ind Cas 361: 6 NLJ 177: 24 Cr LJ 361: AIR (Vol 10) 1923 Nag 260.

——S. 494 — An order by which a Court acting under S. 494 accords consent to the withdrawal from a prosecution, is a judicial order and for every such order the reasons should be given so that the High Court acting in its revisional jurisdiction may be in a position to examine into the matter and determine whether the discretion vested in the Court has been properly exercised. Before accepting and acting upon the reason given for withdrawal by the Public Prosecutor the Sessions Judge should examine the commitment record for himself. 48 Cal 1105: 34 CLJ 51: 25 CWN 615: 22 Cr LJ 760: 64 Ind Cas 280: AIR (Vol 8) 1921 Cal 259 (DB).

——S. 494 — In withholding or according consent to the withdrawal of a prosecution under S. 494 the Court acts in a judicial capacity and for its order, as for every order judicially made, it ought to record reasons. 4 Ind Cas 1126, Diss. 26 CLJ 208: 18 Cr LJ 886: 22 CWN 69: 41 Ind Cas 998: AIR (Vol 5) 1918 Cal 485 (DB).

### 10. Revision.

S. 494 — Direction to withdraw under S. 494, Cr. P. Code, a prosecution launched — Nature of order — If revisable. See (1949) 2 MLJ 388.

**——Ss. 494 and 439 — Consent given by Court for withdrawal — Revision — Interference.**

The giving of consent by a Court for the withdrawal of a prosecution under S. 494, Cr. P. Code, is a judicial act, and it is open to the High Court in revision to set aside an order which followed upon the giving of such consent on the view that it was improperly given. 49 PLR 305: AIR (Vol 35) 1948 Lah 74: 49 Cr LJ 106 (DB).

**——Ss. 494, 439 — Revision by witness who is aggrieved.**

An order made by a Magistrate under S. 494 Criminal P. C., can be set aside in revision even where the revision application is made by a witness in the case who is the aggrieved person. AIR (Vol 27) 1940 Sind 233: 42 Cr LJ 182: ILR (1941) Kar 32: 191 Ind Cas 440 (DB).

——S. 494 — Sessions Judge refusing permission to withdraw — High Court would be reluctant to interfere. 48 Cal 1105, Cons. 23 MLW 101: 27 Cr LJ 334: 92 Ind Cas 750: AIR (Vol 13) 1926 Mad 296 (DB).

——S. 494 — The section controls other sections in the Code — Case withdrawn — Sufficient reasons given — Revision was refused. 71 Ind Cas 53: 24 Cr. LJ 5: AIR (Vol 11) 1924 Cal 538 (DB).

**——S. 494 — No revision lies at the instance of private person.**

An order of acquittal passed under S. 494, Cr. P. Code, should not be revised by the High Court at the instance of a private party. The private prosecutor has no position at all in criminal litigation. The Crown is the prosecutor and the custodian of the public peace, and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance. 77 Ind Cas 734: 2 Pat 708: 5 Pat LT 404: 25 Cr LJ 446: 2 Pat LR Cr 165: 2 Pat LR Cr 187: AIR (Vol 11) 1924 Pat 283 (DB).

**11. Stage for withdrawal.**

**——S. 494 (a) — Withdrawal at beginning or after charge.**

A withdrawal at the beginning of a case must come under S. 494 (a), Criminal P. C., and would only amount to a discharge of the accused and it would not come under sub-s. (b), a withdrawal after a charge has been framed, which produces the result of an acquittal. AIR (Vol 22) 1935 All 366: 1935 ALJ 653: 1935 AWR 134: 36 Cr LJ 1103: 157 Ind Cas 205: 1935 All LR 741.

——S. 494 — Per Mukherji J.— The expression 'cases tried by jury', in S. 494, Cl. 1, means a state of things when it can be said that there is, in fact, a trial by a Jury. When the accused has been committed to the Court but a jury trial has not begun the case is not within Cl. (1) of S. 494, and is within Cl. (2). In such a case the withdrawal of the case may be permitted until the judgment is pronounced. If the trial before a jury has actually begun, the case will at once come within Cl. (1) and that clause will then apply to it. AIR (Vol 19) 1932 Cal 699: 60 Cal 233: 36 CWN 928: 56 CLJ 79: 34 Cr LJ 433: 142 Ind Cas 891 (DB).

**——S. 494 — Time for withdrawal — Accused convicted by first Court — Appeal by accused — Petition for withdrawal cannot be put in, in appellate stage.**

It is only in cases indicated in S. 494, that is to say in cases to be tried by jury, before the return of the verdict and in other cases in the Court of first instance before the judgment is pronounced, that the public prosecutor may with the consent of the Court withdraw from the prosecution of any person. It does not contemplate the case of withdrawal by the public prosecutor after the conviction of the accused by the first Court and in the appellate stage of a case. The Public Prosecutor has no right at the appellate stage of the case to present any petition for withdrawal under S. 494, even though the petition is inspired by the District Magistrate, nor is the Sessions Judge entitled to allow the Public Prosecutor to put in such an application and to proceed to acquit the accused before he even attempted to judicially determine the accused's appeal. 46 CLJ 121: 104 Ind Cas 449: 28 Cr LJ 833: AIR (Vol 14) 1927 Cal 816 (DB).

**——Section 495.**

**——S. 495 (1) — "Any such officer" — If includes private prosecutor — Power to withdraw from prosecution.**

The expression "any such officer" in S. 495 (2), Cr. P. Code, includes only the officers specified in S. 495 (1), and does not include a private person who is permitted to conduct the prosecution in a particular case. A private prosecutor cannot therefore withdraw from a prosecution. Such power can be exercised only by a public prosecutor. 28 Pat 70: AIR (Vol 36) 1949 Pat 344: 50 Cr LJ 699 (DB).

**——S. 495 (2) — Withdrawal from prosecution — Public Prosecutor not appearing in official capacity — Power of.**

Per Khundkar J.— The words "any such officer" in S. 495 (2), Cr. P. Code, contemplate the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer when generally or specially empowered by the Provincial Government in this behaif, that is to say, when these officers are appearing in a case in their official capacity. Therefore, a Public Prosecutor appearing for a complainant, not in his official capacity but with the permission of the Court, has no power of withdrawing from the prosecution. ILR (1946) 2 Cal 123 (DB).

**——S. 495 (4) — Police Officer taking part in investigation if can conduct case.**

In security proceedings, the accused is not prosecuted for any offence within the meaning of S. 495 (4), Criminal P. C. Hence sub-s. (4) of S. 495, Criminal P. C., does not apply to security proceedings. It may be that by analogy, it is not desirable that a Police Officer should conduct a case under Chap. VIII, if he has taken part in the investigation, and if he should apply for permission under sub-s. (1) to do so, such permission may very properly be refused.

But there is no provision of law which prevents the Magistrate in proceedings under Chap. VIII to allow the Police Officer who makes the investigation to conduct the case in Court. AIR (Vol 30) 1943 Sind 54: 44 Cr LJ 44: ILR (1943) Kar 22: 203 Ind Cas 90 (DB).

**——Ss. 495 (1) (4), 110 — Scope.**

A person in respect of whom an inquiry is being made under S. 110, Criminal P. C., is not being prosecuted for any offence. Hence, sub-s. (4) of S. 495 does not apply in the case of an inquiry under S. 110, but on the other hand, sub-s. (1) of S. 495 does apply, since the Magistrate is enquiring into a case. Under that sub-section, the Magistrate has a discretion whether to allow the Police Sub-Inspector to conduct the prosecution or not and he is entitled to exercise his discretion by analogy to sub-s. (4). It is generally undesirable for the Police Sub-Inspector who has been enquiring into a case under S. 110 to conduct such case. AIR (Vol 27) 1940 Bom 416: 42 Bom LR 909: 42 Cr LJ 150: 191 Ind Cas 334 (DB).

**——Ss. 495, 526 — Murder — Counsel privately engaged by complainant is not proper person.**

In the prosecution of a case of murder, an Advocate privately engaged is not a proper person to conduct the prosecution. It is essential that in the prosecution on behalf of the Crown, private interests and private feelings, for instance, the desire for vengeance should have no place. Therefore, an Advocate privately engaged to represent the complainant should have no other place than that of one strictly subordinate to the officer who prosecutes on behalf of the Crown. AIR (Vol 27) 1940 Sind 220: ILR (1940) Kar 482: 42 Cr LJ 158: 191 Ind Cas 378.

**——S. 495 — Circle Inspector, if can withdraw.**

Under S. 495, Criminal P. C. an officer of the Police not below a certain rank, which the Local Government is to prescribe is entitled to conduct the prosecution and is, therefore, by the same section, entitled to make an application for withdrawal. Where the lowest rank prescribed by the Local Government is that of the Sub-Inspector and a Circle Inspector being above that rank, his appearance in the case under the instructions of the District Superintendent of Police to apply for withdrawal is sufficient to enable him to present the application for the withdrawal. AIR (Vol 25) 1938 Nag 76: 39 Cr LJ 65: ILR (1939) Nag 85: 172 Ind Cas 130.

**——S. 495 — Court Jamadar, empowered to conduct case, present — Magistrate, if can permit other person to conduct it.**

The Court Jamadar who is a first grade headconstable is an officer generally empowered by the Local Government to conduct prosecutions and is, therefore, an officer entitled to conduct the prosecution without the permission of the Magistrate. When there is an officer who has that power present in Court, it cannot be open to the Magistrate to give permission to some other person to conduct the prosecution either instead of or along with him without his consent. AIR (Vol 23) 1936

Bom 35: 37 Bom LR 967: 37 Cr LJ 333: 160 Ind Cas 689 (DB).

**——S. 495 — Complaint by woman for outraging her modesty — Advocate engaged by her — Permission granted — Court Jamadar applying to conduct prosecution — Reference to District Magistrate — Procedure, if proper.**

A Magistrate is required to exercise his discretion in a judicial manner in giving permission under S. 495, Criminal P. C., to any person to conduct a prosecution. He has to exercise his discretion after consideration of the circumstances of the case. In trials for grave offences, a very heavy duty is cast upon the Police and it is not for a private individual to see that the Crown is properly represented. If a Magistrate exercises his discretion in a judicial manner, a High Court will not lightly interfere. In cases of dispute, adequate reasons should be given for the order.

M, a woman, reported to the Police that three persons had committed an assault upon her and outraged her modesty, thereby committing an offence under S. 354, I. P. C., read with S. 109. They were sent up for trial. M, the applicant had engaged an Advocate to safeguard her interest, and at the commencement of the trial, this Advocate made an oral application to the Court under the provisions of S. 495, Criminal P. C., asking for permission to appear and conduct the case on behalf of the prosecution. The application was granted. The case proceeded and the complainant was examined-in-chief and partly cross-examined. An application was then made to the Court by a Police Jamadar submitting that he and not the complainant's Advocate should be permitted to conduct the prosecution on the ground that the case was a Crown case instituted by the Police and that it was his duty to conduct it. The Magistrate communicated with the District Magistrate informing him of the situation and asking for instructions. After getting instructions, the Magistrate directed that the Court Jamadar should conduct the prosecution and that the Pleader could only assist him. The applicant filed a petition in revision seeking to set aside that order and obtain an order that her Advocate should be permitted to continue the prosecution:

Held, that the Jamadar who was applying to conduct the prosecution was governed by S. 495, Criminal P. C., and had, under that section, to obtain permission from the Magistrate to appear. The order permitting the Advocate to appear and conduct the prosecution was proper but the procedure subsequently adopted by the Court in referring the matter to the District Magistrate was not proper. In the first place, it was not competent for him to apply to higher authority for advice in such circumstances, and in the next place, having obtained such advice, to vary an order already passed in the exercise of a proper judicial discretion. Consequently, under the circumstances, the original order should stand. AIR (Vol 22) 1935 Sind 3: 36 Cr LJ 1046: 29 SLR 114: 156 Ind Cas 789.

——S. 495 (4) — Excise Officers are impliedly as they are not expressly included in the expression "Officer of Police" in S. 495(4), Criminal P. C. AIR (Vol 20) 1933 Bom 234: 35 Bom LR 376: 57 Bom 441: 34 Cr LJ 905: 145 Ind Cas 138 (DB).

**——S. 495 — Permission, when can be granted.**

Before a private individual can conduct a Crown case, it is necessary for the applicant to obtain permission of the Court under cl. (1) of S. 495, Criminal P. C., that he should himself be put in charge of the prosecution. If he obtains permission for himself, then it is no doubt open to him to brief Counsel to represent him. The provisions of S. 495, cl. (1) are no doubt wide enough so as to empower a trying Magistrate to permit "any person" to conduct the prosecution but that does not mean that the trying Magistrate should grant such permission indiscriminately. He has to exercise his discretion after considering all the circumstances of the case. In a trial for grave offences such as murder, a very heavy duty is cast on the Police and the District Magistrate to see that a real offender does not get off, and it is for the District Magistrate and not for a private individual to see that the Crown case is properly conducted. The fact that the accused is an influential man and the allegations that the investigating Police Officer did not do his duty properly before the case was sent to the Court, that the Crown case is being mishandled, and that the prosecution is not being conducted by the Public Prosecutor himself, but an officer called the Assistant Police Prosecutor who will not be able to do justice to the case, are not sufficient grounds to justify the complainant being permitted to be put in charge of the Crown case.

It is no doubt true that an officer who is either generally or specially empowered by the Local Government to conduct a prosecution is clothed with very wide powers and cl. (2) of S. 495, Criminal P. C., empowers such officer to enter a nolle prosequi. But whether an officer of the grade of an Assistant Police Prosecutor should be clothed with such authority or not is a matter for Government to decide. AIR (Vol 20) 1933 Sind 345: 35 Cr LJ 320: 27 SLR 331: 147 Ind Cas 131 (DB).

**——S. 495 — Applicability to security proceedings.**

Though the proceeding under S. 107 is not a complaint and the Magistrate cannot proceed under Ss. 202 and 203, yet he can refer the matter to the Police for enquiry and report and if the Magistrate has issued notice under S. 112, he can direct the Police to adduce evidence on behalf of prosecution. AIR (Vol 19) 1932 All 670: 1932 ALJ 880: 34 Cr LJ 42: 54 All 1036: 140 Ind Cas 536.

**——S. 495 — Permission not necessary — Counsel engaged by complainant — Right to address Court.**

Where the complainant engaged counsel after the examination of the witnesses and the Public Prosecutor desired him to address the Magistrate for the prosecution at the conclusion of the case.

Held, that the permission of the court under S. 495 was not necessary for that purpose. 1930 MWN 769.

**——S. 495 — Engaging pleader.**

Prosecutor can choose his own pleader save where the Public Prosecutor takes up the case. 18 SLR 30: 25 Cr LJ 571: 81 Ind Cas 59: AIR (Vol 12) 1925 Sind 99 (DB).

**——S. 495 — Complainant — Also Prosecuting Inspector — Permission — Discretion of Court.**

The fact that the complainant in a case is also Prosecuting Inspector of the Court does not debar him from proscuting the case in his private capacity as a private citizen. Under S. 495 Cr. P. C. the trying Magistrate should decide himself whether he should allow complainant to conduct the prosecution and should not be guided by the District Magistrate's opinion on reference. 17 Cr LJ 486: 10 Bur LT 213: 36 Ind Cas 166: AIR (Vol 4) 1917 Low Bur 153.

**——S. 495 — Circle Inspector permitted to prosecute — If can withdraw.**

A Police Circle Inspector permitted to conduct a prosecution can withdraw it, with the permission of the trying Court, under S. 495. AIR (Vol 2) 1915 Mad 234: 1914 MWN 776: 15 Cr LJ 641: 25 Ind Cas 841.

——S. 495 — **Withdrawal by Police Inspector.**

Criminal Court cannot acquit an accused on a motion for withdrawal of the case by a Police Inspector who is not specifically permitted to conduct the prosecution under S. 495, Cr. P. C. (1909) 10 Cr LJ 501 (502): 4 Ind Cas 132 (Mad) (DB).

——S. 495 (4) — **Police Inspector arresting an accused and searching books, how far an investigating officer.**

An Inspector of Police, on information received by him, applied for a warrant and arrested the accused, seized the property found, and named the witnesses to be summoned by the Magistrate; but he did not examine any of the witnesses and his investigation was confined to an inspection of the books and papers which had been seized.

Held, that the Inspector fell within the provisions of S. 495 (4). (1902) 4 Bom LR 271: 26 B 533 (536, 537) (DB).

——S. 496.

See also Criminal P. C. S. 497.

1. Scope and object.
2. Bail before investigation.
3. Breaking of bail.
4. Cancellation.
5. Defence of India Rules, R. 130A.
6. Discretion and duty of Court.
7. Order of release, communication of.
8. Power of High Court.
9. Security proceedings.
10. Surety, liability of.

**1. Scope and object.**

——S. 496 — **Right of bail.**

Per Full Bench, Bajpai, J., contra. — The provisions regarding bail are essentially a part of the law of procedure, and, as such, must be regulated by the law under which a particular trial is held. The commission of an offence does not 'ipso facto' carry with it a right of bail. Such a right is dependent on the provisions contained in a statute and to the statute alone can the Court look for any right which the offender claims. AIR (Vol 30) 1943 All 26: 1942 ALJ 686: 1942 AWR HC 392 (1): ILR (1943) All 238: (1942) 5 FLJ (HC) 233: 44 Cr LJ 216: 205 Ind Cas 113 (FB).

——S. 496 — Bail is a matter of procedural privilege at the most, and not an accrued right at least until it is granted. AIR (Vol 30) 1943 Nag 36: 1943 NLJ 16: ILR (1943) Nag 73: 44 Cr LJ 237: (1943) 6 FLJ (HC) 53: 205 Ind Cas 161 (DB).

——S. 496 — As S. 496 itself indicates, it covers the case of accused persons and not persons who have been convicted of an offence. AID (Vol 29) 1942 Sind 132: ILR (1942) Kar 278: 44 Cr LJ 378: 205 Ind Cas 322 (DB).

——S. 496 — **Applicability.**

The proviso in S. 496 that bail can be granted only to a person other than a person accused of a non-bailable offence is not applicable to the Court of Session acting under S. 498, Cr. P. Code. AIR (Vol 16) 1929 All 614: 10 LRA Cr 98: 1929 ALJ 927: 30 Cr LJ 718 : 12 AI Cr R 65 : 117 Ind Cas 99 : 1929 Cr C 193.

——S. 496 — A person who is re-arrested after having been discharged on executing a surety bond, is entitled to be released under S. 496, if he is not accused of a non bailable offence. AIR (Vol 16) 1929 Pat 654: 1929 Cr C 382: 30 Cr LJ 809: 10 PLT 801: 117 Ind Cas 628.

——S. 496 — Refusal of bail is contrary to the spirit of the provisions of Ch. 8. The object of this Chapter is to prevent a suspect from committing offences and to allay public apprehensions, and that object is sufficiently attained by requiring him to find sureties. AIR (Vol 13) 1926 Sind 288: 20 SLR 122: 27 Cr LJ 935: 96 Ind Cas 391.

**2. Bail before investigation.**

——S. 496 — Directing bail before the Police investigation — Section allows such a power. AIR (Vol 10) 1923 Lah 663: 26 Cr LJ 167: 83 Ind Cas 727.

**3. Breaking of bail.**

——S. 496 — A person who applies to the High Court and is allowed out on bail and afterwards breaks his bail, is not entitled to have his application in revision heard. AIR (Vol 10) 1923 All 327: 4LRA Cr 72: 24 Cr LJ 240: 71 Ind 704.

**4. Cancellation.**

——S. 496 — Where an accused is already out on bail, the fact that in the meanwhile, he puts in a petition setting up an alibi, is not such a conduct on his part as to make it necessary to cancel the bail bond. AIR (Vol 29) 1942 Pat 52 (1): 42 Cr LJ 882: 196 Ind Cas 476 : 8 BR 29.

——Ss. 496, 497 — **Offence becoming non-bailable.**

In an application for release of a person on bail, it was found that he was accused of a bailable offence and released on bail granted under S. 496 but through some development in the condition of the party injured, the offence became a non-bailable one punishable with transportation for life:

Held, that the Magistrate had power to cancel the bail granted to carry out the provisions of S. 497 (1), Criminal P. C. AIR (Vol 23) 1936 Sind 187: 30 SLR 131: 38 Cr LJ 93: 1936 Cri Cas 972: 165 Ind Cas 923.

——Ss. 496, 497 — **Bail cancelled by High Court — Sessions Judge, if can grant subsequently.**

Where the High Court has cancelled a bail granted by the Sessions Court, unless a new case for granting bail is shown to exist as to why the order of the High Court should be altered, there is no authority which authorises the Sessions Judge to reverse the order of the High Court. AIR (Vol 20) 1933 All 895: 3 AWR 68: 35 Cr LJ 814: 1933 Cri C 1525: 1934 All LR 369: 148 Ind Cas 133.

——Ss. 496, 501 — **Cancellation.**

Where the accused was not charged with a non-bailable offence and was let on bail by the City Magistrate in whose Court the case was pending but on a Police report, the District Magistrate cancelled the bail and instructed the Police to obtain a warrant of arrest for the accused:

Held, that the order of the District Magistrate who had no seisin of the case was without jurisdiction and that even the trying Magistrate was not empowered to cancel the bail in a case in which the accused was, as a matter of right, entitled to be on bail, and that the utmost which the trying Court could do was to enhance the amount of bail. AIR (Vol 19) 1932 All 327: 33 Cr LJ 752: 1932 Cri Cas 306: 13 LRA (Cr) 100: 18 AI Cr R 98: 139 Ind Cas 330.

**5. Defence of India Rules, R. 130A.**

——S. 496 — **R. 130A, Defence of India Rules does not make bailable offence non-bailable.**

Under R. 130-A, Defence of India Rules, no bail can be ordered without the prosecution being given an opportunity to oppose the application for bail. But offence itself does not thereby become non-bailable. If the offence is bailable, the prosecution must show why the accused should not be released on bail. AIR (Vol 31) 1944 Nag 149: ILR (1944) Nag 813: 1944 NLJ 75: 46 Cr LJ 247: 217 Ind Cas 207.

**——S. 496 — Effect of Defence of India Rules, 1939, R. 130-A.**

The effect of R. 130-A, Defence of India Rules, 1939, is to repeal the provisions of S. 496, Criminal P. C., in so far as it divests the Court of its discretion in the matter of refusing bail in cases of bailable offences.

Rule 130-A gives the Court a discretion in the matter. AIR (Vol 30) 1943 Bom 82: 45 Bom LR 72 : 44 Cr LJ 399 : ILR (1943) Bom 167: 205 Ind Cas 602 (DB).

**6. Discretion and duty of Court.**

**——S. 496 — Bail, granting of — Imposition of conditions — Legality.**

In bailable offences there is no question of discretion in granting bail as the words of S. 467, Cr. P. Code, are imperative. In such cases the Criminal Court has no discretion while granting bail to impose any condition except demanding of security with sureties.

Where a Magistrate while releasing the accused on bail stated that besides executing bonds with sureties, their release was subject to the condition that the accused would not enter upon the land in dispute for a particular period & that they would not commit any breach of the peace.

Held that the conditions were repugnant to the principle underlying S. 496 of the Cr. P. Code and they have to be deleted. AIR (Vol 36) 1949 Mad 77 : 1948 MWN 368 (2) : 49 Cr LJ 640 : (1948) 1 MLJ 332 : 61 LW 342.

**——S. 496 — Duty of Court and Police officer — Release on bail — Bailable offence — Arrested person offering bail and holding high position under Government — Duty to release on personal bond — Committal to custody — Propriety.**

S. 496, Cr. P. Code, obviously imposes a statutory duty both upon a Police officer and a Court to release a person arrested for a bailable offence on bail as soon as he is prepared to offer bail. They are also authorised in a fit case to direct his release on a personal bond. Where the arrested person, at the time of the arrest, holds a very high position under the Government of India, the case is a fit one for a mere personal bond and release. Unless the arrested person is unable or unwilling to offer bail or to execute a personal bond, he cannot be taken into custody. 48 Cr LJ 656 (Lah): (1947) 231 Ind Cas 32.

**——S. 496 — Duty of Court.**

In considering the question of bail, the Court has to make use of the material as it is before it and not as it will appear after the evidence has been taken in Court. AIR (Vol 30) 1943 Oudh 419: 1943 OWN 234: 44 Cr LJ 770: 1943 AWR (CC) 72: 208 Ind Cas 293.

**——S. 496 — Cash deposit.**

The law does not authorise a Magistrate to demand a cash deposit as a condition to the release of the accused on bail. The amount of every bond executed should be fixed with due regard to the circumstances of the case and should not be excessive. AIR (Vol 30) 1943 Pat 375: 24 PLT 229: 22 Pat 726: 10 BR 347: 45 Cr LJ 340: 211 Ind Cas 240.

**——S. 496 — No condition can be imposed.**

The Magistrate has no discretion in granting bail where a person is charged with bailable offences only. Hence imposing of a condition e.g., not to enter on the disputed land, in a bail order leads to the infringement of the provisions of S. 496, Criminal P. C., in case the condition is not fulfilled. AIR (Vol 29) 1942 Mad 740: 55 LW 693 (2): (1942) 2 MLJ 553: 1942 MWN 749: 44 Cr LJ 202: 1942 M Cr. C 142: 204 Ind Cas 88.

**——S. 496 — Status of accused.**

The main points for consideration in the application for bail are:—(1) Whether there is any likelihood of the accused absconding; and (2) whether there is any likelihood of the accused tampering with the evidence by threatening the complainant. The social position or status of an accused person should never be taken into consideration when granting or rejecting an application for bail.

Merely giving money for the defence of the accused does not mean that the person is tampering with the evidence of the prosecution witnesses.

The Courts must see that the accused are not locked up or are hampered in their defence simply because it is alleged that they will tamper with the evidence.

The persons accused under S. 302-115, Penal Code, are not entitled to bail as a matter of right. AIR (Vol 27) 1940 Oudh 8: 1939 OWN 791: 1939 AWR 144: 40 Cr LJ 841: 1939 Oudh LR 548: 183 Ind Cas 713.

**——Ss. 496, 497 — Arranging for funds and defence whether ground.**

Where two brothers are accused persons in a case, the fact that one of them should be given an opportunity to arrange for the defence and for funds, is not as sufficient reason to grant him bail where it has been held that the release of the accused persons on bail has led to tampering with the witnesses for the prosecution. AIR (Vol 20) 1933 All 895: 3 AWR 68: 35 Cr LJ 614: 1933 Cri Cas 1525: 1934 All LR 369: 148 Ind Cas 133.

**——S. 496 — Withholding of bail as punishment.**

Bail will not be withheld merely as a punishment and the requirements as to bail are merely to secure the attendance of an accused person at the trial. But in granting or refusing bail, the Courts generally take into consideration the following points; (1) the nature of the accusation; (2) the nature of the evidence in support of the accusation; (3) the severity of the punishment which conviction will entail, and (4) whether the accused, if released on bail, is likely (a) to tamper with the prosecution evidence or (b) to get up false evidence in support of the defence. AIR (Vol 20) 1933 Sind 367: 35 Cr LJ 144: 1933 Cri Cas 1339: 146 Ind Cas 561 (DB).

**——S. 496 — Case involving accounts.**

In cases involving the taking of accounts, it is desirable that the accused should be given full opportunity of instructing his counsel as regards accounts, etc.

Whether accused is to remain at large on bail depends upon in most cases the exigencies of the particular case, before the Court. In cases involving question of accounts, it is desirable that the accused be given full opportunity of instructing his

counsel as regards accounts etc. AIR (Vol 19) 1932 Lah 16: 32 PLR 383: 32 Cr LJ 1175: 1932 Cr Cas 26: 134 Ind Cas 490.

——S. 436 — Test for granting bail.

In exercising the discretionary power to admit a person to bail Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence and the character, means and standing of the accused. AIR (Vol 16) 1929 Lah 284: 30 Cr LJ 1129: 120 Ind Cas 10.

——S. 496 — A complaint was filed under Penal Code, S. 124-A but no original or translation of alleged speech was attached to it. Sanction of the Local Government required under S. 196, Cr. P. Code was attached. Although in the sanction order attached to the complaint a short abstract of the words used was given, it was not mentioned by the complainant in his statement. On application by the accused for granting bail the Magistrate refused bail.

Held, that there was no proper complaint and the Magistrate did not direct his mind to question of presence or absence of proper complaint and the order refusing bail was not passed on proper appreciation of the facts and non-bailable warrants should not have been issued. AIR (Vol 16) 1929 Lah 284: 30 Cr LJ 1129: 120 Ind Cas 10.

——S. 496 — The point of severity of punishment must be looked at not from what sentences in particular instances, the Courts have awarded but from what is possibly the maximum that the Court may award. AIR (Vol 16) 1929 Lah 284: 30 Cr LJ 1129: 120 Ind Cas 10.

——S. 496 — Offence bailable — Mere seriousness of the offence is not sufficient to refuse bail. AIR (Vol 15) 1928 All 211: 29 Cr LJ 450: 26 ALJ 363: 9 AI Cr R 326: 9 LRA Cr 44: 108 Ind Cas 689.

——S. 496 — The question of grant of bail is not only to be dealt with from the point of view of there being likelihood or not of the accused persons absconding. AIR (Vol 13) 1926 Nag 279: 27 Cr LJ 319: 92 Ind Cas 703.

**7. Order of release, communication of.**

**——S. 496 — Order of release, how communicated.**

The Police Regulations are a volume of orders by the Local Government and there is no paragraph in the Criminal P. C., giving the Local Government power to issue orders for carrying out the provisions of the Criminal P. C. The Criminal P. C., therefore cannot be modified by any orders of the Local Government in a Departmental Code. There is nothing in the Code, which suggests that orders of release passed by a Magistrate must be communicated through a Superintendent of Police. There is nothing in it which indicates that a Magistrate is incorrect when he adopts a method of giving his order for release directly to the sureties of the accused. The Code gives him authority to order release on bail and it is certainly not for a Sub-Inspector to refuse to carry out such an order on the mere technical quibble that he thought that such an order should be communicated to him through the Superintendent of Police. There is nothing in S. 167, Criminal P. C., which indicates that the order, either of detention or of release, should be communicated through the Superintendent of Police. There is nothing in S. 496 which provides that the order for release shall be communicated through the Superintendent of Police. AIR (Vol 25) 1938 All 534: 1938 ALJ 782: 1938 AWR 471: 39 Cr LJ 971: 1938 All LR 794: 177 Ind Cas 867.

**8. Power of High Court.**

**——Ss. 496 to 502, 561-A — Power of High Court to grant bail to convicted person before or after leave to appeal is granted by Privy Council.**

Sections 496 to 502 together with S. 426 are, and were intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail, and exclude the existence of any additional inherent power in a High Court relating to the subject of bail. Section 561-A of the Code confers no powers. It merely safeguards all exiting inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice.

The only granting of bail which is referred to in Chap. XXXIX is the granting of bail to accused persons. There is no reference therein to the granting of bail to persons who have been tried and convicted. The Code, therefore, confers no powers on a High Court in India to grant bail in the case of a convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard. AIR (Vol 32) 1945 PC 94: 1945 MWN 366: (1945) 2 MLJ 40: 58 LW 343: 47 Bom LR 634: 11 BR 493: 1945 ALJ 340: 46 Cr LJ 662: 49 CWN 477: 1945 NLJ 425: 26 PLT 217: ILR (1945) Lah 57: 220 Ind Cas 91.

**9. Security proceedings.**

**——Ss. 496, 109, 117 — Applicability to security proceedings.**

Section 496, Criminal P. C., applies to proceedings under S. 109. Section 496 does not merely refer to an accused person but generally to "any person other than a person accused of a non-bailable offence who appears or is brought before a Court."

In the absence of any special form prescribed by law with reference to the preventive sections of the Criminal P. C., there is nothing to prevent the use of the printed form prescribed for appearance under Ss. 496-499, specially when the bond makes it clear what the nature of the proceedings was and in which Court accused was to appear. AIR (Vol 27) 1940 Nag 75: 1939 NLJ 537: 41 Cr LJ 155: ILR (1940) Nag 61: 185 Ind Cas 318.

——S. 496 — In the case of proceedings under S. 107, the accused is entitled as of right to bail. AIR (Vol 20) 1933 Rang 165: 34 Cr LJ 1195: 1933 Cri Cas 764: 146 Ind Cas 23.

——S. 496 — A person against whom proceedings under S. 107 are taken is entitled as of right to bail. AIR (Vol 20) 1933 Rang 164: 34 Cr LJ 950 (2): 1933 Cri Cas 763: 145 Ind Cas 344.

**——Ss. 496, 107, 110 — Magistrate's power to detain in custody till completion of enquiry.**

The law does not empower a Magistrate to detain in custody, until the completion of the enquiry, a person against whom proceedings are pending under S. 107 or S. 110, Cr. P. C. S. 496, Cr. P. C., is imperative and the Magistrate is bound to release such person on bail or recognizances. (1904) 8 CWN 779: 32 C 80 (83): 1 Cr LJ 775 (DB).

**10. Surety, liability of.**

**——S. 496 — Liability of person given bail.**

Section 496, Criminal P. C., does not state that a person released on bail must give a bond himself. The person giving bail enters into a contract with a penalty clause to produce the accused person before a Magistrate when called upon. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to perform his contract, then the penalty clause may be put into operation against him, although it is not necessary to exact the penalty in full. AIR (Vol 27) 1940 Lah 339: 42 PLR 411: 41 Cr LJ 598: ILR (1941) Lah 519: 190 Ind Cas 688.

**——S. 496 — Form of.**

The terms of a bond or bail bond executed under S. 496 should be in accordance with form 42 or schedule. That form indicates what the contents of a bond with sureties should be. In order to be enforceable a bail bond must be in accordance with the form. Where the bond is not in accordance with the form, the person executing the same incurs no legal liability by executing it. AIR (Vol 15) 1928 Lah 318: 10 AI Cr R 247: 29 Cr LJ 491: 109 Ind Cas 219.

——S. 496 — A police officer acting under S. 496 has the power to demand a bail from person arrested or to accept his own bond without sureties. But under no provision of law the police officer can take a third party's bond for such person's appearance. There can be no surety without a principal. Where therefore no undertaking has been given by the person arrested to appear when called upon to do so it is not possible for any person to declare himself surety for his appearance. AIR (Vol 15) 1928 Lah 318: 29 Cr LJ 491: 10 AI Cr R 247: 109 Ind Cas 219.

**——S. 497.**

1. **Scope of the section.**
2. **Principles governing grant of bail.**
3. **"Offence punishable with death or transportation for life" — Sub-section (1).**
4. **Sub-section (2).**
5. **Cancellation of bail and rearrest — Sub-section (5).**
6. **Application for bail — Form and contents.**
7. **Revision.**

**1. Scope of the section.**

**——Ss. 497 and 499 — Bail before completion of investigation — Magistrate can require accused to appear before Police when required.**

Section 499, Criminal P. C., does not, in express terms, say that the accused can only be required to attend a Court, the Court of Session or the High Court. The words are wide enough to include a Police Station or a Police Office among the places which an accused person executing a bail bond may be required to attend. Consequently, the Magistrate admitting the accused to bail before the investigations are completed is competent to require him to appear before the Police when needed. AIR (V 32) 1945 Lah 215: 47 PLR 199: 47 Cr LJ 155: 221 Ind Cas 350.

——S. 497(5) — Applicability — Bail granted under S. 498 — Order for arrest — Power of High Court — S. 561-A — Jurisdiction of High Court. AIR (V 32) 1945 Mad 250: ILR (1946) Mad 62: 47 Cr LJ 106.

**——S. 497 — Rights and privileges of security prisoner.**

It is not correct to say that a man on trial for criminal offence is not entitled to the usual rights and privileges of an accused person if he happens to be a security prisoner. AIR (V 32) 1945 Nag 33: ILR (1945) Nag 74: 1945 NLJ 30.

——S. 497 — Section 497 does not authorise the grant by anticipation of bail to persons who are not arrested or detained. AIR (V 28) 1941 Sind 83: ILR (1941) Kar 281: 42 Cr LJ 703: 195 Ind Cas 178 (DB)

**——S. 497 — Law to be closely followed.**

The Criminal Procedure Code requires that in matters relating to the administration of law, such as the arrest of the accused and the granting of bail to the accused, the provisions of the law should be closely followed. AIR (V 28) 1941 Sind 83 : ILR (1941) Kar 281: 42 Cr LJ 703: 195 Ind Cas 178 (DB).

**——S. 497 — Applicability and scope.**

The new S. 497, Criminal P. C., draws a distinction between non-bailable offences which are punishable with death or transportation for life and other non-bailable offences. In the former case, the Magistrate's power for granting bail are restricted, but not so in the latter class of cases. AIR (V 27) 1940 Oudh 8: 1939 OWN 791: 1939 AWR 144: 40 Cr LJ 841: 1939 Oudh LR 548: 183 Ind Cas 713.

**——S. 497 — Proviso — Woman or sick or infirm person.**

The proviso to section 497 gives the court power to direct that any person under the age of sixteen years or any woman or any sick or infirm person, accused of such an offence be released on bail. AIR (V 27) 1940 Oudh 8: 1939 OWN 791: 1939 OLR 548: 183 Ind Cas 713: 1939 AWR 144: 40 Cr LJ 841.

**——S. 497 — Principles.**

In granting bail Magistrates can proceed under S. 497, Criminal P. C., only and their discretion is regulated by the provisions of that section; but S. 498 confers upon a Sessions Judge or the High Court, wide powers to grant bail which are not handicapped by the restrictions in the preceding section.

There is no hard and fast rule and no inflexible principle governing such discretion. The only principle that is established is that there should be a judicial exercise of that discretion. It is not any one single circumstance which necessarily concludes the decision, but it is the cumulative effect of all the combined circumstances that must weigh with the Court. AIR (V 18) 1931 All 504: 1931 ALJ 773: 33 Cr LJ 94: 54 All 115: 1939 Cri Cas 892: 135 Ind Cas 113 (SB).

**——S. 497 — Appeal to Privy Council.**

Petition for special leave to appeal to Privy Council lodged — High Court can grant bail pending petition. 15 PR 1908, Not Foll. AIR (V 14) 1927 All 97: 49 All 247: 8 LRA Cr. 2: 7 A I Cr R 29: 27 Cr LJ 1377: 25 ALJ 97: 98 Ind Cas 593 (DB).

**——S. 497 — Effect of amendment.**

In view of the amendment of S. 496 of the Cr. P. Code, Courts will be less fettered than before. AIR (V 11) 1924 Cal 476: 81 Ind Cas 220: 25 Cr LJ 732: 51 Cal 402: 38 CLJ 388 (DB).

**——S. 497 — Powers of trial Court and High Court.**

S. 497 deals with the powers of the trial Courts and the trial Court has no further power, but the

High Court as Court of appeal is not so restricted and it can act according to its own discretion. This discretion, however, is not to be used arbitrarily. It must be based on some judicial principles. In this case, on the ground that if the accused were kept in custody they would not be able to conduct their defence properly, the High Court released them on bail. AIR (V 11) 1924 Oudh 435: 81 Ind Cas 956 11 OLJ 527: 25 Cr LJ 1132.

——Ss. 497, 498—High Court and Sessions Judge's power to grant bail in cases tried under the special procedure. (1910) 14 CWN 512(516): 37 C 412: 6 Ind Cas 8: 11 Cr LJ 217.

### 2. Principles governing grant of bail.

(a) General.
(b) Duty of Court and discretion.
(c) Test and consideration.

#### (a) General.

——S. 497 — **Police diary, use of.**

Where Police information cannot be placed before Court, the accused cannot be called upon to answer to anything which the prosecution is not disclosing. It is quite illegal that the Court should act on material not disclosed to the accused because he would be prejudiced thereby. AIR (V 31) 1944 Nag 149: 1944 NLJ 75: ILR (1944) Nag 813: 46 Cr LJ 247: 217 Ind Cas 207.

——S. 497 — In a case of murder, the fact that the accused is a goshain and has no member in his family who can look after his case is no reason to admit him to bail. AIR (Vol 21) 1934 All 815: 3 AWR 668: 34 Cr LJ 184 (1): 1934 Cri Cas 998: 1934 All LR 1053: 152 Ind Cas 802 (2).

——S. 497 — **Crimes punishable with long terms of imprisonment.**

Save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be released on bail. The richer the accused and the more easy it is for him to find bail, the less it is desirable that he should be released, and in no circumstances whatever, without an order from the High Court should any person accused of murder be allowed bail. AIR (Vol 19) 1932 Pat 209: 11 Pat 280: 13 PLT 530: 33 Cr LJ 574: 1932 Cri Cas 522: 18 AI Cr R 315: 138 Ind Cas 27 (DB).

——S. 497 — Magistrate should not refuse bail unless there is likelihood of accused absconding or terrorising prosecution witnesses or committing similar or other serious offence. AIR (Vol 16) 1929 All 614: 117 Ind Cas 99: 10 LRA Cr 98: 1929 ALJ 927: 30 Cr LJ 718: 12 AI Cr R 65: 1929 Cr C 193.

——S. 497 — **English principles.**

In view of express provisions of Indian Statute, principles of granting bail laid down by English authorities should not be followed. AIR (Vol 15) 1928 Sind 142: 22 SLR 435: 29 Cr LJ 470: 109 Ind Cas 118.

——S. 497 — Both on principle and authority, S. 498 must be interpreted as being controlled by the provisions of S. 497. AIR (Vol 15) 1928 Sind 142: 109 Ind Cas 118: 22 SLR 435: 29 Cr LJ 470.

——S. 497—The phrase "death or transportation for life" in S. 497 must not be taken as extending to offences punishable with transportation for life only. AIR 1925 Rang 129, Diss. from. AIR (Vol 13) 1926 Rang 51: 93 Ind Cas 65: 3 Rang 538: 27 Cr LJ 401.

——S. 497 — **Policy of law — Under-trial prisoners.**

The present policy of the law is to allow the bail in the case of under-trial prisoners rather than to refuse it. That granting bail would be prejudicing the case is no reason for refusing bail. AIR (Vol 12) 1925 Lah 510: 92 Ind Cas 590: 7 LLJ 331: 26 PLR 440: 27 Cr LJ 302.

——Ss. 497 and 498 — **Bail — Grant of — Confession.**

The rule laid down in S. 497 is one founded upon justice and equity and should be followed by the High Court as well as by every other court subordinate to it, unless anything appears to the contrary. The High Court under S. 498 cannot use its powers to get rid of the very reasonable and proper provisions of S. 497. Where one of the accused made a confession implicating himself and the petitioners and the confession was corroborated by such of the evidence, as was recorded by the enquiring Magistrate, bail was refused in the High Court. AIR (Vol 2) 1915 Cal 784: 42 Cal 25: 16 Cr LJ 215: 27 Ind Cas 839 (DB).

——S. 497 — **Bail — Grant of bail in non-bailable offences — Practice.**

The rule in respect of non-bailable offences is that bail is not to be taken except in special circumstances. (1906) 8 Bom LR 420 (420): 3 Cr LJ 499 (DB).

#### (b) Duty of Court and discretion.

——S. 497—Bail will not be withheld merely as a punishment. But in granting or refusing bail, the Courts will take into consideration, amongst other things, the question whether the accused, if released on bail, is likely to tamper with the prosecution evidence or get up false evidence in support of the defence.

Magistrates are bound to consider whether a prisoner, if released, will suborn evidence and they may well refuse to enlarge on bail a prisoner who is of such a character that his presence at large will intimidate witnesses. AIR (Vol 21) 1934 Sind 131: 28 SLR 47: 36 Cr LJ 711: 1934 Cri Cas 1067: 155 Ind Cas 113 (DB).

——S. 497 — The High Court will only interfere with the discretion exercised by the Sessions Judge in refusing bail if that discretion was manifestly wrong or if, in fact, no real discretion has been exercised. Although the High Court has unfettered powers to grant bail, yet in exercising these powers the High Court ought to have regard to the limitations imposed on lower Courts in this connexion. AIR (Vol 13) 1926 Nag 279: 27 Cr LJ 319: 92 Ind Cas 703.

——S. 497 — Even under the present section, a magistrate has discretion to refuse release on bail in a non-bailable offence. AIR (Vol 13) 1926 Sind 257: 95 Ind Cas 939: 20 SLR 136: 27 Cr LJ 859.

#### (c) Test and consideration.

——S. 497 — A vague allegation that the accused is likely to tamper with evidence is not a justification for not releasing him on bail. AIR (Vol 31) 1944 Nag 149: 1944 NLJ 75: ILR (1944) Nag 813: 46 Cri L Jour 247: 217 Ind Cas 207.

——S. 497 — **Applicant young and respectable.**

Although in an application for bail, the argument that the applicant is of young age and comes from a respectable family and that it will be unfortunate that he should be associated with bad characters in jail if ultimately it is found that he was

not guilty, has some force, yet after all it is an argument which could be raised in almost every case, because respectable men, even older, may suffer deterioration from detention in jail. AIR (Vol 23) 1936 All 656: 1936 ALJ 961: 37 Cr LJ 1017: 1936 AWR 732: 1936 Cr C 792: 1936 All LR 799: 164 Ind Cas 703 (1).

——S. 497 — Accused can be granted bail in non-bailable cases on certain conditions. 1932 MWN 719.

**——Ss. 497, 498 — Principles — Penal Code, S. 121-A.**

The accused were charged under S. 121-A, Penal Code. They had not done any overt illegal act in pursuance of the alleged conspiracy and all that they were alleged to have done was to hold meetings, study the principles of communism and also to make attempt to disseminate those teachings. The conspiracy was nipped in the bud by the police and the case was not one in which the accused persons would probably be sentenced for transportation for life. It was not suggested that the accused were dangerous criminals who, if they were liberated, would in any way intimidate or cause hurt to the prosecution witnesses or that they would tamper with them and although the prosecution evidence was closed, the end of trial was not in sight and the Judge trying the case could not definitely say that the accused were really guilty:

Held, that under the circumstances, the case was pre-eminently one in which bail should be granted.

(Bail was granted on condition that the accused gave an undertaking in writing to the District Magistrate that they will not take part in any public demonstration or agitation of any description and that they will not make any public speeches or contribute anything to the public press during the time they were out on bail.)

Per Mukherji, J. — The principle to be deduced from Ss. 496 and 497 is that grant of bail is the rule, and refusal is the exception. An accused person is presumed under law to be innocent till his guilt is proved and as a presumable innocent person, he is entitled to every freedom and every opportunity to look after his case. An accused person, if he enjoys freedom will be in a much better position to look after his case and to properly defend himself than if he were in custody.

Per Boys J. — Section 497 (1) applies to a stage when the accused is first brought before a Court or his arrest is brought to the notice of the Court. It has no application to an application for bail presented during trial even if it is made before a Magistrate. The appropriate provision applicable where the investigation or inquiry or trial has been proceeding is sub-s. (2) of S. 497. AIR (Vol 18) 1931 All 356: 1931 ALJ 515: 32 Cr LJ 1271: 53 All 931: 134 Ind Cas 842: 1931 Cri Cas 612: 15 AI Cr C 526 (DB).

**——S. 497 — Grounds for refusal.**

When the allegations against a prisoner are of a vague and general character and are not better defined or substantiated, they are not a sufficient ground for refusing an application to enlarge a prisoner on bail. AIR (Vol 17) 1930 Bom 484: 129 Ind Cas 341: 1930 Cr C 1020: 32 Bom LR 1131 (DB).

**——S. 497 — Grounds for bail.**

Accused convicted of non-bailable offence — Court of appeal should not release the accused on bail unless there is an error of law or mistake of fact or for any other reason mentioned in S. 497(1). AIR (Vol 15) 1928 Sind 142: 22 SLR 435: 109 Ind Cas 118: 29 Cr LJ 470.

**——S. 497 — Facts to be considered — Principles guiding Magistrates in granting bail indicated.**

The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal enquiry is, whether a recognizance would effect that end. In seeking an answer to this enquiry, Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances the character, means and standing of the accused. The intention of the Legislature is that an accused person should be brought before a magistrate competent to try him with as little delay as possible, and that occasions for remand to jail custody of undertrial prisoners should be as few as possible. AIR (Vol 14) 1927 Nag 53: 97 Ind Cas 39: 27 Cr LJ 1063: 7 AI Cr R 138.

——S. 497 — There is no difference between the English and the Indian practice. Bail is not to be withheld merely as a punishment and the requirements as to bail are merely to secure the attendance of the accused at the trial. The test is to be applied by reference to the following considerations amongst others: (1) The nature of the accusation. (2) The nature of the evidence in support of the accusation. (3) The severity of the punishment which conviction will entail. (4) The character of the sureties that is to say, whether they are independent or indemnified by the accused. (5) The character and behaviour of the accused. Any allegation that the accused is tampering, or attempting to tamper, with witnesses, and thereby obstructing the course of justice, would be a very cogent ground for refusing bail. AIR (Vol 14) 1927 Pat 302: 102 Ind Cas 909: 8 PLT 537: 28 Cr LJ 621: 8 AI Cr R 303: 6 Pat 802 (DB).

——S. 497 — Magistrates are bound, when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the prisoner and the punishment which in the event of conviction is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should be taken into account, the magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing that he will use his liberty to suborn evidence. AIR (Vol 14) 1927 Rang 205: 5 Rang 276: 104 Ind Cas 101: 28 Cr LJ 773 (FB).

——S. 497 — The mere previous respectability of a man is per se no sufficient reason for giving bail when he has been convicted of a criminal offence. AIR (Vol 13) 1926 Nag 279: 27 Cr LJ 319: 92 Ind Cas 703.

——S. 497 — Where the High Court is concerned with men who have been actually convicted, the principle which will necessarily guide the High Court in granting bail will be whether there are reasonable grounds for believing that the convicts committed the offences in question. AIR (Vol 13) 1926 Nag 279: 27 Cr LJ 319: 92 Ind Cas 703.

**——S. 497 — Rules for guidance of Magistrates are laid down.**

It must be understood that while a wide discretion as to the grant of bail in cases other than those involving capital punishment has now been placed in the hands of magistrates, they are bound when weighing the probability of the prisoner appearing for trial, to consider the nature of the offence charged, the character of the evidence against the prisoner and the punishment which, in the event of conviction, is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner, if released, will tutor witnesses, should not be taken into account, the magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence. AIR (Vol 13) 1926 Rang 51: 93 Ind Cas 65: 3 Rang 538: 27 Cr LJ 401.

——S. 497 — **Grounds — Considerations for granting release on bail discussed.**

Two persons were committed to Sessions on charges under Ss. 167 and 466, I. P. C. The Sessions Judge released one of them on bail but refused to release the other. This other person was about 70 years old and a Patwari. During the trial in the Magistrate's Court he was released on his personal recognizance of Rs. 50 only, and it was found that if he were not released there would be nobody to instruct his counsel in going through the documentary evidence, and that he would not be able to make a proper defence.

Held, that there was no reason to refuse his release on bail. AIR (Vol 12) 1925 Oudh 489: 89 Ind Cas 150: 28 OC 220: 12 OLJ 394: 26 Cr LJ 1286.

——S. 497 — The test to determine whether bail is to be granted or not, is applied by reference to the following considerations; the nature of the accusation, the nature of the evidence, the severity of the punishment which conviction will entail, the character, means and standing of accused. The discretionary power of the Court to admit to bail is not arbitrary but is judicial. AIR (Vol 11) 1924 Cal 476: 81 Ind Cas 220: 51 Cal 402: 38 CLJ 388: 25 Cr LJ 732 (DB).

——S. 497 — If the offence is one, assuming it not yet to have been tried, in which the accused is charged with some grave act of violence like murder or dacoity or organized riot, or if it is a serious charge of fraud in some commercial transaction, in which he has made, or is alleged to have made, large gains so that he is not an unlikely person to endeavour to escape punishment by absconding, bail should not be granted; a fortiori, where the man has already been convicted and has only appealed. But where the charge is one of an argumentative nature, and in the category of ordinary crimes against society, the man has the right to retain his freedom pending his trial, subject to a reasonable guarantee which will involve loss upon himself and his sureties if he does not present himself, the question being whether one has reasonable ground for supposing that the person is such or the offence is such that he is likely to prefer the expense of exile involved in absconding, rather than face his trial and accept any punishment which the law inflicts upon him. AIR (Vol 8) 1921 All 94: 63 Ind Cas 414: 19 ALJ 693: 22 Cr LJ 654.

### 3. "Offence punishable with death or transportation for life" — Sub-section (1).

——S. 497 — Section 497, Criminal P. C., gives the Magistrate unfettered discretion to grant bail in case of non-bailable offences except in cases punishable with transportation for life or with death. AIR (Vol 28) 1941 Rang 324: 1941 Rang LR 566: 43 Cr LJ 373: 198 Ind Cas 455 (DB).

——S. 497 — **Bail, held not justified.**

An accused in a case of criminal conspiracy for the murder of a man with whose wife, it was alleged, he was carrying on an intrigue, also recorded as a Magistrate a dying declaration of the deceased, the husband of the woman. The Magistrate granted bail to the accused on the ground that there was a discrepancy in the evidence of the approvers but there was nothing to suggest that the discrepancy was not capable of explanation and would be fatal to the prosecution case:

Held, that the grant of bail was not justified. AIR (Vol 28) 1941 Sind 83: ILR (1941) Kar 281: 42 Cr LJ 703: 195 Ind Cas 178 (DB).

——S. 497 — **Powers of High Court.**

The High Court should not grant bail in cases where a person is charged with offences punishable with death or transportation for life except for exceptional and very special reasons. AIR (Vol 17) 1930 Rang 335: 1930 Cr C 1151: 128 Ind Cas 577: 32 Cr LJ 148.

——S. 497 — **Scope.**

Under the provisions of S. 497, Cr. P. C., a Magistrate has no power to grant bail in cases falling under S. 409, Penal Code. AIR 1926 Rang 51 held overruled by AIR 1927 Rang 205 (FB). AIR (Vol 17) 1930 Rang 335: 1930 Cr C 1151: 128 Ind Cas 577: 32 Cr LJ 148.

——S. 497 — **Interpretation — Words "If there appear....or transportation for life".**

The words "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life" not only cover offences punishable with death or in the alternative with transportation for life, such as cases of murder and of waging war under Ss. 302 and 121, I. P. C., but include offences merely punishable with transportation for life. AIR (Vol 15) 1928 Bom 244: 30 Bom LR 622: 29 Cr LJ 901: 111 Ind Cas 661: 11 AI Cr R 76 (DB).

——S. 497 — **"Death or transportation for life".**

The phrase "death or transportation for life" in S. 497 does not extend to offences punishable with transportation for life only; and means only those offences for which death and transportation for life are alternative sentences. AIR (Vol 14) 1927 Nag 53: 97 Ind Cas 39: 27 Cr LJ 1063: 7 AI Cr R 138.

——S. 497 — **"Death or transportation" must be read disjunctively.**

The phrase "death or transportation for life" must be read disjunctively as if it ran "punishable with death or punishable with transportation for life". 3 Rang 538: AIR 1926 Rang 51: 93 Ind Cas 65 Overruled. AIR (Vol 14) 1927 Rang 205: 5 Rang 276: 104 Ind Cas 101: 28 Cr LJ 773 (FB).

——S. 497 — The amended S. 497 does not limit the powers of Magistrates in granting bail in case of non-bailable offences except in cases punishable with transportation for life or with death. AIR (Vol 14) 1927 Rang 205: 104 Ind Cas 101: 5 Rang 276: 28 Cr LJ 773 (FB).

——S. 497 — **Murder case.**

A person accused of murder shall not be released on bail, either by the Police or the Court before whom he is brought, if there appears reasonable grounds for believing that he has been guilty of the offence of which he is accused on the ground that the case against him does not go beyond mere suspicion. (1927) 99 Ind Cas 860: 5 Bur LJ 170: 28 Cr LJ 188.

——Ss. 497 (1) and 498 — **Bail — When granted.**

Section 498 of the Cr. P. C., is in no way limited by S. 497 (1) of the Code. But the High Court

will not grant bail in non-bailable offences except when special circumstances are disclosed. AIR (Vol 4) 1917 Sind 32: 10 SLR 208: 18 Cr LJ 642: 40 Ind Cas 290 (DB).

**4. Sub-section (2).**

**——S. 497 — Complaint under S. 409, Penal Code — Bail, if should be granted.**

On a complaint under S. 409, I. P. C., the Magistrate should hold a preliminary enquiry before issuing a warrant of arrest. He should not issue it merely on a sworn statement of the complainant, without asking him how he proposed to prove his allegations :

Held, that where the Magistrate issues warrant of arrest without any preliminary inquiry, the accused should be granted bail. AIR (Vol 24) 1937 Rang 474: 39 Cr LJ 91: 172 Ind Cas 176.

——S. 497 — Though a High Court is not limited within the bounds of S. 497 and has absolute discretion in the matter, yet the legislature has placed the initial stage of dealing with crimes with Magistrates, and having, in effect, enacted that persons accused of non-bailable offences shall be detained in custody, except when there are in the opinion of the Magistrate dealing with the case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court is bound to follow the general law as a rule and not to depart from it, except under very special circumstances, especially so in the initial stages of a case. AIR (Vol 12) 1925 Rang 129: 85 Ind Cas 43: 26 Cr LJ 427: 2 Rang 546.

**——S. 497 — Principle.**

The view of the law that all the persons accused of non-bailable offence should be released on bail, unless and until the Court is satisfied and there are good grounds for believing them to be guilty, is absolutely mistaken. Persons accused of non-bailable offences should not be released on bail as a rule, but they may be so released, if there are reasons for believing that the case against them is such that it is not likely to succeed, or if there are special circumstances justifying bail. Where the accused were released on bail by the committing Magistrate but the High Court set aside that order,

Held that this order would not prejudice a subsequent application to the Magistrate to admit them to bail if sufficient cause under S. 497 be found at any future date. AIR (Vol 10) 1923 All 479: 83 Ind Cas 483: 26 Cr LJ 4.

**——S. 497 — Bail — Non-bailable offence — Court, duty of.**

In case of an application for bail, in a non-bailable offence, bail should only be granted, when the Court is satisfied on an examination of the investigation, enquiry or trial, that there is no reasonable ground for believing that the accused has committed the offence. AIR (Vol 6) 1919 All 82: 54 Ind Cas 769: 21 Cr LJ 161.

**——S. 497 — Bail — Power of High Court — Practice.**

The section does not refer to the likelihood or not of the accused absconding or to any other matter but only to the fact whether there are reasonable grounds for believing that the accused is guilty or not. The High Court though it has a large discretion, will not lightly interfere with the discretion of the Magistrates, especially in the initial stages of a case. (1912) 6 LBR 172: 6 Bur LT 73: 14 Cr LJ 171: 19 Ind Cas 171.

**——Ss. 497 and 498 — Bail — When granted.**

An accused must be released on bail unless his guilt has been made out having regard to the question whether there are reasonable grounds for supposing that he would abscond if released on bail. If after remand the prosecution does not adduce evidence of an incriminating nature, it must be presumed that there is no such evidence and the accused should be released on bail under S. 497 (2) though the preliminary enquiry should proceed. (1909) 36 Cal 174: 13 CWN 51: 9 Cr LJ 409: 1 Ind Cas 910 (DB).

**5. Cancellation of bail and re-arrest — Sub-s. (5).**

**——S. 497 — Case committed to Sessions Court — Power of Sessions Judge to grant and cancel bail.**

Where a case triable exclusively by a Court of Session is committed to that Court, there is nothing to prohibit the Sessions Judge from taking bail under S. 497, Cr P. Code, if in his opinion the conditions enumerated in any of sub-Ss. (1), (2) and (3) of that section are fulfilled. He need not go to S. 498 for that purpose. The Sessions Judge shall then be the Court before which the accused has appeared or is brought for trial. In such a case, where the Sessions Judge himself has allowed bail, there should be nothing in his way to cancel the bail at a subsequent stage of the trial. It does not stand to reason that a Magistrate may cancel the bail allowed by him and a Sessions Court, which is admittedly a Court of superior jurisdiction, should be denied those powers. AIR (V 37) 1950 Lah 195: Pak LR 1950 Lah 720 (DB).

**——Ss. 497 and 498 — Bail granted by High Court in committal case — Power of Magistrate to cancel bail when he commits the accused to the Court of Session.**

When bail has once been granted by the High Court or a Court of Session in a committal case it is not within the power of the Subordinate Magistrate to cancel it when he commits the accused to the Court of Session, unless of course the order granting bail is explicitly of a temporary character and applicable only to a particular stage in the proceedings. AIR (V 35) 1948 All 366: 1948 ALW 130: ILR (1948) All 477: 1948 AWR (HC) 113: 1948 ALJ 147: 1948 OA (HC) 113: 49 Cr LJ 521 (FB).

**——Ss. 497 (5), 498 and 561A — Bail under S. 498 — If can be cancelled under S. 497 (5) — Powers under S. 561A — Use of.**

Section 497 (5) does not apply if the accused is released on bail under S. 498. The power conferred by S. 497 (5) to cancel bail and re-arrest an accused is expressly limited to cases in which the accused has been released under S. 497.

But the High Court has adequate jurisdiction under S. 561A of the Code to continue or discontinue an order granting bail in the circumstances which enures for a limited period only pending public investigation.

It cannot, however, discontinue the order granting bail in the absence of special circumstances or a breach of conditions if the order of bail was in absolute terms, pending the disposal of the case.

(Bail was cancelled and the accused ordered to be re-arrested and committed to custody pending completion of committal proceedings or until further orders.) AIR (V 32) 1945 Mad 250: (1945) 1 MLJ 187: 58 LW 131: 1945 MWN 435: 47 Cr LJ 106: 221 Ind Cas 178.

**——S. 497 — Discovery of fresh evidence and accused tampering with evidence, if grounds.**

Bail once granted can be subsequently cancelled if fresh evidence for believing that the accused has been guilty has been discovered since the bail was granted and there is reason to believe that the accused has tampered with the evidence since the grant of the bail. AIR (V 30) 1943 Oudh 419: 1943 AWR (CC) 72: 1943 OWN 234: 44 Cr LJ 770: 208 Ind Cas 293.

——S. 497— **Magistrate acting without jurisdiction.**

The discretion to be exercised under S. 497 by Magistrate is a judicial discretion according to law. The District Magistrate, while forwarding an application for bail to his Subordinate Magistrate having jurisdiction should not indicate his inclination or his disinclination to the granting of bail to the applicant as, by a few words, Subordinate Magistrates might be improperly influenced in discharge of their judicial duties.

The Magistrate finding that the order of bail he had passed was without jurisdiction, should commit the accused forthwith to custody but not allow him to remain on bail pending the passing of the final order cancelling the bail bond. AIR (V 28) 1941 Sind 83: ILR (1941) Kar 281: 42 Cr LJ 703: 195 Ind Cas 178 (DB).

——S. 497 — Where the Magistrate to whom the case is transferred is satisfied that the accused person has been tampering with a prosecution witness, the Magistrate in order to prevent a repetition of the offence, is entitled to direct that the accused be re-arrested notwithstanding the order for his release on bail by the first Magistrate. AIR (V 27) 1940 Bom 40: 41 Bom LR 1232: 41 Cr LJ 251: ILR (1940) Bom 38: 186 Ind Cas 101 (DB).

——S. 497 (5) — **Principles.**

The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner and that the accused person has not to come into contact with the prosecution witnesses or to exert any undue influence on them so as to destroy the evidence or to minimise its effect against him. It is a sort of trust reposed in him by Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by Court he disentitles himself to the privilege so granted. This is more specially so, when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own fiat. It is no doubt true, that the object of S. 497 (5), Criminal P.C., is not punitive but it is equally true that the interests of the administration of justice demand that nobody should be allowed to impede the course of justice or hamper its administration in any manner. AIR (V 23) 1936 Lah 730: 37 Cr LJ 937: 15 Lah 779: 39 PLR 56: 1936 Cri Cas 765: 164 Ind Cas 376.

——S. 497 — **Power of Sessions Judge to cancel.**

Under S. 497 Criminal P.C., an accused person shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. It is open to the Sessions Judge to cancel the bail of an accused against whom proceedings are going on in the committing Magistrate's Court on the grounds referred to in the section. AIR (V 21) 1934 Lah 609 (2): 35 PLR 558: 36 Cr LJ 227: 152 Ind Cas 1080.

——S. 497 (1) (5) — **Discretion of Court — Penal Code, S. 409.**

Section 497 (1), Criminal P. C., does not require that bail should be granted unless Sessions Judge has evidence before him which will practically justify a conviction. The accused is not to be released if there appear reasonable grounds for believing that he has been guilty of an offence of the specified kind; but if the application for bail is made in an initial stage of the trial, the Magistrate may expect the prosecution to satisfy him that it is genuine case and that they will be able to produce good prima facie evidence in support of the charge, but he cannot expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt. Under S. 497 (5) the Sessions Judge has a discretion in the matter of granting bail. AIR (V 20) 1933 Bom 492: 35 Bom LR 1072: 35 Cr LJ 539: 1933 Cri Cas 1596: 147 Ind Cas 1010 (DB).

——S. 497 (5) — **Release by Police — Power of Magistrate to commit to custody.**

In the case of an accused person who has been released by the Police, the Magistrate has no power under S. 497 (5), Criminal P.C., to commit him to custody. The words 'by itself' in S. 497 (5), mean by the Magistrate in question. AIR (V 20) 1933 Sind 331: 1933 Cri Cas 1078: 27 SLR 197: 35 Cr LJ 580: 147 Ind Cas 1159.

——S. 497 — **Interference by High Court.**

High Court has jurisdiction to consider whether or not the order by the Subordinate Court passed under S. 497, should or should not be maintained and also whether under S. 497 (5), the accused should be allowed to continue at large.

Where the accused is charged with serious offence such as an attempt to murder, bail should not be allowed especially when the injured person is not well enough to attend the identification parade. AIR (V 19) 1932 Lah 433: 33 Cr LJ 335: 33 PLR 387: 1932 Cri C 579: 136 Ind Cas 709.

——S. 497 — Offence under S. 124-A, Penal Code — Accused on bail — Charge read — Accused praying for adjournment for argument before pleading — If adjournment granted, bail need not be cancelled. AIR (V 17) 1930 Lah 309: 121 Ind Cas 425: 31 Cr LJ 266: 31 PLR 11: 1930 Cr C 341.

——S. 497 — **High Court — Powers of.**

High Court has ample jurisdiction to exercise discretion and order the re-arrest of any person out on bail under its own order if it feels that the circumstances warrant or demand such a course. The principles which govern the granting of bail, are not really doubtful. The Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or innocence. It would be entirely exceeding its function, if it did that in any detail, but it may incidentally have to look at the weight of the evidence against the accused, as a necessary part of what is its proper function, that is, to enquire whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial, or whether there is any real reason to suppose that he is likely to tamper with the witnesses, who would be called against him. Where two men of importance in their own walk of life were charged with a very serious offence and where it was more possible that they may take advantage of a release than that they may take their trial.

Held, the accused should not be allowed to be on bail especially since a very short time was to elapse

before their trial. AIR (V 12) 1925 Mad 1224: 90 Ind Cas 665: 26 Cr LJ 1593: 22 MLW 156 (DB).

——S. 497 — Under S. 497 (5) the powers of the High Court are confined to cases of persons released by the Trial Magistrate and under S. 498 the High Court can only release accused on bail and cannot order the arrest and commission to custody of persons already released on bail by the Sessions Judge. Therefore, there is no jurisdiction in the High Court to entertain an application under S. 497 (5) or S. 498 against an order granting bail passed by a Sessions Judge in a case pending before a Sub-Magistrate. AIR (V 12) 1925 Nag 228: 82 Ind Cas 755: 25 Cr LJ 1363.

**——Ss. 497 and 498 — Bail once granted whether may be cancelled.**

A bail once granted cannot be cancelled without sufficient reasons being given for the same. (1911) 2 MWN 138: 12 Cr LJ 503: 12 Ind Cas 223.

**——Ss. 497, 498 — Bail — Explosives Act (VI of 1908) — Bail when to be granted — Object of — Non-bailable offence — Likelihood of absconding —Seriousness of offence charged — Evidence of complicity — What kind of evidence sufficient — Prosecution, opportunity to, to produce evidence — Remand — Conspiracy, case of — Cancellation of bail.**

Petitioners who were charged with offences under the Explosives Act (VI of 1908) which are non-bailable and of a very serious nature, were refused bail by the enquiring Magistrate;

Held, per Mitra J. (Coxe J. dissentiente) on an application to the High Court under S. 498 of the Criminal Procedure Code for bail, that the main question for consideration was: Were there reasonable grounds for believing that the petitioners were guilty of the offences of which they were accused? Other considerations must also arise and one of these which has always guided Court of justice, both in England and in India, is whether there are any grounds for supposing that the accused, if released on bail, would abscond and attempt to escape justice by avoiding or delaying an enquiry or trial. An accused may ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt.

If, after a remand evidence of an incriminating character is not adduced and if the prosecution had already sufficient time to adduce such evidence the court would reasonably come to the conclusion that such evidence was not forthcoming at the time. It should then, under S. 427 of the code, release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed.

Whether there are reasonable grounds or not for believing that the accused are guilty of the offences charged must be decided judicially, that is to say, there should be tangible evidence on which, if unrebutted, the Court might come to the conclusion that the accused might be convicted. The statement by a witness in the witness box that he has seen a certain act done —an act of an incriminating character — may be sufficient.

As to whether the witness can be fully relied on or not is a question for subsequent consideration. But if there be no evidence whatsoever or evidence of a very flimsy character on the face of it, the inference would naturally be after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing that an accused is guilty. The prosecution must, however, have a fair opportunity, according to the nature of the case, of adducing evidence of a really incriminating character. The detention of an accused under trial is not intended to be penal but its object is to secure attendance. The seriousness of an alleged offence and some evidence of its perpetration by the accused would, however, justify detention. Bail allowed to an accused person may be cancelled by the Magistrate if, upon further evidence produced, a case is made out against him. (1909) 13 CWN 51 (55, 56): 36 Cal 174: 4 MLT 432: 9 Cr LJ 409: 1 Ind Cas 910 (DB).

**——Ss. 497, 498 — Explosives Act (VI of 1908) — Bail when to be granted — Likelihood of absconding — Evidence of complicity — What evidence sufficient — Police officer swearing to existence of evidence — Delay in production of evidence — Remand bail, cancellation of.**

On a question whether bail should be granted by the High Court to certain persons undergoing trial under the Explosives Act (VI of 1908):

Held, that the decisions of English Courts are not necessarily a safe guide in interpreting sections of the Criminal Procedure Code. It is not correct to say that in exercising its discretion under S. 498 of the Code in granting bail to under-trial prisoners, the High Court should confine its attention only to the question whether the prisoner is or is not likely to abscond. There may be other circumstances also which may affect the question of granting bail to accused persons who are alleged to have committed crimes of a grave and serious nature.

It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay and such delay will dispose the Court to grant bail.

Under S. 167 of the Code, a Magistrate, on the perusal of the entries in the Police-diaries relating to the case to which the accused have no access, may from time to time authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. Thereafter he can, under S. 344, by a warrant, remand an accused for any term not exceeding 15 days at a time if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand.

Where on the accused being placed for trial a Police officer of superior rank swore to the existence of evidence implicating the accused, and it did not appear that the production of the evidence was being unreasonably delayed, bail was refused.

Bail was allowed, however, to those in regard to whom the production of evidence was being unreasonably delayed. A Magistrate may commit an accused person who has been released on a bail if a prima facie case is made out against him by the sworn testimony given before him. (1909) 13 CWN 43: 36 C 166 (170, 171, 172) : 1 Ind Cas 738: 9 Cr LJ 375 (DB).

**6. Application for bail — Form and contents.**

——S. 497 — It is highly desirable that an affidavit supporting an application for bail should set forth on what ground bail is desired, and the reasons for the ground should be explained. AIR (V 21) 1934 All 815 : 3 AWR 668 : 36 Cr LJ 184 (1) : 1934 Cri Cas 998 : 1934 All LR 1053 : 152 Ind Cas 802 (2).

**7. Revision.**

——S. 497 — Accused persons committed for non-bailable offence to the Sessions Court for trial on prima facie case being made out — Trial adjourn-

ed sine die, closely connected case being tried by Committing Magistrate — Bail granted — No urgency — Orders from Government not obtained for remanding accused to jail though there was time to do so — High Court would not interfere in revision. AIR (V 16) 1929 Sind 137 : 117 : Ind Cas 773 : 23 SLR 340 : 30 Cr LJ 845 : 1929 Cr C 337 (DB).

——S. 498.

1. Bail bonds — Essentials.
2. Powers of High Court and Court of Session.
3. "Any person".
4. In any case.
5. Reduction of bail.
6. Inherent powers.
7. Cancellation of bail.
8. Bail pending appeals to 'Privy Council'.

**1. Bail bonds — Essentials.**

**——S. 498 — Bail bond — Power to impose conditions in.**

In bailable case, the Court cannot in granting bail impose conditions. The order can just fix the amount for which the accused is to furnish the bond, the number of the sureties to be furnished and the amount for which each of the sureties is to furnish the bond. AIR (V 37) 1950 All 525 : 51 Cr LJ 1377 1950 ALJ 267 : 1950 AWR 344.

**——Ss. 498 and 118 — Bail — Exessive bail —Security proceedings.**

Where a person is arrested on suspicion of a non-bailable offence, no needless impediment should be placed in the way of his being admitted to bail. The intention of the law is that the man should be let off ordinarily on such moderate security as is suitable for his appearance in Court, pending inquiry.

An order against the accused under S. 112 of the Cr. P. C., was made and he was asked to furnish security to the extent of Rs. 10,000. The accused was unable to furnish security and remained in custody during the greater part of the enquiry. Finally an order was made under S. 118.

Held, that the order requiring security for bail in such large sums was oppressive and that the accused had not a fair trial. AIR (V 5) 1918 Bom 254 : 20 Bom LR 121 : 19 Cr LJ 329 : 44 Ind Cas 345 (DB).

**2. Powers of High Court and Court of Session.**

(a) General.
(a-1) 'Jurisdiction'.
(b) 'Discretion'.
(c) Principle.
(d) Offences punishable with 'death or transportation'.
(e) Power to set aside orders of Magistrate.

**(a) General.**

**——S. 498 — Powers under — If limited by S. 497.**

S. 498, Cr. P. Code, confers upon a Sessions Judge or the High Court wide powers to grant bail which are not handicapped by the restrictions in S. 497, Cr. P. Code. AIR (V 35) 1948 All 26 : 48 Cr LJ 941 : ILR (1947) All 746 : 1947 AWR (HC) 290 : 1947 ALJ 535.

**——Ss. 498, 497 — Commitment, if bar.**

The factum of commitment to Sessions by a Magistrate does not necessarily give the Sessions Judge reasonable grounds for believing that the accused has been guilty of the offence charged. It does not, therefore, debar the Sessions Judge from granting bail to the accused. AIR (V 22) 1935 Pesh 101 : 36 Cr LJ 1141 : 157 Ind Cas 286. 1935 Cr C 853 (DB).

——S. 498 — The High Court's power of granting bail is conferred on it by S. 498. It is entirely unfettered by any conditions and it is very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the Legislature itself left discretion of the Court entirely unfettered.

Per Boys, J. — The Legislature has given the High Court and the Court of Session discretion (to act under S. 498) unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz., that the discretion must be exercised judicially. This power is not limited by the conditions laid down in S. 497, though the Court may give consideration to such matters.

No accused person has any right under the law to be allowed to argue in person an application for bail but in special circumstances, such permission may be given, AIR (V 18) 1931 All 356 : 1931 ALJ 515 : 32 Cr LJ 1271 : 53 All 931 : 12 LR ACr 75 : 1931 Cri Cas 612 : 15 AICrR 526 : 134 Ind Cas 842 (DB).

——S. 498 — A Sessions Judge has wide powers under S. 498. AIR (V 16) 1929 All 320 : 116 Ind Cas 748 : 51 All 603 : 1929 ALJ 585 : 10 LRACr 82 : 11 AICrR 554 : 30 Cr LJ 697.

**(a-1) 'Jurisdiction'**

**——Ss. 498, 497 — Power of High Court and Sessions Court — Discretion.**

Under S. 498, Criminal P. C., a wider discretion to grant bail is given to the Court of Session and the High Court than that given to Subordinate Courts by S. 497. That discretion is unfettered though it cannot be exercised arbitrarily but must be exercised judicially.

Where the Commissioners appointed to try the Punjab Conspiracy Case granted bail to the accused against whom charges under S. 302-109 and S. 307-109, I. P. C. were framed, giving reasons for granting bail and fixed the amount of security at a high figure and considered the case of the accused to be on the border line:

Held, that the Commissioners had jurisdiction to grant bail and there was no adequate ground for interference in revision with the discretion exercised by them in the matter. AIR (V 20) 1933 Lah 925 : 35 Cr LJ 294 : 34 PLR 1068 : 15 Lah 39 : 146 Ind Cas 1083 : 1933 Cri Cas 1384.

——S. 498 — Under S. 497 (5) the powers of the High Court are confined to cases of persons released by the Trial Magistrate and under S. 498, the High Court can only release accused on bail and cannot order the arrest and commission to custody of persons already released on bail by the Sessions Judge. Therefore, there is no jurisdiction in the High Court to entertain an application under S. 497 (5) or S. 498 against an order granting bail passed by a Sessions Judge in a case pending before a Sub-Magistrate. AIR (V 12) 1925 Nag 228 : 82 Ind Cas 755 : 25 Cr LJ 1363.

**——S. 498 — Bail — Jurisdiction of convicting Court to release on bail pending appeal.**

A Sessions Judge has no jurisdiction to release an accused, after convicting him, on bail pending his appeal to the High Court. S. 498 of the Criminal Procedure Code indicates generally the powers of a Sessions Judge to release on bail all prisoners whom he thinks may be found to have been wrongly convicted and whose case he can either deal with himself or has power to refer to the High Court. It does not give him power in any way to alter or vary his order. (1902) 4 Bom LR 55 (55,56) (DB).

**(b) 'Discretion'.**

**——S. 498 — Considerations.**

The question of granting bail at any particular stage of a case is a question for the discretion of the Court having regard to the circumstances of the case. If the Court is satisfied that there are reasonable grounds for believing that no case has been or is likely to be made out against the accused and there is no reason to believe that he will abscond the Court should ordinarily grant bail. (1932) 137 Ind Cas 514 (1): 33 PLR 331 : 33 Cr LJ 467 (1).

**——S. 498 — Discretion of Sessions Judge in admitting to bail a person charged with a non-bailable offence.**

In this case the High Court declined to interfere with the discretion of the Court of Sessions in admitting to bail a person who stood committed to that Court on a charge under S. 302 read with S. 109 of the Indian Penal Code. (1908) AWN 195: 5 ALJ 419 (420) : 8 Cr LJ 49.

**(c) Principle.**

**——S. 498 — Power of Sessions Judge — Grant of bail on ground that it would facilitate defence — If justified.**

The power granted to a Sessions Judge under S. 498, Cr. P. Code, is not intended to be arbitrary, but must always be guided by the provision of S. 497, and the more so when the Sessions Judge is trying the case himself. The fact that it would facilitate the defence is not a sound reason for releasing the accused on bail. AIR (V 37) 1950 MB 43 : 51 Cr LJ 1131.

**——S. 498 — Granting of bail with condition that cannot be complied with — Propriety.**

Granting of bail with a condition which no person can possibly comply with, is tantamount to refusing the bail. In such cases, the Court should refuse the bail rather than impose such condition. AIR (V 36) 1949 Cal 582 : 50 Cr LJ 1009: 53 CWN 699 (DB).

**——S. 498 — Anticipatory bail to person not placed under restraint — Power of Court to grant.**

The very notion of bail presupposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrants have been issued. S. 498, Cr. P. Code, does not permit the High Court or the Court of Session to grant bail to any one whose case is not covered by Ss. 496 and 497, Cr. P. Code. It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a Court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself. No bail can be allowed to a person at liberty for whose arrest no warrants have been issued. AIR 1947 Lah 77 not foll. AIR (V 37) 1950 EP 53: 51 Cr LJ 480: 51 PLR 330 (FB).

——Ss. 498, 118, 123 — A Sessions Judge acting under S. 123, Criminal P. C., has power to grant bail to a person against whom an order under S. 118, Criminal P. C., has been made in a proceeding laid before him. AIR (Vol 29) 1942 Sind 132 : ILR (1942) Kar 278 : 44 Cr LJ 378 : 205 Ind Cas 322 (DB).

——S. 498 — Under S. 498, Criminal P. C., the High Court has power to release a person on bail in any case, that is to say, that the power in granting bail in non-bailable offences is unrestricted, but that power has to be used judicially and not in an arbitrary manner.

(The accused who were charged under S. 302, read with S. 115, Penal Code were granted bail.) AIR (Vol 27) 1940 Oudh 8 : 1939 OWN 791 : 1939 AWR 144 : 40 Cr LJ 841 : 183 Ind Cas 713 : 1939 Oudh LR 548.

**——S. 498 — Lower Court to be moved first.**

It is desirable that the ordinary practice should certainly be that the lower Court should first be moved and this is particularly desirable in a bail application, where the appropriate Court to deal with the matter is the Court which is going to try the case and where an expression of opinion by a superior Court is likely to prejudice the trial in the lower Court. But where the lower Court's judgment is likely to be affected by some remarks made by the superior Court during the proceedings in that case, then the superior Court can be moved but only as an exception to the general rule. AIR (Vol 25) 1938 Lah 762 : 40 PLR 716 : 40 Cr LJ 127 : 178 Ind Cas 632 (2).

**——S. 498 — Serious offence.**

Although the High Court can admit to bail a person who has been committed on serious charges, yet in a case where after an exhaustive enquiry the accused has been committed by a competent Magistrate on grave and serious charges relating to non-bailable offences, the High Court should not lightly enlarge him on bail. AIR (Vol 25) 1938 Lah 762 : 40 PLR 716 : 40 Cr LJ 127 : 178 Ind Cas 632 (2).

**——S. 498 — Conviction for attempt to shoot — Bail, if can be granted.**

A man who is convicted of an attempt to shoot another, cannot safely be released on bail until it is established that he is not guilty or, that his conviction is not justifiable. A man is kept in prison not only to prevent his absconding but if there is reason to believe that he has committed crimes of a certain type, to prevent him from being a possiole danger to the community. AIR (Vol 23) 1936 All 656 : 1936 ALJ 961 : 37 Cr LJ 1017 : 1936 AWR 732 : 164 Ind Cas 703 (1).

——S. 498 — The High Court's power to grant bail under S. 498, Criminal P. C., is not limited by the restriction imposed by S. 497 (1). The High Court will not, however, grant bail in non-bailable cases except in special circumstances and according to the exigencies of each particular case. AIR (Vol 21) 1934 Sind 131 : 28 SLR 47 : 36 Cr LJ 711 : 1934 Cri Cas 1067 : 155 Ind Cas 113 (DB).

**——S. 498 — Scope.**

The proviso in S. 496 that bail can be granted only to a person other than a person accused of a non-bailable offence is not applicable to the Court of Session acting under S. 498, Cr. P. Code. AIR (Vol 16) 1929 All 614 : 117 Ind Cas 99 : 1929 ALJ 927 : 10 LRA Cr 98 : 30 Cr LJ 718 : 12 AI Cr R 65 : 1929 Cr C 193.

**——S. 498 — Grounds for bail — Party faction — Release of one party if sufficient ground.**

Where members of two parties were being prosecuted, and a member of the other party was released on bail but the applicant was charged under S. 304, I. P. C.

Held, that the reasons that the applicant was required to instruct the counsel and that the party being released will have better chance of representing their case must weigh with a Court, and if there was no danger of the applicant absconding if released on bail, he should be so released and that it was necessary for the Sessions Judge to consider all these points under S. 498. AIR (Vol 16) 1929 All 320 : 51 All 603 : 116 Ind

Cas 748 : 1929 ALJ 585 : 10 LRA Cr 82 : 11 AI Cr R 554 : 30 Cr LJ 697.

——S. 498 — **Bail — When granted.**

The High Court should not confine itself to considering whether the prisoner is likely to abscond or not and must be disposed to grant bail if delay is caused, especially where the accused is entitled to be tried speedily. (1909) 36 Cal 166 : 13 CWN 43 : 9 Cr LJ 375 : 1 Ind Cas 738 (DB).

——S. 498 — **Bail — Non-bailable offence.**

An accused person ought to be released on bail unless reasonable grounds are made out on the evidence for believing him to be guilty. (1906) 10 CWN 1093 (1094) : 4 Cr LJ 221 (DB).

**(d) Offences punishable with death or transportation.**

——S. 498 — **Power of Sessions Court.**

Having regard to S. 498, the power of the Sessions Judge, like the power of the High Court, is unlimited and not fettered, as the discretion of the Magistrate is, by the provisions of sub-s. (1) of S. 497, except of course, in this sense that the Sessions Judge like the High Court will naturally not grant bail in a case which comes under sub-s. (1) unless there are some good grounds for doing so. In such a case there ought to be special circumstances to justify the grant of bail and the Court need not be as strict in the case of an offence under S. 409, I. P. C., even though it happens to be made punishable with transportation for life, as it should be in the case of offences like murder. AIR (Vol 20) 1933 Bom 492: 35 Bom LR 1072: 35 Cr LJ 539: 147 Ind Cas 1010: 1933 Cri Cas 1596 (DB).

——S. 498 — **Cases punishable with death or transportation.**

It cannot be laid down as a broad proposition that the grant of bail should be the rule and the refusal of bail, the exception. On the other hand, in cases where there is a reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation for life, as regards which the Legislature has thought fit to prohibit Magistrates from granting bail at all, the grant of bail by a Sessions Judge or the High Court, who have undoubtedly power under S. 498, Criminal P. C., is to be made, not as a general rule but only in exceptional cases. This is particularly so when the accused is on his trial, the prosecution evidence is closed and the Sessions Judge has refused to exercise his discretion in his favour. AIR (Vol 18) 1931 All 504: 1931 ALJ 773: 54 All 115: 33 Cr LJ 94: 1931 Cri Cas 892: 135 Ind Cas 113 (SB).

——S. 498 — **Exercise of powers — Discretion under, should be used under exceptional circumstances.**

Though the discretion under S. 498 is absolute, the High Court must exercise it judicially and since the legislature has chosen to entrust the initial stage of dealing with questions of bail to Magistrates and while giving Magistrate an unfettered discretion of granting of bail in all cases except two classes, i.e., cases punishable with death and cases punishable with transportation for life, the High Court ought not to grant bail in such cases except for exceptional and very special reasons. AIR (Vol 14) 1927 Rang 205: 104 Ind Cas 101: 5 Rang 276: 28 Cr LJ 773 (FB).

**(e) Power to set aside orders of Magistrate.**

——S. 498 — **Powers of Superior Court.**

The District Magistrate ordered an accused charged under S. 304 I. P. C. and who was released on bail by the trying Magistrate, to be rearrested. Held, that he had no power to do so. The powers conferred by S. 498 of the Cr. P. C. on the Sessions Court are unqualified and he has power to set aside a District Magistrate's illegal order of rearrest. (1911) 4 Bur LT 70: 12 Cr LJ 244: 10 Ind Cas 774.

**3. "Any person."**

——S. 498 — **"Any person" — "May direct that any person be admitted to bail" — Meaning of — Powers of Court to make anticipatory order for release on bail if and when arrested.**

The words "any person" in S. 498, Cr. P. Code, cannot include any person who was under arrest and in custody. "Admission to bail" necessarily and essentially implies the substitution of the custody of the detaining authority by the control of the bail (surety) into whose hands the person bailed is delivered.

The words "may direct that any person be admitted to bail" in S. 498, Cr. P. Code, would not enable the Court to direct that the applicant or applicants be admitted to bail if and when the police considered it necessary to arrest the applicant or applicants, though the police might think the applicant or applicant ought not to be released on bail. ILR 1949 Lah 77 Dissented from. AIR (Vol 37) 1950 Sind 19: 51 Cr LJ 705 (DB).

——S. 498 — **Powers of High Court — Grant of bail in anticipation of arrest.**

The High Court has no inherent powers, apart from those expressly mentioned in the Cr. P. Code, to grant bail in cases falling under that Code. AIR 1945 P.C. 94, foll. Under S. 498, Cr. P. Code the High Court has power in a proper case to make an order that a person who is suspected of an offence for which he may be arrested by a police officer or a Court, shall be admitted to bail. The exercise of this power should, however, be confined to cases in which, not only is good prima facie ground made out for the grant of bail in respect of the offence alleged, but also, it should be shown that if the petitioner were to be arrested and refused bail, such an order would, in all probability, be made not from motives of furthering the ends of justice in relation to the case, but from some ulterior motive and with the object of injuring the petitioner, or that the petitioner would in such an eventuality suffer irreparable harm. AIR (Vol 36) 1949 Lah 77: Pak LR (1949) Lah 65: 50 Cr LJ 387 (FB).

——S. 498 — **Bail was granted.**

In view of the facts that the investigation against the accused under Cotton Cloth and Yarn Control Order, 1943, had ended and the challan presented and that there was no likelihood of the accused, an old man of status and not in good health, absconding, and the chances of tampering with witnesses were greatly reduced, the accused was enlarged on bail. 1945 NLJ 223.

——S. 498 — **Sind Frontier Regulations Sec. 8 — Bail — Power of High Court.**

An application for bail on behalf of an accused, being under S. 8 of the Sind Court Regulations, does not lie to the High Court under S. 498 of the Code. (1911) 5 SLR 105: 12 Cr LJ 568: 12 Ind Cas 656.

**4. In any case.**

——S. 498 — Per Percival, J. C. — Section 337, which is a special section dealing with approvers controls the general S. 498.

Per Rupchand Bilaram, A. J. C.— Cl. (3) of S. 337 should be interpreted as obligatory only on the Magistrate granting the pardon requiring him to detain the accomplice in custody and as in no way affecting the powers of the superior Courts. But the discretionary powers of superior Court to grant bail to approvers should be sparingly exercised. AIR (Vol 14) 1927 Sind 173: 101 Ind Cas 471: 28 Cr LJ 439: 8 AI Cr R 43 (DB).

——S. 498 — Mention in the order that sentence is suspended is not illegal.

When an appellate Court or a Court bearing a revision admits the appellant or the applicant to bail or orders that a fine should not be paid till the disposal of the case, he thereby orders the suspension of the sentence, and therefore mention in the order that the sentence is suspended does not render the order bad. AIR (Vol 12) 1925 All 218: 84 Ind Cas 719: 22 ALJ 1103: 26 Cr LJ 367.

——S. 498 — Bail pending reference.

There is nothing in S. 123 (2) controlling the very wide provisions of S. 498. Bail can be allowed by the Sessions Judge in the case of a person against whom an order has been made under S. 118 as the order is liable to be revised by a Sessions Judge under the provisions of S. 123, sub-section (2). AIR (Vol 10) 1923 Cal 723: 75 Ind Cas 537: 50 Cal 969: 37 CLJ 592: 24 Cr LJ 953 (DB).

——S. 498 — Interpretation — "In any case."

The words "in any case" in S. 498 are not to be construed in their widest and unlimited sense but in the narrower sense laid down therein. AIR (Vol 8) 1921 Sind 8: 81 Ind Cas 160: 25 Cr LJ 672: 19 SLR 59 (DB).

——S. 498 — Criminal Law Amendment Act (XIV of 1908), S. 14 (1) — Sessions Judge's power to grant bail — Criminal Procedure Code, S. 498 — Sessions Court, superior to District Magistrate — District Magistrate's duty to send records to Sessions Judge when called for.

Where the provisions of Part I of the Criminal Law Amendment Act have been applied to proceedings before a Magistrate in respect of an offence, the Sessions Judge ceases to have jurisdiction to grant bail under S. 498 of Cr. P. C., the exercise of such jurisdiction being inconsistent with the special procedure prescribed in the said part. The proper Court to apply to for bail in such a case, is the High Court whose power to admit to bail is not affected by the Act. 14 CWN 512 (1910) ref. to. The District Magistrate acted improperly in not sending the records to the Sessions Judge when he called for them. (1910) 11 Cr LJ 219: 6 Ind Cas 10: 14 CWN 516 (519): 37 Cal 439 (DB).

5. Reduction of bail.

——S. 498 — Objection and scope.

Section 117 (3) has apparently been introduced for the purpose of preventing a breach of peace or disturbance of the public tranquillity or the commission of any offence or in the interest of public safety pending an enquiry under Ss. 108, 109 and 110. It is not therefore open to the High Court under provisions of S. 498 to reduce the security which the Magistrate orders to be furnished. AIR (Vol 17) 1930 Lah 529: 125 Ind Cas 322: 31 Cr LJ 812: 1930 Cr C 677.

6. Inherent powers.

——S. 498 — There is no such thing as an inherent power to suspend sentences and the only authority which can do so is a Court of Criminal Appeal before which an appeal is pending, unless, of course, there is express statutory provision to the contrary.

Although a mere order for suspension of sentence may not have the effect of setting a man at liberty, an order for bail unquestionably has the effect of suspending the sentence.

There is no power to alter or modify the sentence once the judgment is signed unless it is expressly conferred, and an order releasing a person on bail after conviction carries with it a suspension of sentence, and that can only be done by an Appellate Court while it is still seized of the proceedings.

The words "in any case" and "whether there be an appeal on conviction or not" in S. 498, Criminal P. C. do not mean that the Court can act once it has reached finality. The Code must be read as a whole and since its scheme is to render a Court functus officio the moment the judgment is signed, the section cannot possibly mean that nevertheless the High Court has power to release an accused on bail and thus suspend sentence when no tribunal is seized of the proceedings. AIR (Vol 24) 1937 Nag 181: 38 Cr LJ 384: ILR (1937) Nag 236: 167 Ind Cas 373: 1937 AI Cr R 118 (DB).

7. Cancellation of bail.

——S. 498 — Grant and cancellation of bail — Power of Sessions Court and High Court.

The powers to grant bail by the High Court or Court of Session under S. 498, Cr. P. Code, are very wide. These may be exercised at any stage in a pending case, uncontrolled by any of the limitations mentioned in S. 497. There is however, under this section no corresponding power to cancel bail. Whenever, therefore, bail is granted by the Sessions Judge under S. 498, he cannot countermand his own order, and the High Court, as a Court of revision, alone shall have the power to do it. Similarly, where the bail was granted by the High Court, it has no power to cancel it under S. 498, and resort must be had to its inherent powers under S. 561-A, Cr. P. Code. AIR (Vol 37) 1950 Lah 195: Pak LR (1950) Lah 720 (DB).

——Ss. 498, 561-A — Inherent power to cancel.

When the High Court has passed an order under S. 498, Criminal P. C. granting bail, that order for bail may be cancelled by the High Court in the exercise of its power under S. 561-A, to secure the ends of justice even though the accused has done nothing since the order to violate any condition on which the bail was granted.

Where, before the actual enquiry was started the High Court released the accused on bail on the ground that there was no reasonable ground for believing that the accused had committed a non-bailable offence but after the enquiry, it was found that a strong case had been made against the accused:

Held, that the High Court had power to cancel the bail and commit the accused to custody. AIR (Vol 19) 1932 All 534: 1932 ALJ 701: 33 Cr LJ 684: 138 Ind Cas 768: 1932 Cr C 630: 18 AI Cr R 306: 13 LRA (Cr) 142.

——S. 498 — Bail under S. 498 — If can be cancelled under S. 497 (5) or under S. 561-A.

Where the accused were released on bail under S. 498, Criminal P. C., S. 497 (5) has no application. But the High Court has adequate jurisdiction under S. 561-A to continue or discontinue an order granting bail which enures for a limited period only i.e., pending public investigation. AIR (Vol 32) 1945 Mad 250: 221 Ind Cas 178: (1945) 1 MLJ 187: 58 LW 131: 1945 MWN 435: 47 Cr LJ 106.

8. Bail pending appeals to Privy Council.

—— S. 498 — High Court's jurisdiction pending decision of Privy Council.

Once the High Court has passed orders in a criminal appeal, it becomes functus officio and has no seisin in the case. This seisin may be revived when the Judicial Committee has granted leave to appeal. The power of the High Court to deal with an application for bail pending decision of appeal to Privy Council depends on whether it has been directed by the Privy Council to do so or not. Once leave is granted and seisin taken, S. 498, Criminal P. C. expressly empowers the High Court to act in the matter not on its own motion but on behalf of the Privy Council.

AIR (Vol 25) 1938 Lah 697: 40 PLR 595: 39 Cr LJ 982: 177 Ind Cas 1001.

—+—Ss. 498, 561-A — **Privy Council appeal — Effect.**

The inherent power of a Court cannot be invoked with respect to any matter which is expressly dealt with by the Code. The question of bail has been expressly dealt with, and although the matter of bail pending an appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive. Moreover, there should not be a resort to inherent power when there are other remedies available. The Local Govt. has ample power to suspend sentence and to release a convict on such terms as it chooses to fix. Where a convict applies for bail on the plea that he is going to appeal against his conviction by the High Court, to the Privy Council, inherent powers should be used sparingly. AIR (Vol 24) 1937 Nag 181: 38 Cr LJ 384: ILR (1937) Nag 236: 167 Ind Cas 373: 1937 AI Cr R 118 (DB).

——S. 498 — **Application for leave to appeal to Privy Council — High Court's power.**

Between the time of an Appellate Court dealing finally with a criminal matter, and the time when a successful approach has been made to the Privy Council, the Court, in matters of bail is functus officio.

It is only when leave to appeal has actually been granted that any question of granting bail, either directly or indirectly, arises. AIR (Vol 23) 1936 Cal 809: 40 CWN 1313: ILR (1937) 1 Cal 464: 166 Ind Cas 612: 1936 Cri. Cas 1121 (DB).

——S. 498 — **Convict showing intention to appeal to Privy Council — Bail cannot be granted.**

A convict sentenced to rigorous imprisonment by the High Court under S. 439 (b) applied for release on bail on the ground that he intended to apply to the Privy Council for special leave to appeal.

Held, that no bail under S. 498 could be granted, the case having been completely and finally disposed of. AIR (Vol 13) 1926 Nag 228: 21 NLR 161: 27 Cr LJ 185: 91 Ind Cas 1001.

——S. 498 — **Jurisdiction — Bail pending appeal to Privy Council.**

S. 498 does not confer jurisdiction upon Court to grant bail to the applicant pending the result of an application to be made to the Privy Council for leave to appeal. AIR (Vol 11) 1924 Cal 64: 72 Ind Cas 362: 50 Cal 585: 24 Cr LJ 362 (DB).

——S. 498 — The Code of Criminal Procedure itself does not give Chief Courts or Courts of Judicial Commissioners in the exercise of their High Court Jurisdiction, power to release on bail a prisoner with whose case it has finally dealt, merely because he desires to move the Privy Council. AIR (Vol 8) 1921 Sind 8: 81 Ind Cas 160: 19 SLR 59: 25 Cr LJ 672.

——S. 498 — **Jurisdiction of High Court to release accused on bail pending appeal to Privy Council — Bail.**

The High Court has jurisdiction to release on bail a person convicted by the Sessions Court of Madras pending appeal to the Privy Council. (1901) 24 M 161 (163): 2 Weir 657 (FB).

——S. 499.

1. Breach of bond.
2. Form of bond.
3. Power and duty of Magistrate.

**1. Breach of bond.**

——S. 499—Bail—Surety for appearance in Court — **Right to control movements of person released on bail — Surety getting release of woman arrested under illegal warrant and executing bond against will of released person and forcibly detaining her in confinement — Offence — Cr. P. Code, S. 90 — Penal Code, S. 366.**

There is no authority or rule of law which justifies a person standing surety for the appearance of another in Court in exercise of such control over the movements of the other as are against the will of that other, in order to secure his appearance in Court. The surety, being responsible for the appearance of that person in Court and being liable to have his bond forfeited for the mere non-appearance of the other, should have no doubt some sort of control. Such control is not unlimited in extent. It must be the minimum control and to an extent up to such maximum period requisite for the surety to put nimself in contact with the public authorities in order to get himself relieved from the obligation under his bond and to enable the Court to pass suitable orders in the matter. The surety is not entitled to keep the other party in confinement till the date fixed for the appearance of that party in Court.

The Court releasing a person arrested under a warrant under S. 90, Cr. P. Code, can only order the release of that person, and lay down the condition for such release but it cannot direct the delivery of the released person to any particular individual or to his nominee. Such a direction is illegal.

Where a person stands surety for a woman arrested and brought before Court and released under such an illegal direction and stands surety for her without her consent and against her will he is not entitled to restrict her movements in any way, although he has stood surety for her appearance, since he has not done it with her consent or wish, but against her will. In any case, if he forcibly takes her and keeps her confined in his house without informing the Court about the facts, he exceeds even the normal right of an ordinary surety who executes a bond with the consent of the released person. He commits an offence under S. 366, I. P. Code, and is liable to conviction thereunder. AIR (Vol 35) 1948 A 72: 49 Cr LJ 1: 1948 ALJ 35: 1948 AWR (HC) 88 (DB).

——Ss. 499 and 514 — **Surety bond for appearance of accused — Accused not signing bond — Bond is for attendance and not for payment of money — — Bond can be enforced against surety.**

Under S. 499, Criminal P. C., the surety does not guarantee the payment of any sum of money by the person accused who is released on bail but guarantees the attendance of that person. He is a surety for attendance and not a surety for payment of money. His contract and the contract of the person released on bail are independent of each other. The fact that the person released on bail himself did not sign the bond for his attendance when called upon does not make the bond executed by the surety an invalid one. AIR (Vol 33) 1946 All 116: ILR (1946) All 238: 47 Cr L Jour 528: 1945 OWN HC 380: 1945 ALJ 467: 1945 AWR HC 307: 223 Ind Cas 406 (DB).

——Ss. 499 and 514 — **Liability of surety executing a bond is not discharged when no bond is taken from the accused.**

Where a bond is executed by the surety alone and not by the accused, undertaking to produce the accused before the Court on the date or dates mentioned in the bond, the surety is not discharged from his liability and the bond executed by him is not invalid on the ground that no bond was taken from the accused. AIR (Vol 32) 1945 All 389: ILR (1945) All 639: 1945 AWR HC 176: 1945 ALJ 476: 47 Cr LJ 209: 211 Ind Cas 544.

——Ss. 499, 514 — **With permission, accused leaving Court to say prayers but absconding — Surety, if liable.**

The liability of the surety must continue so long as the surety has not been discharged or the bail

bond cancelled and the accused taken into the custody of the Court.

In his bond, the accused bound himself to appear in the Court on a certain date and thereafter, as directed by the Court and the surety, bound himself that the accused shall so attend and in default of his so attending, he bound himself to forfeit Rs. 1,000. The accused was produced on the fixed date. During the course of the proceedings, the accused, with the Court's permission, left the court house to say his prayers and absconded. The bail bond was not cancelled nor was the surety discharged:

Held, that the surety's liability continued even after the production of the accused in the Court. The forfeiture of the bond, therefore, was justified but that inasmuch as the surety was taken off his guard, it was a mitigating circumstance whereby the penalty for forfeiture could be reduced to something nominal. AIR (Vol 28) 1941 Sind 31: 42 Cr LJ 427: ILR (1941) Kar 164: 193 Ind Cas 471 (DB).

——**Ss. 499, 514 — Forfeiture, legality.**

The only condition contemplated by a bail bond is a condition for attendance in a Court and a bail bond in which any other condition of the nature of condition as to undertaking for good behaviour is included, such a bond cannot be regarded as a bond under the Code. The forfeiture of such a bond is, therefore, illegal. AIR (Vol 26) 1939 Cal 714: ILR (1939) 2 Cal 42: 43 CWN 639: 41 Cr LJ 138: 185 Ind Cas 249.

——**S. 499 — Forfeiture.**

Section 499, Criminal P. C., is not exhaustive and does not override the inherent powers of the High Court in matters of bail. There are no restrictions on the High Court in the matter of imposing conditions on which it grants bail. There is no irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the district where he was tried to hear the reserved judgment in his appeal. Such a bond is valid. Where the sureties were well aware of the terms on which they had undertaken to furnish security for the due appearance of the accused, as the terms were set out in the bond which they signed, and they knew that they were responsible for his appearance not only in the High Court but in such Court as the High Court might direct him to attend in order to surrender to his bail, and they fail to produce the accused before the Court according to the directions of the High Court, there is a forfeiture of the bond. AIR (Vol 25) 1933 Nag 420: 40 Cr LJ 464: ILR (1939) Nag 170: 180 Ind Cas 608.

——**S. 499 — Nature of proceedings.**

Bail proceedings are special proceedings about which there are specific directions in the Code, and they must be strictly followed. Section 499, Criminal P. C., states that the time and place at which the accused is to appear must be mentioned in the bond, and the second clause of that section states that if the accused is to appear in some other Court, the bond must expressly say so. Where there is no mention in the surety bond of the Court in which the accused is to appear, the bond cannot be enforced. The fact that the surety did not produce the accused in totally different Court, even supposing he had undertaken to produce him in a particular Court, is not a breach of the bond and the surety is not liable. AIR (Vol 23) 1936 Nag 243: 38 Cr LJ 100 (2): ILR (1937) Nag 137: 1936 Cri Cas 1037: 165 Ind Cas 825.

——**S. 499 — Bond to keep peace — Liability of surety.**

It is advisable that all considerations should be weighed at the time when a security and surety bond is demanded and that the sum fixed therein should be equitable; the reduction of that sum at the time of forfeiture is prima facie inadvisable and goes far to undermine the whole purpose for which such bonds are taken. AIR (Vol 23) 1936 Pesh 141: 37 Cr LJ 849: 1936 Cri Cas 668: 163 Ind Cas 443.

——**S. 499 — Surety failing to produce accused.**

A surety executed a bond for the appearance of the accused but no similar bond was executed by the accused himself:

Held, that the two kinds of bonds contained different undertakings and were not co-related. The validity of the one did not depend on the validity of the other and the surety became amenable to the penalties contemplated by law in the event of his failure to produce the accused. AIR (Vol 21) 1934 All 1046: 36 Cr LJ 297: 4 AWR 778: 1934 Cri Cas 1329: 1934 All LR 1116: 16 LRA Cr 21: 153 Ind Cas 155 (1).

——**S. 499 — Transfer and re-transfer of case to same Court — Non-appearance of accused — Surety, if liable.**

Where a surety signed a bail bond to the effect that the accused would attend at the Court on a fixed date and other dates of the preliminary enquiry, and the case was subsequently transferred from that Court and later re-transferred to it, the surety is not liable when the accused fails to appear after the retransfer. The obligation under the bond ceased to exist on transfer of the case and is not revived on subsequent re-transfer of the case. AIR (Vol 21) 1934 Cal 101: 37 CWN 880: 35 Cr LJ 532: 1934 Cri Cas 145: 147 Ind Cas 1041.

——**S. 499 — Forfeiture.**

Where the accused, who was convicted of cheating and sentenced to pay fine, was given time for payment of fine on his executing a bond undertaking to appear on a particular day, and the time was extended twice at his request but no fresh bond was taken from him on his failure to appear on the last day of the extension, the Magistrate forfeited the bond:

Held, that the bond only required the accused to be present on a particular day and that absence on a later date should not be visited with a penalty.

A bond imposing a penalty must always be construed strictly. A breach of the bond will not be assumed but the party alleging that the condition was broken must prove the breach. AIR (Vol 19) 1932 Bom 290: 34 Bom LR 584: 56 Bom 220: 33 Cr LJ 628: 1932 Cri Cas 402: 138 Ind Cas 512 (DB).

——S. 499 — Surety bond undertaking to produce accused in one Court — Accused asked to be presented in another Court and absconding on his way — Failure of surety to produce in the stipulated Court — Forfeiture is justified. AIR (Vol 14) 1927 All 831: 102 Ind Cas 554: 49 All 825: 25 ALJ 537: 8 A I Cr R 52: 8 LR A Cr 98: 28 Cr LJ 586.

——**S. 499 — Form No. 42 — Commitment — Bail — Omission of date for appearance in bond — Effect — Forfeiture of security.**

Where in a bail bond, the accused bound himself to appear on a specified date and below his signature, the surety undertook to produce the accused, but no date was mentioned, and the accused, failed to appear.

Held that the bail bond should be read as one document and that the bond was rightly forfeited by the Lower Court. AIR (Vol 6) 1919 Mad 945 : 19 Cr LJ 687: 46 Ind Cas 47 (DB).

—— **S. 499 — Bail bond — Suicide — Forfeiture.**

Where an accused person commits suicide, the sureties who have given bail for his appearance are not liable for the default of his appearance, even though the possibility of his doing so may have passed through their minds and they did not take steps to prevent the suicide. AIR (Vol 2) 1915 Mad

114: 37 Mad 156: 26 MLJ 63: (1913) MWN 77: 13 Cr LJ 684: 16 Ind Cas 322 (DB).

——Ss. 499 and 514 — **Bond to appear before Police — Validity of — Forfeiture — Power of Magistrate to enforce penalty.**

The wording of Ss. 499 and 514 of the Cr. P. C. makes it clear that a police officer in charge of a station has power to make it a condition of a bond that the accused should attend at a particular place and on his failing to attend and if a First Class Magistrate is satisfied that the bond is forfeited, to a call the person bound to pay the penalty. 11 C. 77 Diss. from. AIR (Vol 1) 1914 Lah 65: 22 PR Cr 1913: 6 PLR 1914: 14 Cr LJ 631: 6 PWR 1914 Cr: 21 Ind Cas 679 (DB).

### 2. Form of bond.

——Ss. 499 and 514 — **Bail bond — Form and contents — Absence of bond by accused himself — Effect — Validity of bond by surety alone — Forfeiture — Conditions.**

A bond under S. 499, Cr. P. Code, has to be taken in accordance with the provisions of the Code, and when any person is to be released on bail, or on his own bond, he has to execute a bond of a sufficient amount to be determined by the Court. There must be a bond executed by the accused himself to ensure his regular attendance in Court as and when and where required by the Court. It is only then that the power to forfeit contained in S. 514 can be exercised. Unless this is done in proper form, there is no obligation on the part of the person ordered to attend. In the absence of a bond by the accused himself there can be no valid bond by the surety or sureties alone. AIR (Vol 34) 1947 Pat 58: 12 Cut LT 32: 229 Ind Cas 55: 13 BR 283: 48 Cr LJ 324.

——**S. 499 — Nature of bond.**

Where although the conditions imposed on the accused before releasing him on bail do not form part of the bail bond executed by the surety, yet if the surety has signed the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds the order-sheet with the surety's signatures itself becomes a part of the contract between the parties. AIR (Vol 27) 1940 Pat 375: 21 PLT 194: 41 Cr LJ 214: 6 BR 221: 185 Ind Cas 598.

——**S. 499 — Essentials.**

It is incumbent under S. 499, Criminal P. C. to get a bond executed by the person who is released on bail and unless that is done, there can be no valid bond by a surety alone. Similarly, mentioning of a definite Court before which the accused person is to appear is an essential condition of a bond under S. 499. AIR (Vol 26) 1939 All 682: 1939 ALJ 779: 1939 AWR 696: 41 Cr LJ 85: ILR (1939) All 924: 184 Ind Cas 662.

——S. 499 — Time not specified in the bond — Bond to the effect that the accused shall be produced "whenever called upon to do so" — Form was held to be not illegal. AIR (Vol 15) 1928 Cal 261 (DB).

### 3. Power and duty of Magistrate.

——**S. 499 — Detention of accused's money in Bank as security — Power of Magistrate.**

Section 499, Cr. P. Code, contemplates the furnishing of personal bond by the accused person and a bond by one or more sufficient sureties. It does not empower a Magistrate to demand cash from the accused as a security. It is not open to a Magistrate to order the detention of the money of the accused in deposit with a bank as security. AIR (Vol 38) 1951 Nag 206: ILR (1950) Nag 866: 1950 NLJ 433.

——**Ss. 499 and 513 — Furnishing of security contemplated by — Demand of cash security — Legality.**

Section 499 of the Cr. P. Code contemplates the furnishing of a personal bond by one or more sufficient sureties. The accused and the sureties have to execute only bonds which are sufficient in the mind of the Magistrate for the amount which he might have fixed. S. 513 only provides for a concession to an accused person who is unable to produce sureties, but it does not authorise a demand of cash by a Magistrate. AIR (Vol 35) 1948 A 238: ILR (1948) All 302: 1948 AWR (HC) 80: 49 Cr LJ 282: 1948 ALW 176: 1948 ALJ 58.

——S. 499 — It is the duty of the Magistrates to see that the bond complies with the requirements of S. 499, Criminal P. C. AIR (Vol 32) 1945 All 389: 1945 AWR (HC) 176: 47 Cr LJ 209: ILR (1945) All 639: 1945 ALJ 476: 221 Ind Cas 544.

——**S. 499 — Notice.**

If no day is specified in the bond but the day is to be a day of which notice is to be given, thereafter reasonable notice must be given to enable both the accused and the surety to attend. AIR (Vol 27) 1940 Sind 136: 41 Cr LJ 802: ILR (1940) Kar 479: 189 Ind Cas 800 (DB).

——**S. 499 — Magistrate should not seek inspiration from counsel for Crown.**

Any Magistrate, who seeks inspiration from any counsel for the Crown, even if he be of the position of Government Advocate, or from any Police Officer, however highly placed he may be, is unworthy of his office. But the Magistrate is not precluded from taking outside help in deciding as to the sufficiency of the sureties. AIR (Vol 24) 1937 Lah 411: ILR (1937) Lah 114: 39 PLR 643: 38 Cr LJ 955: 170 Ind Cas 586.

——**S. 499 — Delegation of power.**

The granting of bail is a judicial act and no judicial function which can only be performed by Courts having seisin of the proceedings can be delegated to another in the absence of an express provision of law. The Judge or Magistrate who grants bail has to be personally satisfied in his judicial capacity that the sureties produced are reliable and solvent, and also that the persons who sign are actually the persons they purport to be. It follows that the Magistrate cannot delegate this responsibility of granting bail to another Magistrate unless the law expressly empowers him to do so.

The very fact that Ss. 60, 76 (1), 85, 86, Criminal P. C., were deemed necessary by the Legislature indicates that they are exceptions, and not part of the general law. The position in all of them is due either to some special rule of law or to a special clause in a contract. (1937) 168 Ind Cas 876: ILR (1937) Nag 168: 38 Cr LJ 633.

——**S. 499 — Proof as to enforceability.**

The terms of a surety bond have to be determined by the language used in the bond itself and it is not for a surety to show that the bond is illegal, but for the Crown to show that the document it wishes to enforce against him is one which can be so enforced under the law. AIR (Vol 23) 1936 Nag 243: 38 Cr LJ 100 (2): ILR (1937) Nag 137: 1936 Cri Cas 1037: 165 Ind Cas 825.

——**S. 500.**

——**S. 500 — Accused kept in custody of Mahila Ashram — Whether released.**

When a Court orders the release of an accused under S. 500, Criminal P. C., it has no right or power to put any restrictions on the accused's movements, and obviously when an accused person is released on the suretyship of another, the intention is that the surety should have control over his movements. Therefore, an order of the Magistrate that the accused should be kept in the Mahila Ashram relieves the surety of his respon-

sibility under the bond as the accused in such a case is not actually "released". The surety, therefore, will not be liable for the non-appearance of the accused on the date of the hearing. AIR (Vol 25) 1938 Oudh 81: 1938 OWN 46: 39 Cr LJ 219: 13 Luck 720: 1938 Oudh LR 34: 172 Ind Cas 862.

**——S. 501.**

**——S. 501 — Application.**

The section applies to insufficient sureties accepted through mistake, fraud or the like. AIR (Vol 3) 1916 Mad 1063: 38 M 1088: 17 Cr LJ 132: 33 Ind Cas 308.

**——S. 502.**

**——S. 502 — Practice.**

Slovenly way in which the Magistrate passed orders without any regard to S. 502, Criminal P. C., criticised. AIR (Vol 32) 1945 All 389: 1945 AWR (HC) 176: 47 Cr LJ 209: ILR (1945) All 639: 1945 ALJ 476: 221 Ind Cas 544.

**——S. 502 — Surety, when discharged.**

Section 502, Criminal P. C., does not provide for a Magistrate discharging a surety so soon as he applies. The Magistrate shall issue a warrant directing the arrest of the accused, and only on the appearance of the accused before him does the Magistrate then discharge the surety. He cannot discharge the surety before the accused appears or is brought before him. AIR (Vol 27) 1940 Sind 136: 41 Cr LJ 802: ILR (1940) Kar 479: 189 Ind Cas 800 (DB).

**——S. 502 — Proper procedure.**

Where the surety files an application for the discharge of his bond, under S. 502 (2), Criminal P. C., the proper procedure is for the Magistrate to issue a warrant for arrest, directing that the person or persons for whom he had stood surety should be brought before him. It is not right that this surety should be called upon to forfeit the bond, ordered to pay the amount of the bond or any part thereof. AIR (Vol 24) 1937 Rang 244: 38 Cr LJ 1010: 171 Ind Cas 80.

**——S. 502 — Application for discharge.**

Where a surety applies for discharge, his security bond cannot be forfeited without complying with the provisions of S. 502, Cl. (2). (1926) 27 Cr LJ 848 : 95 Ind Cas 768 (Lah).

**——S. 502 — Limits of liability.**

Magistrate has no power after the appearance of the accused to attach bail money deposited by the surety to realise the fine imposed by the conviction. AIR (Vol 11) 1924 Audh 396 : 11 OLJ 296 : 26 Cr LJ 113 : 83 Ind Cas 673.

**——S. 502 — Surety — Suicide — Discharge.**

The sureties are discharged from liability on the death of the accused by suicide. AIR (Vol 3) 1916 Bom 221 : 18 Bom LR 683 : 17 Cr LJ 393 : 35 Ind Cas 825 (DB).

**——S. 502 — Prisoner — Suicide — Discharge of surety.**

When a person on bail commits suicide, the surety is discharged. AIR (Vol 2) 1915 Mad 114 : 37 Mad 156 : 26 MLJ 63 : 1913 MWN 77 : 13 Cr LJ 684: 16 Ind Cas 332: (1912) 16 CWN 550: 13 Cr LJ 592: 15 Ind Cas 1008 (DB).

**——S. 502 — Discharge of surety — Bail bond — Cancellation of bail bonds.**

Where a surety applies for a cancellation of his bond under S. 592, Cr. P. C., there is no such thing as hearing the application on the merits. The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused. Hence, where a surety after once presenting an application for cancellation of his bail bond, fails to appear in person or by pleader, such failure cannot deprive him of his right to treat the bond as cancelled. When once the application is presented and reviewed, there is no option left to the Magistrate but to act under S. 502, Cr. P. C., 1898. (1907) 9 Bom LR 1285 (1286) : 6 Cr LJ 385 (DB).

**——S. 503.**

See also Criminal P. C., Ss. 505 and 506.

1. **Scope and applicability.**
2. **Courts which can issue a commission.**
3. **Discretion of Court.**
4. **Pardanashin lady.**
5. **Ruling Prince of Indian State.**
6. **Examination of witness in Indian State.**
7. **Issue of commission to a place outside India.**

See N. 1.

**1. Scope and applicability.**

**——S. 503 — Issue of commission to examine witness in Burma.**

Burma has ceased to be part of British India and a Magistrate in British India has no power to issue commission for the examination of a witness in Burma. AIR (Vol 25) 1938 Mad 192 : ILR (1938) Mad 455 : 1937 MWN 1132 : 46 MLW 703 : 39 Cr LJ 27 : (1937) 2 MLJ 902 : 1937 M Cr C 318 : 171 Ind Cas 931.

**——S. 503 — Accused citing as witness person who cannot be served and who cannot be examined on commission — Whether ground for stopping proceedings in trial.**

Proceedings in trial should not be stopped merely because the accused cited as one of his witnesses a person on whom process could not be served and who could not be examined on commission. AIR (Vol 23) 1936 Pesh 101 : 37 Cr LJ 618 : 1936 Cr C 311 : 162 Ind Cas 270.

**——S. 503 — Court in British India, if can issue process against or order examination of person residing outside British India.**

It does not follow that because the English Courts have powers to issue writs for the examination of witnesses in other parts of the British Empire, Courts in India have the same power. The powers conferred by the Criminal P. C., are limited geographically to British India and hence the Courts in British India have no power to issue process against a witness resident outside British India. AIR (Vol 23) 1936 Pesh 101 : 37 Cr LJ 618 : 1936 Cr C 311 : 162 Ind Cas 270.

——S. 503 — An application for commission being issued to Africa is clearly outside the authority of the S. 503. AIR (Vol 13) 1926 Bom 71 : 49 Bom 878 : 27 Bom LR 1373 : 27 Cr LJ 114 : 91 Ind Cas 690 (DB).

**——S. 503 — Letter of request to English Courts.**

The High Court has no authority to issue a Commission or a letter of request to English Courts or for the examination of a witness in a criminal case, on an application on behalf of accused. (1909) 10 Cr LJ 571 : 4 Ind Cas 400 (All).

**——S. 503 — Evidence taken on commission in Nepal — Conviction under S. 141, I. P. C., on such evidence — General Clauses Act, S. 3, sub-s. 27 — Burden of proving if Nepal is in India.**

In a case where a commission was issued under S. 503, Cr. P. C., for the taking of evidence of witnesses in Nepal, an accused was convicted on such evidence : — Held, that the onus of proving that Nepal is in India as defined by the General Clauses Act, S. 3, sub-s. 27, lies on the party who alleges that the evidence taken there is proper evidence, and on their failing to do so, the conviction must be set aside. Quaere : Whether Nepal is in India. (1903) 7 CWN 635 (636) (DB).

**2. Courts which can issue a commission.**

**——Ss. 503, 506 — Pendency of case before Bench Magistrate — Examination of witnesses on commission — Procedure.**

If an inquiry, trial or other proceeding is pending before a Presidency Magistrate, District Magistrate, Court of Session or the High Court, then the Court concerned may, if it thinks fit, make an order under S. 503, Criminal P. C. If, however, the proceedings are pending in the Court of any Magistrate not being one of those specified in S. 503, Criminal P. C., then the procedure to be followed is as provided in S. 506, Criminal P. C. The Magistrate should apply to the District Magistrate stating the reasons for the application and the District Magistrate may either issue a commission in the manner provided or reject the application. Any party, therefore, who has a case pending in the Court of the Bench Magistrates and desires that his witnesses should be examined on commission should move the Bench Magistrates to apply to the District Magistrate in the manner stated in S. 506, Criminal P. C. If the Bench declines to comply with this request, the party aggrieved will have his remedy by an application in revision. AIR (Vol 20) 1933 Sind 278 : 35 Cr LJ 22 (1) : 1933 Cr C 952 : 146 Ind Cas 203 (DB).

——S. 503 — S. 10 of the Malabar (Restoration of Order) Ordinance I of 1922 read with S. 503 of the Cr. P. Code does not authorise a special Judge acting under the Ordinance to issue a commission for the examination of witnesses. AIR (Vol 11) 1924 Mad 243 : 18 MLW 399 : 1923 MWN 758 : 24 Cr LJ 840 : 45 MLJ 305 : 74 Ind Cas 952 (DB).

**——S. 503 — Additional District Magistrate.**

Additional District Magistrate authorised to exercise all the powers of a District Magistrate as contained in Schedule III, Part V (18) is empowered to issue a commission under S. 503. This power entitles him to issue a commission for the examination of a witness within his own jurisdiction. AIR (Vol 10) 1923 Lah 158 : 24 Cr LJ 622 : 73 Ind Cas 510.

**——S. 503 — Commission for local enquiry — Jurisdiction of Magistrate to issue — No notice taken of the report — Accused misled — Procedure.**

When the petitioners having been convicted on a charge of wrongful restraint applied for local enquiry and the Magistrate issued a commission, it was held the Magistrate had no authority to issue a commission and as the accused must have been seriously misled by it, he should be given a further opportunity of adducing evidence. AIR (Vol 1) 1914 Cal 478 : 18 CWN 399 : 15 Cr LJ 302 : 23 Ind Cas 510 (DB).

### 3. Discretion of Court.

**——Ss. 503, 506 — Court, if can issue commission for examination of witnesses.**

It is desirable that the witness on whose statement the accused is likely to be convicted should be examined in the presence of the accused so that the latter may get a chance of cross-examining him and the Court may also have a chance of noticing the demeanour of the witness; but to say that in no case a commission should be issued for the examination of a witness would be to delete the provision of Ss. 503 and 506, Criminal P. C. AIR (Vol 25) 1938 Pat 366 : 19 PLT 395 : 4 BR 734 : 39 Cr LJ 732 : 176 Ind Cas 558.

**——S. 503 — Complainant twice present — Inability to be present again due to reasons of health — Certificate of doctors — Commission.**

It is always better that the complainant attends in person rather than that he should be examined on commission, but where he has already appeared twice for cross-examination and his condition is clearly bad and it has been certified by doctors that he must have undisturbed rest, and if complete rest and treatment are taken, there is every possibility of his recovery within the next three or four months commission should be issued for his cross-examination especially when it appears that the opposition to this commission is caused, not by a legitimate objection to its being issued, but by a desire to delay the case. AIR (Vol 24) 1937 Rang 231 : 38 Cr LJ 875 : 170 Ind Cas 238.

**——Ss. 503, 505 — Temporary illness of witness — Whether ground for examination on commission — Principles.**

In a criminal prosecution, above all, the witnesses should be examined in open Court, giving an opportunity for the accused to examine them and it is only in the circumstances which are stated in Ss. 503 and 506 of the Criminal P. C., that an order for examination on commission can be made.

The mere fact that a witness is temporarily ill is not a ground for allowing that witness to be examined on commission.

It is only in the clearest possible cases that Ss. 503 and 506, Criminal P. C., should be used. AIR (Vol 19) 1932 Pat 242 : 13 PLT 345 : 33 Cr LJ 942 : 1932 Cr C 639 : 140 Ind Cas 291.

**——S. 503 — Remand for evidence on commission.**

Case remanded for taking evidence on commission — Examination of witnesses by Magistrate himself is competent or at least is covered by S. 537. AIR (Vol 16) 1929 Lah 104 : 30 Cr LJ 948 : 11 LLJ 370 : 118 Ind Cas 643.

**——S. 503 — (Ch. 40), Ss. 503 to 508 — Discretion — Provisions of O. 26, C. P. C. should ordinarily guide criminal Courts.**

The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the Court has no opportunity of noting the demeanour of the witness and on the other of controlling irrelevant and unnecessary or harassing cross-examination of the witness. Chapter 40 of the Cr P. Code no doubt confers a wide discretion on the Court to issue commissions, but such discretion should be sparingly exercised and only in case of real hardship and inconvenience having due regard to the prejudice which is likely to be thereby caused to the opponent. In ordinary cases, the provisions of O. 26, R. 1, C. P. Code, may be accepted as a safe guide by a criminal Court. AIR (Vol 13) 1926 Sind 124 : 20 SLR 28 : 27 Cr LJ 89 : 91 Ind Cas 393 (DB).

**——S. 503 — Expert — Assistant Mint Master is an expert.**

The Asst. Mint Master of the Calcutta Mint is an expert witness and there is no illegality in allowing him to be examined on commission instead of insisting on his personal attendance. AIR (Vol 12) 1925 Oudh 616 : 12 OLJ 497 : 2 OWN 377 : 26 Cr LJ 1232 : 88 Ind Cas 848.

**——S. 503 — Saving of expenses.**

Issue of commission to save great expense is permissible. AIR (Vol 10) 1923 Lah 73 : 4 Lah LJ 538 : 25 Cr LJ 652 : 81 Ind Cas 140.

**——S. 503 — Serious trial — Evidence on commission — If proper.**

The issue of a commission for the examination of an important witness in a serious criminal trial is a procedure which is much to be deprecated and which should never be adopted except for the most cogent reasons. AIR (Vol 9) 1922 Pat 40 : 3 PLT 398 : 1922 Pat HCC 159 : 23 Cr LJ 218 : 65 Ind Cas 1002 (DB).

——S. 503 — An expert witness when he is the principal witness cannot be examined on commis-

sion. (1911) 1 MWN 97 : 9 MLT 334 : 12 Cr LJ 64 : 9 Ind Cas 347 (DB).

**4. Pardanashin lady.**

——S. 503 — In criminal trials, it is desirable, where possible, the normal procedure of the Court should be followed; witnesses should ordinarily be examined in the Court precincts, and the Magistrate who tries the case should himself see the witnesses. Ladies may be examined in Chamber in the presence of the parties. AIR (Vol 23) 1936 Sind 221 : 38 Cr LJ 127 : 30 SLR 366 : 1936 Cr C 1089 : 166 Ind Cas 45 (DB).

**——S. 503 — Examination in chambers — Woman should be examined in chambers and not on commission.**

In a prosecution under S. 498, Penal Code, where the identity of the woman, alleged to have been enticed, is in question and the accused insists on issuing a commission for her examination on the ground that she is married to a zamindar who observes pardah, the better course is, instead of issuing commission, the woman should be examined by the Magistrate in chambers. AIR (Vol 17) 1930 Sind 56 : 1930 Cr C 94 : 31 Cr LJ 115 : 120 Ind Cas 518 (DB).

**——S. 503 — Pardanashin complainant — If can be examined by commission.**

A purdanashin complainant may be examined by commission under S. 503, since its terms refer not only to an enquiry and a trial but to any other proceeding. AIR (Vol 1) 1914 Cal 479 : 42 Cal 19 : 15 Cr LJ 348 : 18 CWN 1020 : 23 Ind Cas 700 (DB).

——S. 503 — The mere fact that a woman is the daughter of a prostitute is not sufficient to prove that she is not a purdanashin lady, especially when she has been respectably married. (1913) 14 Cr LJ 3 : 11 PWR Cr 1913 : 43 PLR 1913 : 18 Ind Cas 147.

**5. Ruling Prince of Indian State.**

**——S. 503 (2) — Complaint by Native Ruler in British India — Power of British Indian Court to examine Ruler on commission.**

A criminal Court in British India has no jurisdiction to issue a commission to an officer representing British Indian Government, resident in the territory of an Indian State, for the purpose of examining the Ruling Prince of that State.

Section 503 (2), Criminal P. C., has no application to a Ruling Prince of a Native State.

The fact that the Ruler has filed a complaint through his agent against the person who wants to examine him does not make any difference. AIR (Vol 20) 1933 Nag 226 : 34 Cr LJ 797 : 16 NLJ 170 : 29 NLR 315 : 1933 Cr C 807 : 144 Ind Cas 510.

**6. Examination of witness in Indian State.**

**——S. 503 — If Agent to the Punjab States cannot compel attendance of witness from Indian States, amendment is suggested.**

If the view that the agent to the Governor-General, Punjab States, has no power to compel attendance of witnesses who are residents of an Indian State, is correct, then the statutory provisions contained in S. 503 (2) are futile and the Government should consider the question of either securing such power or of repealing the law which authorizes criminal Courts to issue commissions to such officer. AIR (Vol 16) 1929 Lah 104 : 11 LLJ 370 : 30 Cr LJ 948 : 118 Ind Cas 643.

**——S. 503 — Summons for examination of witness in a Native State — Political Officer cannot return it unserved on the ground of want of convenience.**

A Magistrate issued a commission for examination of witnesses living in a Native State under S. 503 to the Agent to the Governor-General. He returned the commission unserved, regretting his inability to comply with the request on the ground that there was no Resident Political Officer in the State, who could execute the commission.

Held, that the Cr. P. Code nowhere speaks of a Resident Political Officer in the territories of any Prince or Chief in India, but of a Political Officer representing the British Indian Government in such territories irrespective of the actual place of residence of the officer concerned and it is the duty of the latter either to proceed where the witness is or to summon such witness before him and to take down his evidence, or to delegate his functions to any officer subordinate to him. But neither the Cr. P. Code nor any other law leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar reason. The provisions of sub-s. (3), S. 503, Cr. P. C., are mandatory in this respect. AIR (Vol 15) 1928 Lah 76 : 9 Lah 347 : 29 Cr LJ 202 : 30 PLR 188 : 106 Ind Cas 794.

**7. Issue of commission to a place outside India.**

See N. 1.

**——S. 504.**

**——S. 504 — Scope of — Security for keeping peace.**

If in convicting a person for an offence involving the forfeiture of a bond for keeping the peace the Magistrate with knowledge of accused's liability to forfeiture, does not make the order for forfeiture, he must be taken to have decided not to take action on the bond in respect of that breach and cannot subsequently add an order for forfeiture to his previous order. 26 A 202, not foll. 7 PWR 1913 Cr: 39 PLR 1913: 13 PR 1913 Cr: 14 Cr LJ 67: 18 Ind Cas 403 (FB).

**——S. 505.**

**——Ss. 505, 507, 256 — S. 256, scope of — Witnesses, cross-examination of — Application for issue of fresh commission for cross-examination — Competency of.**

Section 256, Criminal P. C., gives an accused person the right to have the witnesses for the prosecution cross-examined after charge has been framed and that right is not in any way affected by the provisions contained in Chap. 40. Section 507, which is one of the sections contained in Chap. 40, provides for the inspection of depositions taken on commission, and it is open to a person accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage (that is to say, after he has inspected the deposition taken on commission and after charge has been framed against him), for re-issue of the commission together with his cross-interrogatories. AIR (Vol 21) 1934 Cal 698 : 61 Cal 824 : 38 CWN 673 : 59 CLJ 377 : 37 Cr LJ 239 : 1934 Cr C 1044 : 152 Ind Cas 1005 (2) (DB).

**——S. 505 — Absence of parties.**

Examination on commission in absence of parties is most unsatisfactory. A I R (Vol 13) 1926 Lah 567 : 27 Cr LJ 840 : 95 Ind Cas 760.

**——S. 506.**

——S. 506 — It is desirable that a witness on whose statement the accused is likely to be convicted should be examined in the presence of the accused so that the latter may get a chance of cross-examining him and the Court may also have a chance of noticing the demeanour of the wit-

ness; but to say that in no case commission should be issued for the examination of a witness would be to delete the provisions of Ss. 503 and 506 of the Criminal P. C. AIR (Vol 25) 1938 Pat 366 : 19 PLT 395 : 4 BR 734 : 39 Cr LJ 732 : 1939 PWN 181 : 176 Ind Cas 558.

——S. 506 — **Personal attendance of warrantor in proceedings under Bombay Prevention of Adulteration Act.**

Magistrate can ask for the issue of a commission under S. 506, Criminal P. C., if he thinks that it is only just and proper that that power should be exercised. Cases where the Court would grant such a request would be rare; but taking the words of the section as they stand, there is nothing to prevent the Court asking the District Magistrate to issue a commission for the examination of the warrantor. The Magistrate need not, however, give his reasons in writing, while rejecting the application for the issue of commission. AIR (Vol 25) 1938 Sind 72 : 39 Cr LJ 477 : 32 SLR 659 : 174 Ind Cas 542 (DB).

——S. 506 — **Examination of ladies.**

Ladies may be examined in chamber in the presence of the parties. AIR (Vol 23) 1936 Sind 221 : 38 Cr LJ 127 : 30 SLR 366 : 1936 Cr C 1089 : 166 Ind Cas 45 (DB).

——S. 506 — **Rejection of application for examination of witness on commission — Remedy of party — District Magistrate, if has jurisdiction.**

The District Magistrate can, in a case which is not before him, act only upon the application of the trial Magistrate. If the trial Magistrate rejects the application for the examination of witnesses on commission, then, the only remedy open to the aggrieved party is to come to the High Court in revision. AIR (Vol 23) 1936 Sind 221 : 38 Cr LJ 127 : 30 SLR 396 : 1936 Cr C 1089 : 166 Ind Cas 45 (DB).

——S. 506 — Any party, who has a case pending in the Court of the Bench Magistrate and desires that his witnesses should be examined on commission, should move the Bench Magistrates to apply to the District Magistrate in the manner stated in S. 506, Criminal P. C. If the Bench declines to comply with such request, the party aggrieved will have his remedy by an application in revision. AIR (Vol 20) 1933 Sind 278 : 35 Cr LJ 22 (1) : 1933 Cr C 952 : 146 Ind Cas 203 (DB).

——S. 506 — **Evidence not necessary — Court refusing to take action under — Propriety.**

Before it becomes incumbent on a Magistrate to take action under S. 506, Cr. P. Code, it must appear that the evidence of the witness is necessary for the ends of justice. Where in a proceeding under S. 145. Cr. P. Code, a certain person was cited as witness by one of the parties and although processes were issued against him on three occasions he did not attend Court on account of illness and thereupon the party who summoned him applied to the Magistrate for the issue of a commission for his examination, held, that the Magistrate was entitled to dismiss the application on the ground that the evidence of the particular witness was not quite necessary. (1930) 31 Cr LJ 645 : 33 CWN 1088 : 124 Ind Cas 325 (DB).

——S. 507.

——S. 507 — In the trial de novo before the successor of the previous Magistrate, the examination and cross-examination of a witness taken on commission in the previous proceedings is admissible without anything further in subsequent proceedings. AIR (Vol 27) 1940 Sind 193 : 42 Cr LJ 80 : ILR (1940) Kar 498 : 191 Ind Cas 127 (DB).

——S. 507 — Section 507, Criminal P. C., provides for the inspection of depositions taken on commission and it is open to a person, accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage for re-issue of commission together with his cross-interrogatories. AIR (Vol 21) 1934 Cal 698 : 38 CWN 673 : 36 Cr LJ 239 : 59 CLJ 377 : 61 Cal 824 : 1934 Cr C 1044 : 152 Ind Cas 1005 (2) (DB).

——S. 507 — Impounding a hundi by a Magistrate not seized of the case. See (1904) 1 ALJ 607 (608).

——S. 508.

——S. 508 — Proceedings cannot be stopped merely because the accused cited as one of his witnesses a person on whom process could not be served and who could not be examined on commission. AIR (Vol 23) 1936 Pesh 101 : 37 Cr LJ 618 : 1936 Cr C 311 : 162 Ind Cas 270.

——S. 509.

See also Evidence Act S. 45.

——S. 509 — **Examination of medical witness in Sessions trial — His deposition before committing Magistrate — If admissible in evidence.**

Sub-section (2) of S. 509, Cr. P. Code, clearly contemplates the treating as evidence in the Sessions case of the deposition of the medical witness before the committing Magistrate even in cases where he is again called and examined in the trial with a view to throw light on any doubtful parts of his previous statement, and there is nothing in the section which can be held to justify the conclusion that where a medical witness is called as a witness in the Sessions trial it is necessary to discard his previous deposition and examine him afresh altogether. AIR (Vol 34) 1947 Lah 377 (DB).

——S. 509 — **Scope and object of — Applicability when medical witness is called and examined.**

Section 509 of the Cr P. Code is a special provision forming an exception to the ordinary rule of evidence that the statements of a person who is alive and is not called in as a witness is not evidence. It was intended to be confined to cases in which a medical witness was not called at the trial and there is no room for its application to cases where he is called and examined. In such a case his deposition before the Magistrate and the post mortem examination report forming part of it cannot be admitted in evidence. AIR (Vol 34) 1947 Oudh 41 : 22 Luck 15 : 47 Cr LJ 930 : 1946 AWR (CC) 207 : 1946 OWN 327 : 1946 A Cr C 137 : 1946 OA (CC) 207 : 226 Ind Cas 389.

——S. 509 — **Scope — Deposition of medical witness on non-medical matters, if can be transferred under S. 509 — Proper procedure.**

Section 509, Criminal P. C., relates to the deposition of a medical witness and there is no warrant for the opinion that the section in authorising the transfer of the deposition of a medical witness, also permits the transfer of that portion of testimony, which relates to matters other than medical. If the prosecution seek to rely on the deposition of a medical witness in regard to such non-medical matters, the witness should in this respect, be treated as an ordinary lay witness and subject, in respect of his testimony on non-medical matters, to the ordinary rules of evidence which require the witness to be examined at the sessions trial unless his statement can be dispensed with under S. 33, Evidence Act. AIR (Vol 30) 1943 Lah 101 : 45 PLR 129 : 44 Cr LJ 518 : ILR (1944) Lah 67 : 206 Ind Cas 417 (DB).

——**S. 509 — Statement of expert medical witnesses as to nature of blows causing injuries — Duty of Court in such cases.**

It is not necessary for the Court to try to reconcile the various statements made by expert witnesses with regard to the nature of the blows which caused the injuries; it should ask itself whether the medical evidence precludes the prosecution story. AIR (Vol 29) 1942 Mad 227 : 1941 MWN 1025 : (1941) 2 MLJ 999 : 43 Cr LJ 521 : 1942 M Cr C 6 : 199 Ind Cas 133.

——S. 509 — Medical witness giving evidence relying on text-books — Theoretical evidence of this description is not of much value unless it is exhaustive with regard to all possible circumstances. AIR (Vol 27) 1940 Mad 710 : 1940 MWN 86 : ILR (1940) Mad 254 : 52 MLW 981 : 42 Cr LJ 582 : 1940 M Cr C 54 : 194 Ind Cas 527 (DB).

——**S. 509 (1) — S. 509 (1), applicability of, to evidence relating to facts tendered by person who also happened to be medical man.**

Section 509 (1), Criminal P. C., confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man. It is, therefore, necessary to prove a dying declaration by producing the doctor who had recorded it if, in recording the statement of the deceased, the doctor was not acting as a medical man. AIR (Vol 27) 1940 Oudh 209 : 15 Luck 429 : 1940 OWN 177 : 1940 AWR 92 : 42 Cr LJ 483 : 1941 Oudh LR 333 : 193 Ind Cas 770.

——**S. 509 — Evidence — Medical Officer examined before committing Court but not before Sessions Court — Whether miscarriage of justice — Duty of counsel for accused.**

The omission to examine the Medical Officer as witness in the Sessions, if he is examined before the committing Court, is likely to cause a miscarriage of justice of a grave character. In such a case, Counsel for the accused should insist upon his coming before the Sessions Court. AIR (Vol 25) 1938 Lah 176 : 39 Cr LJ 410 : 40 PLR 484 : 174 Ind Cas 420 (DB).

——**S. 509 — Post mortem certificate by itself is no substantive evidence — Isolated statement in it cannot, without guidance of doctor, be used for drawing inferences.**

A post mortem certificate is not evidence. It can be used by the doctor who gave it when giving evidence, to refresh his memory and it can also be used as a record of what he observed at the time to corroborate, or perhaps to contradict, whatever he might say in the witness-box; but it cannot by itself be substantive evidence.

Where a post-mortem certificate contains a statement that some quantity of undigested kora food was found in the stomach of the deceased, it is unsafe for the Court to act upon such an isolated statement without the guidance of the opinion of the doctor and to draw an inference that death must have taken place within a very short time of the taking of the last meal by the deceased. AIR (Vol 25) 1938 Mad 336 : 1938 MWN 36 : 47 MLW 272 : 40 Cr LJ 596 : 1938 M Cr C 89 : 181 Ind Cas 849.

——**S. 509 — Evidence— Medical evidence — Consent by accused's Advocate to dispense with medical witness present in Court — Duty of prosecution.**

In a trial of murder no consent or admission by the prisoners' Advocate to dispense with the medical witness can relieve the prosecution of their duty of proving by evidence the nature of the injuries received by the deceased and that the injuries were the cause of death. AIR (V 23) 1936 Mad 426 : 1936 MWN 110 : 43 MLW 305 : 37 Cr LJ 471 : 70 MLJ 447 : 59 Mad 349 : 161 Ind Cas 663 : 1936 M Cr C 89 : 1936 Cr C 509 (DB).

——**S. 509 — Applicability when medical witness is present in Court.**

Section 509, Criminal P. C., is not intended to be applied when the medical witness is present in Court. AIR (V 23) 1936 Mad 426 : 43 MLW 305 : 37 Cr LJ 471 : 70 MLJ 447 : 1936 MWN 110 : 59 Mad 349 : 161 Ind Cas 663 : 1936 M Cr C 89 : 1936 Cr C 509 (DB).

——**S. 509 — Post mortem report — Admissibility.**

A post mortem report is not evidence and can only be used by the witness who conducted the post mortem inquiry as an aid to memory. AIR (V 23) 1936 Mad 426 : 1936 MWN 110 : 43 MLW 305 : 70 MLJ 447 : 59 Mad 349 : 161 Ind Cas 663 : 1936 M Cr C 89 : 1936 Cr C 509 : 37 Cr LJ 471 (DB).

——**S. 509 — Murder — Medical evidence — Time of death must be given.**

In murder cases, time is a matter of importance and the medical evidence must give some estimate as to how long the person to whom the portions of the body discovered belonged had been dead. In every case of this sort, the medical officers should give an opinion as to the date of death. AIR (V 22) 1935 Lah 805 : 37 Cr LJ 250 : 38 PLR 138 : 160 Ind Cas 187 : 1935 Cr C 1165 (DB).

——S. 509 — The medical evidence can only be used as corroborative of the charge and not the evidence of the charge. AIR (V 21) 1934 Pesh 27 : 35 Cr LJ 961 : 148 Ind Cas 1043 : 1934 Cr C 523 : 21 AI Cr R 252.

——**S. 509 — Lahore High Court Rules and Circulars, Chap. XXIV, para. 5 — Deposition of medical witness — Omission of Magistrate to append certificate — Admissibility of deposition.**

The failure of a committing Magistrate to append a certificate to the deposition of a medical witness that it was taken by him and signed by him in the presence of the accused has not the effect of making the evidence of the medical witness recorded by the committing Magistrate inadmissible if it otherwise appears that the statement was recorded and attested by the Magistrate in the presence of the accused. AIR (V 20) 1933 Lah 131 : 34 Cr LJ 443 : 142 Ind Cas 577 : 1933 Cr C 247 (DB).

——**S. 509 — Duty of Prosecution.**

In a criminal trial, it is the bounden duty of the prosecution to tender in evidence not only the medical evidence and the post mortem report of the Civil Surgeon who performed the post mortem examination on the body of the deceased but also the reports of the Chemical Examiner and of the Imperial Serologist. AIR (V 20) 1933 Oudh 265 : 34 Cr LJ 1009 : 10 OWN 1108 : 145 Ind Cas 470 : 1933 Cr C 592 : 20 AI Cr R 405 (DB).

——**S. 509 — Result of medical examination — Consent of accused not put down in writing — Admissibility.**

It is not necessary in order to make evidence disclosed on the medical examination of the accused admissible, that the fact of consent of the deceased having been obtained for examination should be put down in writing. It is enough if his consent to the examination was obtained. AIR (V 19) 1932 Cal 723 : 36 CWN 1152 : 34 Cr LJ 177 : 60 Cal 179 : 141 Ind Cas 622 : 1932 Cr C 728 (DB).

——S. 509 — In a murder case, it is most essential that time of post mortem should be recorded as, in many cases, it assists Court in determining whether death took place at the time alleged or not.

AIR (V 18) 1931 Oudh 119 : 8 OWN 107 : 32 Cr LJ 697 : 6 Luck 475 : 131 Ind Cas 439 : 1931 Cr C 241 : 15 AI Cr R 489 (DB).

——S. 509 — **Previous deposition.**

Medical witness — Cross-examination reserved for Sessions Court — Latter Court not summoning him but admitting previous deposition— Procedure is wrong. AIR (V 10) 1923 Pat 116 : 60 Ind Cas 662 : 3 Pat LT 32.

——S. 509 — **Record of statement — Expert witness.**

The statement of a medical witness taken and attested by a Magistrate in the presence of the accused should be recorded with the utmost care and accuracy as it is admissible on evidence in the Sessions Court even in the absence of the witness. It should be carefully scrutinized and if the deposition requires further explanation or elucidation, the Judge should summon and examine the witness. AIR (V 4) 1917 Oudh 288 : 20 OC 61 : 18 Cr LJ 380 : 38 Ind Cas 764 (DB).

——S. 510.

1. **Evidentiary value and proof.**
2. **Identity of matter or thing examined.**
3. **"Under the hand."**
4. **Chemical Examiner.**

### 1. Evidentiary value and proof.

——S. 510 — **Chemical Analyser's report — Proof — Evidentiary value.**

The report of the Chemical Analyser may be used as evidence without that officer being called as a witness and that undoubtedly is the usual practice. But the weight to be attached to such a report must depend, to a considerable extent, on the reasons which the Chemical Analyser gives for the conclusion which he has arrived at, and in some cases, where the matter to be reported on is the process of certain substances in the article submitted for examination, much would turn on the quantity of the incriminating substance found in the article. If the Chemical Analyser's report alone is to be considered sufficient, it should contain all the information which that officer himself would have been able to furnish if he had been examined as a witness. AIR (V 31) 1944 Bom 321 : 46 Bom LR 481 : 216 Ind Cas 288 : 46 Cr L Jour 162 (DB).

——S. 510 — **Report of Municipal Analyst.**

The Municipal Analyst must be called as a witness in order to prove that the contents of his report were true. His report does not fall within S. 510, Criminal P. C. AIR (V 30) 1943 Bom 445: 45 Bom LR 895 : 45 Cr LJ 92 : 209 Ind Cas 515 (DB).

——S. 510 — **Report of Chemical Examiner — Accepting of without cross-examination.**

The acceptance of the mere written report of the Chemical Examiner as evidence in criminal cases without subjecting him to cross-examination is dangerous. AIR (V 26) 1939 Lah 149 : 40 Cr LJ 576 : ILR (1939) Lah 206 : 41 PLR 493 : 181 Ind Cas 864 (DB).

——S. 510 — **Report or certificate, if enough — Exceptions.**

Subject to certain exceptions — those exceptions being amongst others, the certificates of the Imperial Serologist touching the matter of bloodstains and of the Chemical Examiner, which are made admissible in evidence, by themselves — the opinion of an expert must be given orally and a report merely or certificate by him cannot possibly be evidence. Unless he goes into witness-box and gives oral evidence, there can be no cross-examination of the expert at all. AIR (V 24) 1937 Mad 407 : 45 MLW 262 : (1937) 1 MLJ 341 : ILR (1937) Mad 764 : 171 Ind Cas 259.

——S. 510 — **Report of Chemical Examiner admitted without putting him in witness-box — Accused not objecting — Report, if rightly admitted.**

The Sessions Judge acquitted the accused who was convicted under S. 14, Dangerous Drugs Act, on the ground that the Chemical Examiner had not been called and examined to depose the contents of the packet and the match-box, which were sent to him for analysis. But it was found that the admission of the Chemical Examiner's Report was not objected to either by the accused or his Counsel and no request was made for putting the examiner into the witness-box and neither did they plead that the contents of the packet or the match-box were not cocaine :

Held, that under S. 510, Criminal P. C., the Report of the Chemical Examiner was admissible in evidence, as establishing the fact that the substance which was taken possession of by the Excise Inspector contained more than 3 per cent. of cocaine admixed with novocaine. AIR (V 21) 1934 All 873 : 15 LRA Cr 110 : 21 AI Cr R 209 : 1934 Cr C 1082 : 1935 All LR 19 : 36 Cr LJ 362 : 57 All 253 : 153 Ind Cas 472 (DB).

——S. 510 — **Chemical Examiner's report — Value of — Court's duty.**

It can hardly be open to the Courts to render S. 510, Criminal P. C., nugatory by refusing to attach any whight to the reports of the Chemical Examiner even though he is not examined. If they are not to have any weight, there would be no object in making them admissible in evidence. The intention of the Legislature is that they should have the same value as they would have if they were formally proved by sworn testimony. It is always open to the Courts to call the Chemical Examiner when this course is deemed to be necessary in the interest of justice. He does not, as a rule, give any opinion as to the cause of death, but merely reports the result of the chemical examination of the substances sent to him. It is for the Court to determine the cause of death after a consideration of such report together with the post mortem appearances as deposed to by the officer who conducts the autopsy and of the other evidence in the case. AIR (V 21) 1934 Lah 150 (2) : 36 Cr LJ 14 : 15 Lah 310 : 1934 Cr C 330 : 37 PLR 67 : 152 Ind Cas 206.

——S. 510 — Trial concluded and the opinions of the assessors recorded — Examination of a Chemical Examiner under S. 540 as a Court witness — Assessors asked if they wanted to modify their opinion — Assessor stuck to their old opinion and the judgment announced:

Held, that the procedure was not justified. But as the evidence already on record, before the examination of the Chemical Examiner, was sufficient for the decision of the case and it was not necessary to make any use of his statement and the assessors did not change their opinion in any way, the accused was not prejudiced. ('34) 149 Ind Cas 442: 35 Cr LJ 1002: 35 PLR 390.

——S. 510—**Report of Chemical Examiner —Value of — Admissibility in evidence — Discretion of Court — Sessions Judge admitting meagre report — Whether can be rejected by High Court.**

Section 510, Criminal P. C., embodies a rule of evidence and allows the Court discretion to admit in evidence a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter duly submitted to him for examination or analysis and report without requiring the officer concerned to be examined in Court to prove the report. Whenever a Magistrate or a Court of Session finds that the

report of the Chemical Examiner is inadequate, they should not admit it in evidence unless the Officer concerned submits a full and satisfactory report or has been examined in support of it. Where the Sessions Judge has admitted the Chemical Examiner's Report in evidence, it is not possible for the High Court, in the face of the provisions of S. 510, to reject it as inadmissible. Although no hard and fast rule can be laid down as regards the value to be attached to such reports, a meagre and cryptic report to the effect that the contents were duly examined with the result that arsenic in traces was detected and a particular test was used, is hardly of any value.

(General practice in admitting Chemical Examiner's Report condemned.) AIR (V 21) 1934 Oudh 62 : 11 OWN 312 : 1934 Cr C 231 : 1934 Oudh LR 341 : 35 Cr LJ 700 : 148 Ind Cas 600 (DB).

**——S. 510 — Chemical Examiner's Report — Admissibility as proof of death — Discretion of Court.**

Per Collister, J. — When a report is received from the Chemical Examiner containing a quantitative analysis, it should be shown to the Medical Officer who conducted the post mortem examination so that he will be in a position to state before the committing Magistrate what are the medico-legal inferences to be drawn from the report.

(The anomaly of the provisions of S. 510, Criminal P. C., pointed out.)

As S. 510 uses the word 'may' and not 'shall,' the Court has discretion in the matter. AIR (V 20) 1933 All 837 : 35 Cr LJ 280 : 1933 Cr C 1463 : 1934 All LR 106 : 1934 ALJ 173 : 56 All 228 : 146 Ind Cas 1089 (DB).

**——S. 510 — Opinion of Imperial Serologist.**

The Imperial Serologist is a highly responsible officer and a duly qualified scientist who would never venture to give any definite opinion on a question unless he had the fullest scientific data in support of his conclusion. His opinion, therefore, is entitled to great weight. AIR (V 20) 1933 Oudh 265 : 1933 Cr C 592 : 20 AI Cr R 405 : 34 Cr LJ 1009 : 10 OWN 1108 : 145 Ind Cas 470 (DB).

**——S. 510 — Chemical Examiner's report — Conviction based on — Validity.**

Where the appellate Court admitted in evidence the report of the Chemical Examiner without examining him, but the evidence to support conviction was otherwise sufficient,

Held, that the dismissal of appeal against conviction was not improper. AIR (V 13) 1926 Rang 193 : 5 Bur LJ 100 : 27 Cr LJ 1281 : 98 Ind Cas 177.

**——S. 510 — Chemical Examiner's report — Admissibility in appeal — Must be tendered as evidence.**

Under S. 510 any document purporting to be a report under the hand of a chemical examiner upon any matter duly submitted to him for examination and report may be used as evidence in any enquiry, trial or other proceeding. This however does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof but at the same time it must be tendered as evidence and used as such so that the accused may have a chance of questioning it. AIR (V 11) 1924 All 193 : 83 Ind Cas 904: 21 ALJ 869 : 5 LRA Cr 9 : 26 Cr LJ 200.

**——S. 510 — Report prior to proceedings.**

A report of Chemical Examiner made before the institution of proceeding is not admissible without his examination in person. AIR (V 5) 1918 Pat 139 : 20 Cr LJ 266 : 50 Ind Cas 26.

**2. Identity of matter or thing examined.**

**——S. 510 — Exhibits forwarded to Chemical Examiner.**

The Police should, when sending exhibits to the Chemical Examiner, mark each one in such a way that its identity can be fixed and safeguarded throughout, and to specify the origin and ownership of each in the covering letter to the Chemical Examiner. The evidence tendered in Court should establish beyond doubt the origin and ownership of each exhibit. AIR (V 31) 1944 Lah 206 : 44 P LR 69 : 45 Cr LJ 660 : 213 Ind Cas 355.

**——S. 510 — Evidence — Chemical evidence — Aconitine poisoning — Nature of evidence required.**

Where the accused are charged with "aconitine" poisoning and the "aconitine" is found in the vomits of the deceased just before his death, it is necessary that the Chemical Examiner's report should be clear about the category of the aconitine because there are many varieties of the plant aconite, that a large number of them are poisonous and that some are not which are known as "pseudo aconitine." The two types vary in their chemical composition but have certain toxicological resemblances which produce similar pharmacological results. It is also necessary to take the point of time of the appearance of the symptoms of poisoning in relation to time of the aileged poisoning because according to medical jurisprudence, and toxicology, in cases of aconite poisoning, symptoms appear in three to five minutes. AIR (V 28) 1941 Mad 870 : 1942 MWN 173 : 43 Cr L J 596 : 200 Ind Cas 95 : 1941 M Cr C 86 (DB).

**——S. 510 — Burden of proof.**

Failure by prosecution to adduce evidence connecting the parcels containing the blood-stained clothes which reached the Chemical Examiner, with those that were alleged to be despatched and referred to at the trial or rather to show that they were despatched is not a mere technical defect. AIR (V 13) 1926 Lah 79 : 26 PLR 748 : 26 Cr LJ 1420 : 89 Ind Cas 844 (DB).

——S. 510 — Per Abdur Rahim J.—A Chemical examiner's report is admissible in evidence without the Chemical Examiner being called as a witness. But the report can be of no use unless there is proof of the identity of the articles found during investigation and sent to the Chemical Examiner with the articles examined by him. (1910) 20 MLJ 657 (676) : 7 MLT 314 : 1910 MWN 77 : 11 Cr LJ 222 : 6 Ind Cas 51.

**3. "Under the hand."**

**——S. 510 — Report by Chemical Examiner — Admissibility — Conditions.**

What S. 510, Cr. P. Code, requires is not that a report should purport to be a report by a Chemical Examiner; it should in addition be under the hand of a Chemical Examiner, which clearly means that the signature should purport to be that of a Chemical Examiner appointed by the Government of Pakistan. AIR (Vol 36) 1949 Lah 240 : Pak LR (1949) Lah 725 : 50 Cr LJ 1011 (DB).

**——S. 510 — Chemical Examiner's certificate — Paper on record in someone's handwriting showing that certain packets contained cocaine, if legal evidence.**

Where all that is on the record of a case is a little scrap of paper on which it is written in somebody's handwriting that the Chemical Examiner's report shows that the packets in question contained cocaine, it is not legal evidence and cannot be substitute for the original certificate or at least for a copy of it certified by the Magistrate as being a true copy. The provisions relating to the production of a report by the Che-

mical Examiner in place of the Chemical Examiner's own personal appearance in Court are special provisions of the Criminal P. C., and must be strictly adhered to. AIR (Vol 25) 1938 Lah 496 : 40 PLR 733 : 39 Cr LJ 714 : 176 Ind Cas 225 (1).

4. Chemical Examiner.

——S. 510 — Admissibility of certificate.

The certificate of the Professor of Anatomy is not per se admissible in evidence apart from special authority like S. 510 of the Code of Cr P. C. AIR (Vol 10) 1923 Bom 183 : 24 Bom LR 803 : 47 Bom 74 : 26 Cr LJ 339 : 84 Ind Cas 643 (DB).

——S. 511.

See also Criminal P. C. S. 255 A.

——S. 511 — Proof of previous conviction — Sufficiency of mere evidence of identity of accused with some other person previously tried.

Previous conviction has to be proved as laid down in S. 511, Cr. P. Code. Where the accused denies all previous conviction the prosecution is bound to prove them according to law. Mere evidence of identity of accused with some other person previously tried would not be enough. 51 Cr LJ 1284: AIR (Vol 37) 1950 Ajmer 42.

**——S. 511 — Proof of previous convictions — Necessity — Admission by accused of such convictions.**

Though the provisions of S. 511, Cr. P. Code, have to be strictly complied with in regard to the proof of previous convictions, where the accused himself admits his previous convictions, it would not be wrong to treat it as sufficient proof. AIR (Vol 36) 1949 Mad 499: 50 Cr LJ 729: (1948) 2 MLJ 625: 1949 MWN 324.

——S. 511 — Under substantive offence, charges incorporating previous convictions explained to accused — Unreserved plea of guilty by accused — There is no necessity for prosecution to prove those convictions under S. 511, Criminal P. C. AIR (Vol 31) 1944 Lah 25: 45 PLR 414: ILR (1943) Lah 477: 45 Cr LJ 364 : 211 Ind Cas 283 (FB).

**——Ss. 511, 221 (7), 255-A — Record of previous conviction destroyed — Secondary evidence under S. 65 (c), Evidence Act (I of 1872) — Conviction slip, if proof of previous conviction — Mode of proving previous conviction and identity of accused.**

The provisions of S. 511, Criminal P. C., are extremely wide. In addition to the simple ways in which previous convictions can be proved coupled with proof of identity, S. 511 permits them to be proved by any other mode provided by any law for the time being in force.

Secondary evidence under S. 65(c), Evidence Act, can be given of records of the previous convictions of the accused which have been destroyed.

But the previous convictions or the identity of the accused cannot be proved by the mere production of a conviction slip which is nothing but a criminal record of the convicts kept by the authorities. Though the slip must be of great value in enabling the authorities to trace the previous convictions of the accused, it is not intended to be, without anything further, proof of the previous convictions or of the identity of the accused.

The fact of the previous convictions can be proved in the very simple way S. 511, Criminal P. C., provides or in any other way any other law provides, if there be any such, while the identity of the accused can be proved by a comparison by an expert of the thumb-impressions of the accused taken in Court and the thumb-impressions on the record. But all this is necessary only if the accused denies the previous convictions. If on the question of the Court, he admits the previous convictions, nothing else is necessary. He can be forthwith convicted under S. 271, Criminal P. C. AIR (Vol 28) 1941 Sind 173: ILR (1941) Kar 308 : 43 Cr LJ 12: 197 Ind Cas 98 (DB).

**——S. 511 — Distinction in cases under S. 75, Penal Code and those on which previous convictions are to be considered only for necessary punishment by Magistrate within limit of maximum punishment.**

The difference should be noted in a case of previous convictions where, under S. 75, I. P. C., enhanced punishment is to be imposed and a case where previous convictions are only to be taken into account for the purpose of necessary punishment imposed by a Magistrate within the limits of the maximum punishment with which the offence is ordinarily punishable. AIR (Vol 28) 1941 Sind 173: ILR (1941) Kar 308: 43 Cr LJ 12: 197 Ind Cas 98 (DB).

——S. 511 — Legally admissible evidence as to previous convictions must fall either within S. 511, Criminal P. C., or S. 54, Evidence Act. AIR (Vol 26) 1939 Sind 203: 40 Cr LJ 770: ILR (1939) Kar 677: 183 Ind Cas 219 (DB).

**——S. 511 — Conviction sought to be proved by finger-prints taken in previous trials — Evidence as to identity of prints.**

Where the previous conviction of the accused is being sought to be proved by their finger-prints taken in the previous trial and the calendar extracts of their previous convictions, the sufficiency of the evidence as to the identity of a convicted person must, in each case, be a question of fact, and no hard and fast rule can be laid down as to what evidence is necessary for the establishment of that identity.

Where, therefore, it is proved that the accused before the Court had his finger-prints taken in jail far away from his native place, soon after a person of his name was convicted of an offence, that is certainly very strong evidence indeed that the person bearing his name who was convicted was the very person who shortly afterwards had his thumb impressions taken. Where however, the finger-prints were taken elsewhere or taken in a place which was not the place of conviction, and taken some time after the conviction, it cannot be said that the identity of the convicted person with the accused before the Court has been established. Where a calendar extract has shown previous convictions, there can be no doubt that the person last convicted was also convicted under the various charges mentioned in the calendar extract. In such cases, a list of previous convictions would be confirmatory of the other evidence establishing the identity of the convicted person in earlier cases with the accused before the Court. The list of previous convictions contained on the finger-print slips is not satisfactory evidence of the previous convictions recited therein, although it may be true that the list of previous convictions forms part of the document. The presumption of correctness in respect of these entries is not strong enough to warrant a Criminal Court in asserting that the person whose finger-prints were recorded had received those previous convictions. If the prosecution are able to prove that a number of persons bearing the names of the accused are found in a calendar extract and that the finger-prints of those accused were taken in the same jail at or about the same time, that is very strong evidence indeed that those persons were jointly convicted. AIR (Vol 25) 1938 Mad 858: 1938 M Cr C 145: 1938 MWN 595: 48 MLW 639: 40 Cr LJ 355: 180 Ind Cas 431.

**——S. 511 — Questioning accused under S. 342.**

Previous convictions relied on for purposes of S. 75, Penal Code, must be proved in accordance with law. A mere admission by the accused is not sufficient especially when there is nothing on the record to justify the questioning of the accused

under S. 342, on that point. AIR (Vol 21) 1934 Lah 693: 35 PLR 697: 36 Cr LJ 778: 155 Ind Cas 478.

——S. 511 — In order to prove the previous convictions standing against an accused person for the purposes of S. 75, Penal Code, it is necessary that the provisions of law as contained in S. 511, Criminal P. C., should be observed. (1934) 151 Ind Cas 719: 36 PLR 7: 35 Cr LJ 1387.

**——S. 511 — Identity of accused — Parade — Evidence of.**

If a jail identification is held in presence of a Magistrate he should be produced at the trial as a witness before the conclusion of the trial. AIR (Vol 7) 1920 All 60: 2 UPLR (A) 115: 21 Cr LJ 515: 56 Ind Cas 771 (DB).

**——S. 511 — Previous conviction — Proof of — Expert evidence — By finger mark expert — If sufficient proof.**

In relying on the evidence of finger print, for the identity of an accused person, there ought to be evidence to prove (first) the similarity of the finger print of the accused taken at the trial with the finger print alleged to be of the person previously convicted, and (second) to identify the last mentioned finger prints as those of the person who had been previously convicted. Where there is no evidence on the second point, the evidence on first point alone by a finger print expert, is insufficient to prove previous conviction. 21 CWN 469: 16 Cr LJ 462: 39 Ind Cas 302: AIR (Vol 4) 1917 Cal 211 (DB).

**——S. 512.**

1. **Scope and object.**
2. **Evidence of absconding.**
3. **Examination in absence of accused.**
4. **Use of evidence in subsequent trial of absconder.**
5. **Death or incapacity of deponent.**
6. **Approver's evidence under Section 512.**

**1. Scope and object.**

——S. 512 — Burden to show that evidence of witnesses recorded under S. 512(1), is admissible is on the prosecution. It must disclose what steps have been taken to ascertain the whereabouts of the witnesses. AIR (Vol 31) 1944 Nag 274: ILR (1944) Nag 511: 1944 NLJ 247 (DB).

**——Ss. 512 (1), 517, 520, 523 — Proceedings under S. 512(1), nature of — Whether inquiry or trial within meaning of S. 517 — Order for disposal of property at conclusion of such proceeding — Appealability.**

The object of the provisions of S. 512(1), Criminal P. C., is solely to record, in a particular way and under particular circumstances, depositions of witnesses which may, in the future, be used against the accused person when he is apprehended and brought to trial. There is no inquiry, for there is nothing into which an inquiry can be made. The sub-section is, in fact, directed merely to the record of evidence and nothing more. It is in contradistinction with sub-s. (2) of S. 512, under which there has to be an inquiry whether an offence punishable with death or transportation has been committed or not by some unknown person. Consequently, an order made at the conclusion of such proceedings for disposal of property produced before the Court, is made under S. 523, and not under S. 517 and, therefore, no appeal lies against such order. AIR (Vol 24) 1937 Rang 42: 14 Rang 633: 38 Cr LJ 358: 167 Ind Cas 245 (DB).

**——S. 512 (1) — Magistrate's duty in proceedings under S. 512(1) — Power to decide disputed facts.**

A proceeding under S. 512(1) is neither an inquiry nor a trial within the meaning of S. 517. The Magistrate has no jurisdiction in the proceedings under S. 512(1) to come to any finding of fact to the prejudice of the accused in the latter's absence except the necessary preliminary finding warranted by the terms of the section, that the accused has absconded and there is no immediate prospect of arresting him. In arriving at a finding as to the accused's guilt of the offence with which he is charged in the first information report, the Magistrate exercises a jurisdiction which is not vested in him. Therefore, if an order for delivery is made by the Magistrate, it must be for delivery to the person entitled to the immediate possession of the property having regard to the indisputable or admitted facts, leaving the parties to fight out their case in the Civil Court. AIR (Vol 24) 1937 Rang 42: 14 Rang 633: 38 Cr LJ 358: 167 Ind Cas 245 (DB).

**——S. 512 — Conviction in absence.**

Convicting and sentencing an accused in his absence is wholly illegal and the conviction is liable to be set aside. 26 PLR 239: 105 Ind Cas 683: 28 Cr LJ 971: AIR (Vol 14) 1927 Lah 870.

**——S. 512 — Notice to surety.**

Notice to surety is necessary before enquiry. AIR (Vol 13) 1926 Cal 1224: 54 Cal 134: 44 CLJ 170: 27 Cr LJ 1293: 98 Ind Cas 189 (DB).

**——S. 512 — Acquittal of accused, effect of, with regard to others similarly charged — Revival of proceedings against absent accused — I. P. C., S. 147.**

Petitioners were charged along with two others with having committed certain offences, under Ss. 379, 341 and 147, I. P. C. The latter who were sent up by the Police were tried and acquitted, and the Magistrate remarked in his judgment that the case against the petitioners was not a true one.

Held, that until this decision was set aside by a higher authority, the petitioners could not be prosecuted; and the order of the Sessions Judge directing their prosecution was bad. (1903) 7 CWN 711 (713) (DB).

**2. Evidence of absconding.**

——S. 512 — If there is evidence on record that the accused were absconding and there was no immediate prospect of their arrest, the absence of a formal finding to that effect does not invalidate the proceedings. Section 512 does not state that there should be a formal finding. All that is required under the section is that there should be upon record evidence properly admissible under the Evidence Act. AIR (Vol 34) 1947 Sind 122: 48 Cr LJ 74: 228 Ind Cas 157: ILR (1946) Kar 79 (DB).

**——S. 512 — Evidence as to absconding.**

A mere perusal of police papers and an oral enquiry made by a Judge cannot be taken to be such "proof", as the Court should require before evidence against an absconding accused can be used against him in his subsequent trial when the witness who gave it has since died. A statement on oath of a police officer might well constitute the necessary proof. But statements made by police officers not in the case in which evidence was recorded or purported to be recorded under S. 512, but in the subsequent case, cannot be used, as it were retrospectively or applied to the facts of the previous proceedings. AIR (Vol 34) 1947 Sind 122: 48 Cr LJ 74: 228 Ind Cas 157: ILR (1946) Kar 79 (DB).

——S. 512 — Magistrate examining witnesses must record a finding that the accused has absconded and that there is no immediate prospect of arresting him — Evidence recorded without such finding is not admissible in subsequent trial of the accused. AIR (Vol 31) 1944 Nag 274: ILR (1944) Nag 511: 1944 NLJ 247 (DB).

——S. 512 — Magistrate satisfied on evidence recorded by him that accused is absconding—Sufficiency of evidence, if can be questioned when accused is later brought to trial or at subsequent stage.

The condition precedent to the recording of a statement under S. 512, Criminal P. C., is that the Magistrate who records such a statement should be satisfied on some evidence led before him that the accused person is absconding. When a Magistrate is so satisfied on evidence recorded by him, the sufficiency of the evidence satisfying him cannot be agitated or questioned, when the accused person is later brought to trial. If the sufficiency of this evidence cannot be questioned at this stage, far less can it be questioned at a later stage when the accused person after trial is convicted and an appeal preferred from the order of conviction. AIR (Vol 28) 1941 Lah 361: 43 PLR 641: 43 Cr LJ 8 : 197 Ind Cas 108 (DB).

——S. 512 — Absconding accused — Proof of presence of accused in place of occurrence before occurrence and subsequent disappearance.

The mere statement of the Police officer that he did not find the accused at his house is not sufficient for the purposes of presuming against the accused that he had become an outlaw after the offence occurred. It is incumbent on the prosecution to prove that the accused was present in the village before the occurrence and that he did disappear after it had taken place. AIR (Vol 21) 1934 Pesh 70:35 Cr LJ 1286: 151 Ind Cas 127 (DB).

——S. 512 — Whether raises inference of guilt.

The fact that a person absconding is of little importance where the evidence is practically worthless and consists of very little, if anything, beyond the fact that he absconded and does not raise inference of guilt. AIR (Vol 18) 1931 Lah 38: 32 Cr LJ 522: 32 PLR 259: 130 Ind Cas 410 (DB).

——S. 512 — Essentials.

As a general rule it is better that the finding that the accused has absconded should be recorded as a condition precedent by the Magistrate who takes the evidence under S. 512. AIR (Vol 13) 1926 All 340: 48 All 375: 24 ALJ 394: 7 LRA Cr 85: 27 Cr LJ 874: 96 Ind Cas 122 (DB).

——S. 512 — Finding that accused has absconded is not necessary.

S. 512 requires only that before the Court records the depositions of the witnesses for the prosecution under this section, it should be proved that the accused person has absconded and that there is no immediate prospect of arresting him, but it does not require that a finding should be given to that effect. AIR (Vol 13) 1926 Lah 83: 6 Lah 489: 27 Cr LJ 247: 26 PLR 845: 92 Ind Cas 423 (DB).

——S. 512 — Absconding accused — Evidence taken in absence of — No finding by Magistrate — Immediate prospect of arrest.

The mere non-recital by the Magistrate in his order of a finding that there was no immediate prospect of the arrest of the accused who had clearly absconded does not render the evidence taken by him under 512 of the Cr. P. C., inadmissible against them when arrested. AIR (Vol 5) 1918 All 60: 41 All 60: 16 ALJ 902: 20 Cr LJ 6: 48 Ind Cas 481 (DB).

——S. 512 — Evidence taken in absence — When to be used.

Evidence taken in the absence of an absconding accused under S. 512 Cr. P. C. cannot be used against him, unless it was proved and found at the time that the accused had absconded, and could not be arrested. AIR (Vol 2) 1915 All 484: 13 ALJ 1043: 16 Cr LJ 801: 38 All 29: 31 Ind Cas 817 (DB).

3. Examination in absence of accused.

——S. 512 — Evidence in the absence of the accused — Legality.

No evidence can be taken in the absence of the accused person, when he has already appeared in Court and it would be illegal. AIR (Vol 37) 1950 Kut 41: 51 Cr LJ 1062.

4. Use of evidence in subsequent trial of absconder.

——S. 512 — Unreasonable delay and inconvenience are questions of fact.

What facts amount to unreasonable delay and inconvenience are questions of fact and no hard and fast rule can be laid down. AIR (Vol 28) 1941 Lah 361: 43 PLR 641: 43 Cr LJ 8: 197 Ind Cas 108 (DB).

——S. 512 — Recording of depositions of witness for purposes of being used against absconding accused — Procedure.

Where a witness is examined at a criminal trial, his deposition cannot be subsequently used at the trial of another accused who is absconding, if the procedure laid down in S. 512, Criminal P. C., is not observed. It is not the law that, for the purpose of being used under S. 512, the depositions of witnesses must be recorded over again in a separate proceeding. It will suffice if, at the commencement of the hearing, the prosecutor brings to the notice of the Court the fact that such a person is absconding, examines a witness or witnesses to prove that fact and obtains a direction of the Court that the evidence about to be taken is being taken for the purpose of being used, if necessary, against the absconder under S. 512, as well as against the person present and under trial.

It is regrettable that so often in cases where an accused person is tried and other accused persons are absconding, it is subsequently found that no proper steps have been taken at the time of the former trial to prevent necessary evidence from being lost by death of the witnesses or otherwise. AIR (Vol. 25) 1938 Pat 49: 16 Pat 116: 4 BR 225: 39 Cr LJ 281 (2): 19 PLT 164: 173 Ind Cas 230 (DB).

——S. 512 — Evidence in other case — Evidence referring to absconding person given at a previous trial of different accused, cannot be used subsequently at the trial of the absconding accused.

When witnesses, who have given evidence at a previous trial against persons then on their trial, happen to have referred in the course of their evidence at the trial to a person who is absconding and is subsequently tried, their statement cannot be read at the subsequent trial of the accused who was then absconding, merely because they happen to be absent and cannot give evidence. The objection to the evidence is the fundamental objection that statements made against a person in his absence cannot be used as evidence against him in a criminal trial. Exceptions to that fundamenal rule can only be created by statute and when a statute permits something to be done which a fundamental rule prohibits, that thing can only be done by strict compliance of the statute which creates the exception. AIR

(Vol 13) 1926 All 340: 48 All 375: 24 ALJ 394: 7 LRA Cr 85: 27 Cr LJ 874: 96 Ind Cas 122 (DB).

**——S. 512 — Conviction of two out of three accused — The third absconding — Subsequent trial of absconder — Effect of previous trial on.**

Where out of three accused, one is absconding and the other two are tried and convicted, the absconding accused when found should be tried separately irrespective of the previous trial and conviction of his co-accused. AIR (Vol 1) 1914 All 85: 36 A 168: 12 ALJ 231: 15 Cr LJ 200: 22 Ind Cas 984 (DB).

**——S. 512 — Evidence taken in absence — When used.**

Statements made by the witnesses before a Magistrate in the absence of the accused cannot be admitted in evidence, if the witness is available. 157 PLR 1911: 12 Cr LJ 214: 56 PWR 1911 Cr: 10 Ind Cas 119 (DB).

**5. Death or incapacity of deponent.**

**——S. 512 — Strict proof of conditions laid down in S. 512 — Fact of death of witness must be proved like any other fact.**

Section 512, Criminal P. C., which empowers a Magistrate to take the depositions of certain witnesses in the absence of the accused, enacts an exception to the principle embodied in S. 33, Evidence Act, namely that the evidence of a witness which a party had no right & opportunity to cross-examine, is not legally admissible. Before an exception can be availed of, the conditions prescribed by the statute must be strictly complied with. Even under S. 33, Evidence Act, strict proof of the conditions required in that section is insisted on especially in criminal cases. Much more so under S. 512, Criminal P. C. Therefore, it is incumbent that the death of the witnesses must be proved and the burden of proving the factum of death is upon the party who wishes to tender the evidence. The fact of death must be proved like any other fact and mere report that a certain person is dead is not sufficient. AIR (Vol 26) 1939 Mad 190: 1938 MWN 582: 40 Cr LJ 437: 180 Ind Cas 605.

**——S. 512 — Inability to attend.**

A qualified doctor's medical certificate indicating accused's inability to attend the Court should be accepted unless there is reason to believe it to be forged or not genuine. AIR (Vol 12) 1925 Lah 101: 25 Cr LJ 638: 81 Ind Cas 126.

**——S. 512 — Depositions when can be used — Witness unable to remember details of occurrence can refresh memory.**

A deposition recorded under S. 512 can only be given in evidence if the deponent is dead or is incapable of giving evidence or his attendance cannot be procured without an unreasonable amount of delay, expense or inconvenience. The mere fact that he is unable to remember the details of the occurrence does not render him incapable of giving evidence within the meaning of the section and his obvious deposition cannot be put in evidence against the accused person. The proper procedure in such a case is to read out his previous deposition of the witness under the provisions of S. 159 of the Evidence Act to refresh his memory and then to ask him whether he remembers the details of the occurrence. AIR (Vol 11) 1924 Lah 605: 25 Cr LJ 95: 76 Ind Cas 31.

**——S. 512 — Inadmissible unless requirements of S. 33 Evi. Act, are satisfied.**

The Lower Courts treated the evidence of witnesses recorded in a case in which another accused was charged with the same offence as admissible under S. 512 of Cr. P. Code. Though the accused insisted on the examination of the witnesses it was not done.

Held, the evidence of a witness recorded in another case cannot be admitted as evidence in this case under S. 33 of the Evidence Act unless the requirements of that section are complied with. AIR (Vol 9) 1922 Oudh 254: 24 Cr LJ 828: 25 OC 142: 74 Ind Cas 860.

**6. Approver's evidence under section 512.**

**——S. 512 — Tender of pardon — Pardon is validly tendered — Proceedings against approver — Practice.**

In an enquiry into an offence of murder a pardon was tendered to the accused and evidence was recorded under S. 512; the validity of the tender of pardon being questioned.

Held, the offence of murder being under enquiry in order to secure evidence the accused was made approver and a pardon was tendered to him which was valid. But the proceeding under S. 512 is only ancillary to that enquiry, and a tender of pardon does not prevent the prosecution being started against the approver as accused. In such a case the approver may plead pardon as defence. On the ground that the approver has failed to perform the conditions of the pardon by giving false evidence under S. 512, the prosecution may proceed against him. A magistrate has power to discharge an approver from custody, if the prosecution do not proceed further in the case against the pricipal offender. AIR (Vol 9) 1922 Bom 177: 23 Bom LR 839: 46 Bom 120 : 22 Cr LJ 620 : 63 Ind Cas 156 (DB).

**——Section 513.**

**——Ss. 513 and 499 — Demand of cash security is illegal.**

The language of S. 499 makes it perfectly clear that what that section contemplates is the furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties. The accused as well as the sureties have, therefore, to execute only bonds which are sufficient in the mind of the Magistrate for the amount which he might have fixed. Section 513 also makes it clear that the Magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money in lieu of executing a personal bond and giving surety of some persons. That section, however, does not authorise a demand of cash by a Magistrate. AIR (Vol 35) 1948 All 238: ILR (1948) All 302: 1948 ALJ 58: 1948 AWR HC 80: 49 Cr LJ 282: 1948 OAHC 80.

**——S. 513 — Bail — Demand for cash security — Legality — Rule.**

An order demanding cash security for bail is illegal, as there is no provision in the Cr. P. Code to support such an order. It is open to the Court to accept cash security to such extent as it may think fit if such security is offered by the accused, but the Court cannot insist on cash security. (1948) 231 Ind Cas 353: 48 Cr LJ 773 (Cal) (DB).

**——S. 513 — Bail — Surety bond, nature and effect of.**

Per Mohammad Noor J.—When a Court orders an accused to be realesed on bail on his offering surety or sureties, the question of the forfeiture of the am-

ount of surety, in case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. When an accused is released on bail on his offering surety for the amount ordered, the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in Court. The surety or sureties must have a personal stake in seeing that the accused carries out his obligation. AIR (V 22) 1935 Pat 195: 16 PLT 223: 36 Cr LJ 730: 14 Pat 442: 1 BR 450: 155 Ind Cas 430 (SB).

——S. 513 — **Scope and object of — Surety bond — Absconding of accused — Surety amount realized from accused's property — Surety, if relieved of his liability — Contract Act, S. 128.**

A executed a bond agreeing to forfeit a sum of Rs. 100 in the event of the accused, who was being bailed, failing to attend the Court on the day fixed for hearing. The accused having absconded, A's bond was forfeited by the Magistrate who ordered him to pay the whole amount of his bond. But owing to certain reasons which appealed to the District Magistrate, this amount was, on appeal to that officer, reduced to Rs. 50. In revision A urged that as the Crown had already realised the sum of Rs. 100 from the property of the absconding accused, he cannot be made liable over again for payment of Rs. 100 or any part thereof:

Held, that the principle laid down in S. 128, Contract Act, had no application to the case and that the recovery from the accused of the amount forfeited by him under his bond did not relieve the surety of his liability to make good such part of his bond as he had been ordered by the Appellate Court to pay.

Section 513, Criminal P. C., is only an enabling section. The underlying object of the section is to enable prisoners who are not likely to abscond and who, at the same time, cannot find sureties to be bailed on their finding cash. AIR (V 20) 1933 Sind 320: 35 Cr LJ 315: 147 Ind Cas 127 (DB).

——S. 513 — **Agreement to idemnify surety.**

An agreement to idemnify a person standing bail is illegal. There is nothing in S. 513 which would justify an inference different from the English law on the question. (1908) 10 Bom LR 553: 32 B 449 (453) (DB).

——**Section 514.**

1. Appeal and revision.
2. Breach of bond.
See also Note 3.
3. Forfeiture.
4. Jurisdiction.
5. Procedure.
6. Remission of penalty.
7. Scope.
8. Surety.
9. Validity of bond.
See also Note 3.

**1. Appeal and revision.**

——Ss. 514, 439 — **Revision.**

Frontier Crimes Regulation (III of 1901), Ss. 10 and 20 — Bond taken by District Magistrate forfeited after the opening case to Jirga — Matter is governed by S. 20 of the Regulation and not by Criminal P. C. — Revision against forfeiture lies to the Commissioner and not to the High Court. AIR (V 31) 1944 Lah 396: 46 Cr LJ 16: 46 PLR 23: 215 Ind Cas 160.

——S. 514 — Court in revision should not interfere with the Magistrate's discretion in the matter of forfeiting a surety bond under Ss. 109 and 110, Cr. P. Code. AIR (V 13) 1926 Sind 180: 20 SLR 95: 27 Cr LJ 326: 92 Ind Cas 342 (DB).

——Ss. 514, 537 — Where the Magistrate has failed to follow the procedure under S. 514, Criminal P. C., in holding the surety to his bond without calling upon him to show cause why the penalty should not be paid, although such an omission is not justifiable, yet if the facts show that such an omission has not occasioned any failure of justice, it is sufficient to prevent interference in revision. AIR (V 27) 1940 Pat 375: 21 PLT 194: 6 BR 221: 41 Cr LJ 214: 185 Ind Cas 598.

——S. 514 — **Order under — District Magistrate, if can himself entertain revision.**

Where an appeal is not admitted, a revision on an order under S. 514, Criminal P. C., can be entertained by the District Magistrate himself, and for such revision the cases need not be sent to the High Court. AIR (V 21) 1934 Sind 152: 36 Cr LJ 215: 152 Ind Cas 874 (DB).

——S. 514 — **Formal order forfeiting bond not recorded — Whether mere irregularity — Interference in revision.**

The failure to record a formal order that the bond executed by the accused has been forfeited before calling upon the accused to show cause why the penalty under the bond should not be paid is a mere irregularity and the High Court will not interfere in revision merely on that ground which the accused had notice and appeared to show cause. AIR (V 30) 1943 Cal 251: ILR (1942) 2 Cal 475: 44 Cr L J 630: 207 Ind Cas 265.

**2. Breach of bond.**
See also N. 3.

——S. 514 — **Accused executing bond to appear in particular Court — Case transferred — Failure to appear in latter Court.**

Where by a bond, an accused binds himself to attend in a particular Court, but fails to appear in another Court to which the case is subsequently transferred, it cannot be said, on the construction of the bond, that the accused has broken the condition of the bond. AIR (V 30) 1943 Bom 178: 45 Bom LR 314: 44 Cr LJ 549: 207 Ind Cas 22 (DB).

——S. 514 — **Surety — Bond to produce accused on being called upon to do so — Notice calling upon surety.**

Where the form of bond executed by a surety is an undertaking to produce the accused in the particular Court on being called upon to do so, in the absence of any notice calling upon the surety to produce the accused, it cannot be said that the surety failed to perform the conditions of the bond. Hence there can be no justification for forfeiture of the bond. AIR (V 30) 1943 Cal 236: ILR (1943) 2 Cal 482: 44 Cr LJ 615: 207 Ind Cas 196.

——S. 514 — **Forfeiture.**

Application for stay under S. 526, cl. (8) — Security bond reciting that application to High Court for

transfer would be filed — Application filed but dismissed for failure of deposit — Bond forfeited.

Held: Bond executed under S. 526, cl. (8) cannot be forfeited for want of prosecution of the transfer application which has actually been made unless that is clearly set out in the form of the bond. AIR (V 25) 1938 Lah 337: 39 Cr LJ 609: 175 Ind Cas 545.

**——S. 514 — Order of forfeiture.**

An order passed against a security for production of accused released on bail, forfeiting his security cannot be sustained if it is not in terms of the bond. AIR (V 17) 1930 Pat 519: 1930 Cr C 1015.

**——S. 514 — Validity of forfeiture.**

There can be no forfeiture of a bail bond except on its own terms. Where the bond provided that the accused "should be surrendered to the District Magistrate on the day of decision of the appeal or within three days thereafter or such other date as the District Magistrate might direct" and the forfeiture was ordered without the Magistrate having fixed a date.

Held, that the forfeiture was not valid. (1930) 11 PLT 578: 128 Ind Cas 348: 32 Cr LJ 121: 15 A I Cr R 341.

——S. 514 — Bond to appear before a specified Court does not cover failure to attend Court to which the case is transferred, unless specially provided therein. AIR (V 12) 1925 Rang 153: 84 Ind Cas 933: 26 Cr LJ 389: 2 Rang 581.

**——S. 514 — Breach, what is — Forfeiture of surety bond — Person bound need not be actually convicted.**

The contention that the provisions of S. 121 are not exhaustive cannot be supported. When the law definitely lays down what would constitute a breach of the bond given under an order passed under S. 118, the breach must be confined to those acts and cannot be extended to the commission of any other acts, but at the same time it is nowhere laid down in the Code that the persons giving the bond should actually be convicted before proceedings are taken against his surety. AIR (V 15) 1928 All 232: 50 All 666: 9 A I Cr R 443: 26 ALJ 443: 30 Cr LJ 203: 113 Ind Cas 740: 9 LRA Cr 68.

**——S. 514 — Personal bond — Forfeiture — Non-appearance in another Court.**

The accused executed personal bonds to attend on the dates on which the case might be heard in the Court of a certain Magistrate, named therein or in a Court of Session if the case should be committed to that Court. The Magistrate (being then on tour) ordered them to appear on one particular date in the Court of another Magistrate. Some of the accused failing so to appear, their bonds were ordered to be forfeited. Held, that order was wrong as the bonds did not require them to appear in the Court of the other Magistrate. AIR (V 7) 1920 All 206 (1) : 18 ALJ 631: 57 Ind Cas 456: 21 Cr LJ 632.

**——Ss. 514, 516 — Surety bond to produce accused before Sessions Court — Proceeding for forfeiture if may be taken by a Magistrate — Delegation of power — Validity.**

Where a surety bond has been executed for the appearance of an accused person before a particular court under S. 514 of the Criminal Procedure Code proceedings to have the bond forfeited can be initiated only by that court. S. 516 of the Code does not authorize the delegation of power to initiate forfeiture proceedings. It is only concerned with the power to direct levy of the amount due on a forfeited bond. (1910) 14 CWN 259 (260): 3 Ind Cas 113: 10 Cr LJ 248 (DB).

**——S. 514 — Bail bond, terms of — Surety, discharge of.**

A bail bond ran as follows: "We stand surety for the production of ..... in the Sessions Court on ..... .....in the sum of Rs. .....Held, the surety was discharged on the appearance of the person on the date before the Sessions Court. Where the bond provided for the appearance on every day of hearing, the surety will be discharged as soon as the hearing is over. The obligation to produce will not extend to the subsequent period in either case. A bail bond should contain a clear provision for the production of the accused persons before the court or officer who is to take measure to secure the surrender of the accused and to recommit them to jail in terms of the warrant. (1909) 36 C 749 (752): 10 Cr LJ 251: 3 Ind Cas 188 (DB).

**——S. 514 — Security bond stipulating prisoner would attend in one court—Transfer of the case to another court — Omission to attend — Breach of the security bond.**

Where a person stood as surety for an accused and guaranteed the appearance of the accused before the Deputy Magistrate before whom the case was proceeding, and the accused did not appear before the District Magistrate before whom the case was subsequently transferred. Held, the surety did not commit any breach of the condition of the surety bond. (1902) 6 CWN 885(885): 30 Cal 107 (DB).

### 3. Forfeiture.

**——S. 514 — Forfeiture of bond — When effected — Enforcement against accused — Right of Court.**

A bond under S. 514, Cr. P. Code, is forfeited when the accused fails to appear forwith in obedience to an order of the Court; and on such failure the Court is fully entitled to enforce the bond against the accused himself. The remedy is not confined to the surety only. AIR (V 34) 1947 Cal 120: 47 Cr LJ 635: 224 Ind Cas 460 (DB).

**——S. 514, cl. (2) — Registration of bond, when security is of immovable property.**

Section 514, cl. (2) of the Code makes it quite clear that what the law contemplates is a personal bond on behalf of the surety and when the bond is forfeited and the penalty is not paid, the Court may proceed to recover the amount by issuing a warrant for attachment and sale of movable property belonging to such person. If security of immovable property is given, then the bond has to be registered under S. 17 of the Indian Registration Act. An unregistered bond cannot affect immovable property and must, therefore, be invalid. AIR (V 32) 1945 All 289: 1945 AWN (HC) 176: ILR (1945) All 639: 1945 ALJ 476: 47 Cr LJ 209: 221 Ind Cas 544.

**——S. 514 — Forfeiture proceedings — Commencement.**

The proceedings for the forfeiture of a bond for keeping the peace need not be commenced before the expiry of the period for which the bond was given. AIR (V 28) 1941 Oudh 321: 1941 OWN 357: 42 Cr LJ 457: 1941 AWR 219: 16 Luck 646: 193 Ind Cas 627.

——S. 514 — Magistrate convicting accused for offence involving forfeiture of security — Forfeiture.

A Magistrate who convicts an accused of an offence involving the forfeiture of the security bond executed by him, to keep the peace can subsequently take action against the accused by forfeiting the security bond. AIR (Vol 28) 1941 Pesh 78: 43 Cr LJ 109: 197 Ind Cas 66 (DB).

——S. 514 — Bail for appearance containing undertaking for good behaviour cannot be regarded as a bond under the Code. Forfeiture of such bond is illegal. AIR (V 26) 1939 Cal 714: ILR (1939) 2 Cal 42: 43 CWN 639: 41 Cr LJ 138: 185 Ind Cas 249.

——Ss. 514, 106 — Bond for appearance of accused — Forfeiture — Burden to give explanation — Bond under S. 106 — Order for forfeiture.

In cases where a bond has been executed for appearance merely, it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say, that the accused absented themselves without reasonable cause for their non-appearance, is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court.

Obiter.— In the case of bond under S. 106, Criminal P. C., it is necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of S. 514, be taken in the presence of the respondent, but when the respondent appears and shows cause, he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. The section does not require that before a final order is made, the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence.

Where the Magistrate directs forfeiture of bond executed for the appearance of accused and directs the surety to pay penalty without giving the accused and the surety an opportunity of showing cause by adducing evidence, as to why the accused failed to appear, the order is bad and must be set aside. AIR (V 26) 1939 Rang 427: 41 Cr LJ 216: 12 Rang 240: 185 Ind Cas 614.

——S. 514 — Forfeiture of bond, if penalty or fine.

The amount of bond executed for appearance before a Court is not fine but a penalty incurred by way of forfeiture under S. 514, Criminal P. C. AIR (V 25) 1938 Cal 255: 39 Cr LJ 473: 174 Ind Cas 823.

——S. 514 — Security bond for transfer application — Forfeiture.

When a party furnishes a security bond to apply for transfer before a certain date and does apply before that date but the application is returned and represented after the material date, there is no forfeiture of security bond. 1937 MWN 576.

——S. 514 — Bail bond — Denial of execution — Forfeiture.

Where a person denies the execution of a bail bond and the Magistrate, without taking any evidence, passes orders forfeiting the bond, the orders cannot be supported as it is necessary that there should be some evidence to prove that the bond was executed by him. AIR (V 22) 1935 Cal 336(1): 36 Cr LJ 888: 155 Ind Cas 1120.

——S. 514 — Adjournment granted to move High Court for transfer of case — Party moving District Magistrate only — Absence of bad faith — Bond should be forfeited only to the reasonable extent. 1934 MWN 269.

——S. 514 — Misunderstanding of surety — Bail-bonds cannot be forfeited.

Where in a proceeding started under S. 514, it appears that the accused and the sureties understood that the date which should be fixed for trial would be intimated to them that the failure to intimate the date to sureties was due to some error on the part of some subordinate of the District Magistrate, that in any case there was abundant room for a misunderstanding and that the failure of the sureties to produce the accused was due to such misunderstanding and was not intentional or even due to negligence, the order forfeiting the amount of the bail-bond cannot be sustained. AIR (V 16) 1929 Pat 658: 11 Pat LT 575: 124 Ind Cas 85: 31 Cr LJ 605: 1929 Cr C 444.

——S. 514 — Conviction for hurt — Only one bond can be forfeited.

A bond to be of good behaviour can be forfeited on a conviction, of the person bound down, under S. 323 or 325, Penal Code. But where two bonds have been executed one by the accused and the other by his surety, only one of the two can be forfeited and not both. AIR (V 11) 1924 Lah 262: 81 Ind Cas 955: 4 Lah 462: 25 Cr LJ 1131.

——S. 514 and Sch. 5, Form XI — Security for good behaviour — Forfeiture — Conditions — Conviction in Native States.

A bond executed by a surety in the form prescribed by Sch. 5, Form XI, Cr. P. C. is not forfeited, on the principal committing an offence in an independent Native State inasmuch he does not break any undertaking to His Majesty or His subjects. AIR (V 5) 1918 Lah 13: 26 PR Cr 1918: 35 PWR Cr 1918: 19 Cr LJ 924: 47 Ind Cas 440 (DB).

### 4. Jurisdiction.

——S. 514 — Court which can enforce forfeiture of bond for production of accused — Bond given to one Court — Case transferred to another Court.

A Court which has taken the surety bond for the production of the accused has primarily the jurisdiction to enforce forfeiture. But where the case has been transferred to another Court action against the surety could be taken by the Court which had taken the bond or by any other first class Magistrate and if the transferee Court happens to be the Court of a first class Magistrate, by that Court. 1950 ALJ 446: AIR (Vol 37) 1950 All 667: 1950 AWR 469.

——S. 514 — Jurisdiction — Bond to Court X to produce accused in that Court — Case transferred to Court Y — Failure to produce accused — Power of Court Y to forfeit bond for breach of condition.

The language of S. 514, Cr. P. Code, makes it clear that it is the Court by which the bond was taken that has power to take the necessary steps to enforce forfeiture of the same, and not the Court to which the case is subsequently transferred. When a bond has been given to produce an accused person in Court X, it is no breach of the conditions of the bond to fail to appear in Court Y, to which the case is subsequently transferred

unless the bond is so conditioned that omission to appear in either of the Courts is expressed to entail forfeiture, Court Y has therefore no jurisdiction to enforce forfeiture of the bond. 27 Cr LJ 377 not foll. 1949 PWN 8: AIR (Vol 36) 1949 Pat 196: 29 PLT 419: 50 Cr LJ 462.

**——S. 514 — Right to forfeit bond — Jurisdiction.**

It is that Court alone, where the accused has bound himself to appear, which has jurisdiction to forfeit the bond and not the Court to which the case is subsequently transferred. AIR (Vol 30) 1943 Bom 178: 45 Bom LR 314: 44 Cr LJ 549: 207 Ind Cas 22 (DB).

**——Ss. 514, 107, 110 and 121 — Person bound down under S. 107 — Proceedings under S. 514 — Person bound under S. 110 — Any Magistrate can proceed under S. 514.**

A person bound down under S. 107, Criminal P. C., would be taken to have broken the terms of the bond only if he commits a breach of the peace at the place where it was apprehended he would do so; while the man from whom a security has been taken under S. 110 would be so liable wherever he commits the offence. Consequently, no Magistrate other than the one who has bound down a person under S. 107, Criminal P. C., could ever have the jurisdiction to take proceedings under S. 514, Criminal P. C., against him and his sureties. AIR (Vol 30) 1943 Pesh 41: 44 Cr LJ 478: 206 Ind Cas 330.

**——Ss. 514(1), 537 — Failure to comply with S. 514 (1), is irregularity — Jurisdiction.**

The failure of the Magistrate to comply with the provisions of S. 514(1), Criminal P. C., does not deprive him of jurisdiction to pass an order forfeiting surety bond for good behaviour. It is an irregularity in procedure which is cured by S. 537, Criminal P. C. Unless, therefore, there has been prejudice to the accused, the proceedings should not be set aside. When the sureties themselves admit that the bonds are liable to forfeiture, the Magistrate is justified in forfeiting them. AIR (Vol 30) 1943 Pesh 6: 44 Cr LJ 381: 205 Ind Cas 325.

**——S. 514 — Bonds did not specify place of appearance and not signed by accused — Court, on certain date sitting at place other than usual — Forfeiture.**

The bonds were executed by the accused for the appearance before certain Court, in the prescribed form. The bonds did not specify the place where the accused were required to appear and were also not signed by the accused. On a certain date, the Court sat at a different place than usual and the accused not having appeared before it, the bonds were forfeited under S. 514, Criminal P. C. It did not appear from the order-sheet that the accused had knowledge of the change of venue:

Held, that the order of forfeiture must be set aside under the circumstances. AIR (Vol 25) 1938 Cal 255: 39 Cr LJ 473: 174 Ind Cas 823.

**——S. 514 — Surety undertaking to produce accused — Failure to produce before Court sitting at different place and on another date.**

Where the surety undertakes to produce the accused before Court on certain date in a certain place, his failure to produce the accused before the Court sitting in a different place and on a different date does not cause forfeiture of the bond. AIR (Vol 21) 1934 Cal 763: 38 CWN 804: 36 Cr LJ 76: 152 Ind Cas 341 (1).

**——S. 514 — Criminal Court ordering accused to furnish security for production of minor before it or before District Judge — Legality — Jurisdiction of District Judge to forfeit bond.**

Where in a criminal case, the accused was ordered to furnish security to the effect that he would produce a minor, who was said to be in his custody, before the Court or the Court of the District Judge If and when required to do so, and subsequently, after the discharge of the accused, on an application before the District Judge for custody of the minor by his father, the District Judge ordered the accused to produce the minor and on his denial of liability under the bond and statement that the minor was not in his custody, the District Judge forfeited the amount of the bond:

Held, that the Criminal Court had no jurisdiction to take any bond for the production of the minor before the District Judge and that under S. 514, Criminal P. C., it was only the Court which had taken the bond that could enforce it and hence the District Judge could not take any action on the bond. AIR (Vol. 20) 1933 Lah 678 (1): 34 Cr LJ 952 (1): 145 Ind Cas 270.

**——S. 514 — Court not held — Order forfeiting amount of security is illegal.**

When the Magistrate himself does not hold his Court on the date fixed for producing the accused, the accused are under no obligation to appear, nor are the sureties under any obligation to produce them, and therefore the amount of security cannot be forfeited for their non-production. AIR (Vol 15) 1928 Lah 20: 9 LLJ 411: 28 Cr LJ 1020: 106 Ind Cas 108: 9 AI Cr R 213: 29 PLR 231.

**——S. 514 — Bond by sureties can be forfeited even after the period of bond.**

When the Magistrate deciding a case of an offence attended with violence is cognizant of the fact that the person convicted is under a recognizance to keep the peace, and does not proceed at once to take steps to forfeit the recognizance, he is not precluded from doing so subsequently. There is nothing in the language which lays down any such limitation. The wording of S. 514 is indeed of the widest character. AIR (Vol 13) 1926 Sind 180: 20 SLR 95: 27 Cr LJ 326: 92 Ind Cas 742 (DB).

**——S. 514 — Grounds for forfeiture — Act of law.**

Bail bond should not be forfeited for failure of the surety to produce the accused person, where the failure to produce is due to an act of law, e.g. his being arrested. AIR (Vol 12) 1925 Pat 389: 86 Ind Cas 657: 4 Pat 259: 6 PLT 397: 3 Pat LR Cr 123: 26 Cr LJ 833: 1925 PHCC 46 (DB).

**——S. 514 — Forfeiture of security for behaviour.**

If a Criminal Court knowing that the person charged before it is under security to be of good behaviour makes no reference to any confiscation of that security in sentencing that person in the case before it, and takes no steps towards its confiscation, it is not competent for that court or any other court in a subsequent and separate proceedings to take such steps. AIR (Vol 11) 1924 Lah 680: 75 Ind Cas 692: 25 Cr LJ 4.

**——Ss. 514, 531 and 573 — Bond for appearance — Forfeiture for non-appearance — Jurisdiction — Irregularity whether cured by S. 531 or 537.**

A Magistrate has no jurisdiction under S. 514 of the Code, to order forfeiture of a personal bond for appearance by the accused when he failed to appear, where the bond was given before another Magistrate; if he does, it is an irregularity not cured by either S. 531 which only relates to proceedings in a wrong place and to defects in local jurisdiction or by S. 537. AIR (Vol 1) 1914 Bom 3: 16 Bom LR 84: 15 Cr LJ 295: 23 Ind Cas 503 (DB).

**——Ss. 514 and 516 — Bond for appearance — Forfeiture — Levy of amount.**

Only the Court which takes a bond for appearance, can forfeit the same, and no other Court has jurisdiction to do so. S. 516 deals only with the power to levy the amount which may be delegated, but not with the power of forfeiture. (1910) 14 CWN 259: 10 Cr LJ 248: 3 Ind Cas 113 (DB).

**5. Procedure.**

(a) General.
(a-1) Grounds of proof.
(b) Notice.
(c) Arrest.
(d) Enforcement of conditions.

(a) General.

——S. 514 — **Forfeiture of bond — Legality — Bond to produce goods or pay value — Person affected called upon only to pay value.**

When proceedings are taken to forfeit a bond, it is necessary that the person affected should be called upon to comply strictly with the terms of the bond. If the bond is executed to produce certain goods or to pay the value thereof, he should be called upon to do either. If he is not called upon to produce the goods but is merely called upon to pay the value thereof, an order forfeiting the bond and exacting the penalty therefor cannot be maintained. (1949) 53 CWN (1 DR) 45 (DB).

——S. 514 — **Procedure under — Steps to be taken by Court.**

Under S. 514, Cr. P. Code, two steps are to be taken: first it must be proved to the satisfaction of the Court that the bond has been forfeited, whereupon the Court is to record the grounds of such proof, and secondly, the Court on being satisfied as aforesaid, should call upon the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. AIR (Vol 36) 1949 EP 221: 51 PLR 68: 50 Cr LJ 565.

——S. 514 — **Proceedings under S. 107 — Accused executing several bonds — Forfeiture of each must be shown — Evidence with regard to one, cannot be used with regard to another.**

Where in a proceeding under S. 107, Criminal P. C., the accused had executed several bonds, it has to be establisher separately that each particular bond has been forfeited and evidence with regard to one bond cannot be used with regard to another. AIR (Vol 30) 1943 Cal 251: 44 Cr LJ 630: ILR (1942) 2 Cal 475: 207 Ind Cas 265.

——S. 514 — **Security bond for keeping peace — Person under recognizance convicted — Forfeiture proceedings.**

It is not necessary that proceedings for the forfeiture of the security bond for keeping peace should be taken only by the Court which convicts the person under recognizance and at the time of the conviction. AIR (Vol 28) 1941 Oudh 321: 1941 OWN 357: 42 Cr LJ 457: 1941 AWR 219: 16 Luck 646: 193 Ind Cas 627.

——Ss. 514, 526 (8) — **Transfer — Security bond — Sind practice — Proceeding under S. 514.**

Application for transfer by complainant — Stay asked and granted on furnishing security bond — Applicant following Sind Court practice applying to Sub-Divisional Magistrate for transfer of case to another Magistrate and not to another district — Application rejected — Suit compromised—Proceedings under S. 514, against applicant for failure to apply to High Court for transfer — Order directing applicant to pay full amount of bond.

Held, that the applicant merely followed the practice of the Sind High Court; there had been a technical non-compliance by the applicant with the terms of his bonds, but that was not enough. If he had come to the High Court at once, he might have been told to go to the Sub-Divisional Magistrate. The parties had compromised their dispute and there was no occasion for the applicant to come to High Court. The grounds given by the Magistrate for forfeiting the bonds were not sound. **AIR (Vol 23) 1936 Sind 51: 37 Cr LJ 792: 162 Ind Cas 985.**

——S. 514 — Where the bond has been forfeited, the Court should, in the first instance, proceed to recover the amount by issuing the warrant for attachment for the sale of movable property belonging to the surety, and when this proves infructuous, an order for imprisonment in civil jail should be passed at a subsequent date. AIR (Vol 21) 1934 All 1046: 36 Cr LJ 297: 4 AWR 778: 153 Ind Cas 155 (1).

——Ss. 514, 530 — **Sub-Divisional Magistrate not exercising powers of District Magistrate hearing appeal.**

Where a Sub-Divisional Magistrate not exercising the powers of a District Magistrate hears an appeal from an order under S. 514, Cri. P. C., the proceedings are void. AIR (Vol 21) 1934 Lah 294: 36 Cr LJ 557: 154 Ind Cas 522.

——S. 514 — The provisions of S. 514 indicate that two steps are to be taken: first, it must be proved to the satisfaction of the Court that the bond has been forfeited, whereupon the Court is to record the grounds of such proof; secondly, the Court, on being satisfied as aforesaid, may call upon the person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid. AIR (Vol 15) 1928 Cal 261 (DB).

——S. 514 — **Delay in proceedings.**

If proceedings under S. 514 for breach of the conditions of a bond to keep the peace under S. 107 of the Code are instituted within one year from date of the bond, the fact that they were not completed within that period will not affect the legality of the proceedings. AIR (Vol 9) 1922 All 503: 68 Ind Cas 847: 20 ALJ 693: 44 All 657: 23 Cr LJ 623.

——S. 514 — **Surety bond — Forfeiture — Procedure on.**

On the forfeiture of a surety bond, the Magistrate should call upon the Government or its representatives to declare against which of the persons, principal or surety, it elects to proceed and for what amount, and then only should pass orders accordingly. 35 PWR 1911 Cr: 226 PLR 1911: 12 Cr LJ 404: 11 Ind Cas 588.

(a-1) **Grounds of proof.**

——Ss. 514, 537 — **Failure to record grounds of proof — No prejudice to surety nor failure of justice — Defect is curable.**

Where in proceedings for the forfeiture of the security bonds, the Magistrate holds for good and justifiable reasons that the bonds had been forfeited but fails to record the grounds of proof as required by S. 514, Criminal P. C., such an omission is merely an irregularity curable under S. 537 when the surety is not prejudiced thereby and no failure of justice has occasioned. AIR (Vol 28) 1941 Oudh 321 : 1941 OWN 357 : 42 Cr LJ 457 : 1941 AWR 219 : 16 Luck 646 : 193 Ind Cas 627.

——S. 514 — **Forfeiture of bond.**

Section 514, Criminal P. C., requires the Court to record grounds of the proof that the bond has been forfeited and a bond for appearance is forfeited when the accused does not require the Court to issue notice to show cause why the bond should not be forfeited. AIR (Vol 27) 1940 Sind 136 : 41 Cr LJ 802 : ILR (1940) Kar 479 : 189 Ind Cas 800.

——S. 514 — **Proceedings under — Failure to record reasons for being satisfied that bond has been forfeited.**

The jurisdiction of the Magistrate to take proceedings under S. 514, Criminal P. C., arises as soon as he is satisfied prima facie that the bond has been forfeited, and the omission to record

the reasons for his being so satisfied is a matter relating to procedure and not to jurisdiction. It is not disobedience of an express provision as to a mode of trial but rather of an omission in a matter of procedure.

It is not necessary that the Court should separately and formally record the grounds of proof but it is sufficient if they exist and appear in the record of the proceedings. AIR (Vol 25) 1938 Nag 275 : 1938 NLJ 79 : 40 Cr LJ 23 : 178 Ind Cas 207.

**——S. 514 — Proof of forfeiture is necessary and Court should record reasons — Effect of non-compliance.**

S. 514 lays down that it must be proved to the satisfaction of the Court that the bond has been forfeited and that the Court shall record the grounds of such proof, and it is after such grounds have been recorded that the person bound by the bond may be called on to show cause why the amount should not be paid. Where there has been a failure to carry out the express provisions of the law and the Deputy Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause, the petitioners are entitled to have proceedings set aside. AIR (Vol 9) 1922 Pat 242 : 67 Ind Cas 830 : 3 Pat LT 381 : 23 Cr LJ 478.

**(b) Notice.**

**——S. 514 — Procedure — Order of forfeiture before issue of notice — Legality — Irregular order subsequently confirmed after notice and after hearing parties — If void or illegal.**

S. 514, Cr. P. Code, does not contemplate the passing of an order of forfeiture before the issue of a notice to show cause why the bond should not be forfeited. What is required by the section is that when the Court is prima facie satisfied that a bond appears to have been forfeited, it shall then issue notice. It is not authorised to pass an order of forfeiture straightway. Where, however, by mistake the Court erroneously passes an order of forfeiture instead of recording the grounds of proof adduced before it and issuing notice, but after the issue of notice the parties appear and show cause and the Court de novo considers the matter and comes to the conclusion that the bond had in fact been forfeited and then passes an order that the amount of the bond should be paid, there is no substantial mistake, in the procedure, and it must be held that there is substantial compliance with the requirements of the section. AIR (Vol 36) 1949 A 322 : 50 Cr LJ 516 : 1949 ALW 17 : 1949 A Cr C 2.

**——S. 514 — Bond — Forfeiture — Liability of surety — Procedure for enforcement — Remission of penalty — Right to — Considerations.**

A bond under S. 514, Cr. P. Code, is forfeited when the accused fails to surrender forthwith when ordered to appear; but so far as the surety is concerned he is then to be called upon to show cause why he should not pay the penalty of the bond. If the surety appears in response to such notice and succeeds in producing the accused within a reasonable time, he is ordinarily entitled to some consideration in the matter of enforcement, and a portion of the penalty ought to be remitted. AIR (Vol 34) 1947 Cal 120 : 224 Ind Cas 460 : 47 Cr LJ 635 (DB).

**——S. 514 — Notice to surety — Necessity for the finding as to forfeiture.**

The proper course for Magistrate proceeding to pass order under S. 514 (1) is to come to a finding based on some evidence that the bail bond executed by the surety has been duly forfeited and then only to issue a notice to show cause why the penalty should not be realized from him. AIR (Vol 16) 1929 Pat 643 : 11 Pat LT 572 : 122 Ind Cas 532 : 31 Cr LJ 420 : 1929 Cr C 371.

**(c) Arrest.**

**——S. 514 — Procedure explained.**

When the penalty of the bond is not paid, the first step which the Court would take is to recover the sum by issuing a warrant for attachment and sale of moveable property belonging to a person liable under the bond or his estate if he be dead. It is only when a penalty is not paid and cannot be recovered by attachment and sale that the person bound is liable to imprisonment under S. 514 (4). AIR (Vol 15) 1928 Rang 310 : 114 Ind Cas 682 : 30 Cr LJ 346.

**(d) Enforcement of conditions.**

**——S. 514 — Penal condition.**

Penal provision in a bond should not be enforced, especially when the penal provision is inserted not in pursuance of the Magistrate's order. AIR (Vol 15) 1928 Rang 310 : 30 Cr LJ 346 : 114 Ind Cas 682.

**6. Remission of penalty.**

**——S. 514 — Remission of penalty — Forfeiture of bond when occurs — Surety when entitled to consideration.**

A bond under the section is forfeited when the accused fails to surrender forthwith. So far as the surety is concerned, he is then to be called upon to show cause why he should not pay the penalty of the bond. If the surety appears in response to such a notice and succeeds in producing the accused within a reasonable time, he is entitled to some consideration in the matter of enforcement, and the Magistrate ought to allow a substantial remission of the penalty. AIR (Vol 34) 1947 Cal 120 : 224 Ind Cas 460 : 46 Cr LJ 635.

**——S. 514, cl. 5 — Discretion of Court — Amount forfeited excessive and surety unable to pay — Remission.**

Under S. 514, cl. (5), Criminal P. C., the Court may, at its discretion remit any portion of the penalty mentioned in a bail bond and enforce payment in part only. The section gives a discretion to the Court but does not indicate what facts and circumstances are to be taken into consideration in the exercise of that discretion. The Court can remit where the accused has been subsequently arrested and the amount forfeited was excessive and the surety was unable to pay. AIR (Vol 22) 1935 Cal 246 : 37 Cr LJ 77 : 159 Ind Cas 385 (2).

**——S. 514 — Bail bond — Forfeiture of, on default of appearance — Re-arresting of accused — Amount forfeited — Reduction of.**

A person should not stand surety for an accused person unless he is in a position to produce the accused in Court.

Where the surety executed a bail bond in the sum of Rs. 3000 and on default of appearance of accused the bond was forfeited to the extent of Rs. 2000 but the surety was unable to pay it and the accused was re-arrested :

Held, that under the circumstances, it was proper that the amount to be forfeited should be reduced to Rs. 500. AIR (Vol 20) 1933 Lah 42 : 34 Cr LJ 1158 (1) : 34 PLR 895 : 145 Ind Cas 967.

**——S. 514 — Security Bond — Forfeiture.**

A person gave security for Rs. 1,000 for a bad character apparently at the request of the Thanadar who then had the surety's son under arrest.

Held, that forfeiture of the whole bond was very hard and not more than Rs. 25 should be realized from him and even then only, the whole penalty

should not be recovered from the Principal. 5 PWR Cr 1918.

——S. 514 — **Forfeiture of bond — Proper amount for.**

A was put on security for Rs. 1,000 for one year under S. 110, Cr. P. C., and two other persons stood as sureties for him. A was, however, convicted under S. 323, I. P. C., in which he was found to have taken only minor part.

Held, under the circumstances, the forfeiture of a reasonable sum of Rs. 50 against the principal was sufficient and the sureties need not be burdened. AIR (Vol 2) 1915 Lah 446 : 6 PR Cr 1915 : 16 Cr LJ 287 : 62 PWR 1915 (Cr) : 28 Ind Cas 335.

### 7. Scope.

——S. 514 (7) — **Use of judgment under cl. (7) — Conviction under S. 392, Penal Code, involving offence under Ss. 342 and 323 — Forfeiture of bond.**

A judgment used under S. 514 (7) is prima facie evidence of the facts of the actual crime which the accused has committed and not merely evidence of any offence at large which might fall within the purview of the particular section of the Penal Code or other enactment under which the Judge has recorded the conviction. Further, S. 514 (7) includes cases in which any element of the offence for which the accused has been convicted also itself constitutes a breach of the conditions of the bond. Therefore, where a person has been convicted under S. 392, Penal Code, and has resorted to force constituting offence under Ss. 342 and 323, the Court would be justified in ordering forfeiture of the bond under S. 20, Sind Frontier Regulation No. 3 of 1892. AIR (Vol 31) 1944 Sind 121 : ILR (1943) Kar 517 : 45 Cr LJ 696 : 213 Ind Cas 185.

——S. 514 — **Opportunity to show cause given — Adjournment is not necessary.**

Section 514, Criminal P.C., does not entitle the surety to an adjournment for the purpose of showing cause. It is sufficient that he is given an opportunity of showing cause. AIR (V 30) 1943 Mad 519 : (1943) 1 MLJ 446: 56 LW 328: 1943 MWN 339: 44 Cr LJ 780: 208 Ind Cas 320.

——S. 514 (7) — **Previous judgment admissible by itself — Objection that no certified copy was filed.**

Where the previous judgment showing the conviction of a person and involving a forfeiture of the bond executed by him admissible in evidence by itself, an objection under S. 514 (7), Criminal P. C., that no certified copy of the same was filed would only be a technical objection without much substance. AIR (V 29) 1942 Lah 78: 43 PLR 711: 43 Cr LJ 467 : 199 Ind Cas 93.

——Ss. 514, 499 — **Bail — No time and place for appearance mentioned — Proceedings under S. 514.**

The release of an accused person on bail and the conditions under which that is permitted by the law are governed by S. 499, Criminal P.C., and the provisions laid down in that section as to the nature and contents of the bail bond are imperative and must be strictly fulfilled. It is incumbent under S. 499, Criminal P.C., to get a bond executed by the person who is released on bail and unless that is done, there can be no valid bond by a surety alone. Similarly, the mentioning of a definite Court before which the accused person is to appear is an essential condition of a bond under S. 499. Where, therefore, a bond is executed by a surety alone and it does not mention any definite Court and time for the appearance of the accused no proceedings can be taken under S. 514, Criminal P. C. AIR (V 26) 1939 All. 682: 1939 ALJ 779: 41 Cr LJ 85: 1939 AWR 696: ILR (1939) All. 924: 184 Ind Cas 662.

——S. 514 — **Accused committing offence and convicted — Bond forfeited — Proceedings under S. 514.**

Where the words of a statute are plain and clear and admit of but one meaning, it is not open to the Court to speculate as to the intention of the Legislature. In such cases, the intention of the Legislature is to be gathered from the words used.

There is nothing in S. 514, Criminal P.C., or any other part of the Code, which restricts expressly or by necessary implication, the power of the Court to take action for realization, of the penalty under the bond after the order convicting the accused has been passed. The mere fact, that no immediate action under S. 514 has been taken against the person under recognizance to keep the peace, or against the surety, on the conviction of the former of an offence involving breach of the peace, is no bar to such proceedings being taken, at subsequent time, e.g., after expiry of the time for appealing or after the dismissal of an appeal by the principal. AIR (V 26) 1939 Lah 70: 41 PLR 69: 40 Cr LJ 505: ILR (1939) Lah 283: 180 Ind Cas 849 (FB).

——S. 514 — The Magistrate will not be committing an illegality in insisting that, in the light of the provisions laid down in S. 514, that security alone can be termed sufficient which is backed by movable property of the value of the amount secured. AIR (V 24) 1937 Lah 411: ILR (1937) Lah 114: 39 PLR 643: 38 Cr LJ 955: 170 Ind Cas 586.

——S. 514 — **Magistrate convicting accused for offence involving forfeiture of security — Subsequent action involving forfeiture — Consideration, in taking security for peace — Reduction of security at the time of forfeiture.**

There is nothing in S. 514, Criminal P.C., to debar a Magistrate, who has convicted a person of an offence which involves the forfeiture of the bond, from subsequently taking action against that person by forfeiting the bond in question.

The correct form of the bond to keep the peace is given in Sch. V, Criminal P.C., and the correct form of the bond by sureties is also given in the same schedule. These show that the surety does not take responsibility for the payment of the amount forfeited by the principal in the event of the principal failing to pay it but enters into a direct bond taking responsibility that the principal shall not commit a breach of the peace. AIR (V 23) 1936 Pesh 141: 37 Cr LJ 849: 163 Ind Cas 443.

——S. 514 — **Evidence and finding.**

The Magistrate is not bound before calling upon the petitioner to show cause why the penalty of his bond should not be paid to record evidence and a finding thereon that it was proved to his satisfaction that the bond has been forfeited. (1930) 11 PLT 578: 128 Ind Cas 348: 32 Cr LJ 121: 15 AI Cr R 341.

——S. 514 — **Bond by supurdar — To produce certain goods on demand — Failure — Subsequent bond — Nature of.**

When the police having seized certain goods hand it over to a Supurdar, on the latter executing a bond to produce them on demand before the Court, but on being called upon to produce them fails to do so, and being directed by the Court, executes another bond undertaking to produce them on demand, the latter bond is covered by the provisions of S. 516-A and it is not open to the petitioner to raise the objection that the bond was not executed under the section merely because the goods were not actually produced in Court. Hence the bond is one taken under the Cr. P. Code, and as

such S. 514 applies to it. AIR (V 16) 1929 Lah 658: 115 Ind Cas 765: 30 Cr LJ 527: 1929 Cr C 215: 12 AI Cr R 347 (DB).

**——S. 514 — Bonds for appearance before Court —Principle explained.**

There is a palpable distinction between bonds which are not and those which are for appearance before a Court. Proof other than is directly before the Court in its own record is required in the former and not in the latter. Where the Court had before it the order for bail, the bail-bond and the fact that the petitioners did not produce the accused, the provisions of S. 514 (1) were substantially complied with and the High Court would not be justified in interfering in revision where there was no possible prejudice on the ground that the proceedings of the Sessions Judge under S. 514 were without jurisdiction as he had before him neither any proof that the bail-bond had been forfeited nor did he record the grounds of such proof before he called upon the petitioners to show cause why the penalty of the bond should not be paid. AIR (V 16) 1929 Pat 658: 11 Pat LT 575: 124 Ind Cas 85: 31 Cr LJ 605: 1929 Cr C 444.

**——S. 514 — Discharge of accused.**

No action shall be taken under S. 514 when the Court itself by discharging the accused persons held that their presence on the date of hearing was unnecessary. AIR (V 12) 1925 Oudh 314: 84 Ind Cas 944: 26 Cr LJ 400 (DB).

**——S. 514 — Bond for appearance by police — Forfeiture.**

Bonds for the appearance before the police taken under the Bombay City Police Act, are not bonds for appearance before a court taken under the Cr. P. C. and could not be forfeited under S. 514, Cr. P. C. AIR (V 5) 1918 Bom 226: 42 Bom 400: 20 Bom LR 379: 19 Cr LJ 607: 45 Ind Cas 511 (DB).

**——S. 514 — Scope of — Forfeiture of security — When legal.**

Where four accused persons from whom security for good behaviour had been taken, joined in a serious riot before the expiry of the period during which they had bound themselves to keep the peace and the Magistrate thereon refrained from passing a heavy sentence on them writing in the judgment plainly that he did so considering the heavy sum of Rs. 4,000, they would forfeit personally, and issued process to the sureties and confiscated the amount in full, held the order of forfeiture was lawful inasmuch as the Magistrate passing the sentence in the substantive case plainly showed his intention to forfeit the security. AIR (V 4) 1917 Lah 188: 15 PR 1917 Cr : 17 PWR 1917 Cr: 18 Cr LJ 566: 39 Ind Cas 806.

**8. Surety.**

**——S. 514 — Forfeiture of bail bond — Amount due from accused on his own bond satisfied — Surety, if discharged from his liability.**

If a person undertakes as a surety to produce an accused person before the Court and in default of his appearance to forfeit a sum of money to Government, he is not discharged from his liability by the fact that the amount due from the accused on his own bail bond has been satisfied by the attachment and sale of his property in distress proceedings. 30 P.R. 1890, Cr & 26 PR 1894, Cr., not foll. (1950) 54 CWN (2 DR) 252 (DB).

**——S. 514 — Proceedings stayed by High Court — Obligation of surety to produce accused before lower Court during period of stay — If discharged.**

If the High Court orders criminal proceedings in a lower Court to be stayed, it means that all proceedings in that Court must be suspended and nothing done until the matter is disposed of in the High Court. It follows therefore that the accused need not appear in the Court from time to time whilst the stay order is in existence. Further the stay order absolves the sureties from their obligation to produce, the accused in Court during the period the stay order is effective. Proceedings under S. 514, Cr. P. Code, cannot therefore be initiated against the sureties for their failure to produce the accused during this period. AIR (V 36) 1949 Cal 234: 52 CWN 784: 49 Cr LJ 635 (DB).

**——S. 514 — Bond given by surety to Customs Inspector to produce accused whenever required — Accused appearing before Magistrate on first hearing and not on subsequent hearing — Liability of surety.**

Where under a bond given to the Customs Inspector the surety undertakes to produce the accused person whenever called upon to do so and as often as required, the surety's liability under the bond comes to an end when he produces the accused before the Magistrate for the first time. If the accused fails to appear on subsequent hearings, the surety is not liable under the bond. AIR (V 36) 1949 Kutch 1: 50 Cr LJ 990.

**——S. 514 — Accused joining army and going beyond jurisdiction — Liability of surety for absence of accused.**

In the absence of any compulsory military service there is no distinction between the accused joining the army and going away beyond the jurisdiction of the Court and merely absconding in the ordinary way. Joining the army is an entirely voluntary act and the surety is liable for the accused's absence on this score when he would certainly be liable on his bond if the accused had merely defaulted in the more usual way. AIR (V 30) 1943 Mad 519: 56 MLW 328: (1943) 1 MLJ 446: 1943 MWN 339: 44 Cr LJ 780: 208 Ind Cas 320 (DB).

**——S. 514 — Security bond — Conviction of principal leading to forfeiture — Sentence reduced partly on ground of provocation by complainant.**

Where the principal is convicted of an offence involving a forfeiture of the security bond executed by him, the fact that his sentence was reduced partly on the ground that there had been some provocation by the complainant is certainly an extenuating circumstance which should be taken into mind in determining the responsibility of the surety for keeping his principal under control. AIR (V 29) 1942 Lah 78: 43 PLR 711: 43 Cr LJ 467: 199 Ind Cas 93.

**——S. 514 (7) — Copy of earlier judgment, whether sufficient proof of forfeiture against surety.**

A copy of the earlier judgment would not alone be sufficient evidence in proof of forfeiture of a security bond against a surety except in the instances specifically mentioned in S. 514 (7), Criminal P.C., which permits production of a certified copy in certain security proceedings, but these do not include proceedings in which a security was given during an enquiry under S. 117, Criminal P.C., and therefore, in such a case the surety is entitled to have evidence in proof of forfeiture of security bond taken again. AIR (V 29) 1942 Lah 78: 43 PLR 711: 43 Cr LJ 467: 199 Ind Cas 93.

——S. 514 — The liability of surety must continue so long as surety has not been discharged or the bail bond cancelled and accused taken into custody of Court. AIR (V 28) 1941 Sind 31: ILR (1941) Kar 164: 42 Cr LJ 427: 193 Ind Cas 471.

**——S. 514 — Bail bond — Forfeiture — Liabilities of sureties.**

There can be no forfeiture of penalty in bail bond except on its own terms. It is no concern of the sureties to find out what exactly it is that the

Police Officer has been directed by the District Magistrate to do in the way of taking bail with sureties. Their liability must be determined by the agreement that is actually taken from them. AIR (V 25) 1938 Pat 211: 17 Pat 436: 39 Cr LJ 523: 4 BR 503: 174 Ind Cas 984.

——S. 514 — A bail bond is a contract between the Crown and the surety. A surety, undertaking to produce the accused until the disposal of the case cannot say, on a transfer of the case, that the bail bond had exhausted. He is liable to produce the accused till the case is disposed of. AIR (V 21) 1934 Cal 785: 38 CWN 852: 36 Cr LJ 133: 152 Ind Cas 646.

——S. 514 — **Magistrate absent on date fixed but accused present — Sureties if responsible for next appearance — Compromise — Proceedings against sureties.**

Four persons were being tried before a Second Class Magistrate under Ss. 324 and 325, I.P.C., A and B stood sureties. The case was adjourned to October 23, 1931. On that day, the Magistrate was absent and the reader of the Court directed the parties to appear on the following day. On that day, the parties put in a compromise. No order was passed on this compromise, but it was noted on the record that the parties had gone away without having had their statements recorded. Non-bailable warrants were, therefore, issued against the accused and at the same time, the sureties were called upon to show cause why their bonds should not be forfeited. Eventually, the compromise was accepted and the accused were acquitted. Still the sureties were ordered to pay Rs. 200 in respect of each bond:

Held, that the sureties had become responsible for the appearance of the accused on the dates fixed by the Court October 24, 1931, was not a date fixed by the Court. Moreover, the accused were present on that date and when the compromise was presented, no orders were given to them for appearance on any other date and there was no justification for proceeding against the sureties when the compromise was eventually accepted. AIR (V 21) 1934 Lah 294: 36 Cr LJ 557: 154 Ind Cas 522.

——S. 514 — **Execution of new surety bond by another person if discharges surety who had executed another bond previously — Held, however that first surety in this case was discharged.**

The execution of a new surety bond in respect of the same accused does not of its own force, discharge the bond previously executed by another person at another place.

For appearance and production of the accused in Court at X, a surety bond was executed. Another surety bond was executed on transfer of the case from X to Y, by another person. Upon re-transfer of the case to X, the first bond was forfeited:

Held, that the first bond executed at X was in the nature of a contract and the transfer of the case from X to Y amounted to the substitution for the former agreement of a new and totally different agreement, which substitution having been made without the knowledge or consent of the surety at X was sufficient to discharge him and the circumstance that from Y, it was once again transferred back to X, was a second variation which did not revive the obligation of the original contract. AIR (V 21) 1934 Sind 152: 36 Cr LJ 215: 152 Ind Cas 874 (DB).

——S. 514 — **Bail bond — Arrest of accused on another charge, whether relieves surety.**

In considering whether the arrest of an accused person by the Police on onather charge relieves a person from his liability to produce him in Court in accordance with a bond executed by him, the important point is not mere arrest but confinement under arrest on the date when production is to be made, which makes such production impossible. The surety is not released by the mere fact that the accused was under arrest for one day or less between the date of the bond and the date when the accused must have been produced in Court. AIR (V 18) 1931 Pat 19: 32 Cr LJ 467: 12 PLT 814: 130 Ind Cas 161.

——S. 514 — **Opportunity to sureties.**

Bail bond for appearance of accused person forfeited — Sureties alleging that they were not allowed to control movement of accused person should be given opportunity of proving their allegation, it being mitigating circumstance. AIR (V 17) 1930 Lah 591: 125 Ind Cas 376: 31 Cr LJ 869: 1930 Cr C. 708.

——S. 514 — **Duration of liability — Liability continues till the final order.**

Where a bond is executed in trial Court for compliance with its order, liability of a person liable under, the bond is not discharged though the trial Court's order was in his favour if the same is reversed in appeal. AIR (V 15) 1928 Rang 310: 114 Ind Cas 682: 30 Cr LJ 346.

——S. 514 — Where in a S. 107 case the accused and complainant agreed that they would not appear in Court the next hearing day and the accused accordingly absented and the surety knowing this concluded that the case would not proceed and took no steps to cause accused's presence in Court.

Held, that penalty should not be exacted from him. AIR (V 13) 1926 Lah 636: 8 LLJ 402: 27 Cr LJ 1152: 27 PLR 646: 97 Ind Cas 672.

——S. 514 — **Construction of bond.**

The surety bond in criminal cases must be strictly construed, and a surety cannot be required to pay the amount of the bond as the result of an opinion held by the Court as to what was in his mind when he signed it. He can only be required to forfeit the amount, if the terms expressed in the bond are broken. Sureties do not bind themselves to produce the accused except on the date agreed; having done so their liability is discharged. AIR (V 9) 1922 UB 8: 65 Ind Cas 420: 4 UBR 71: 23 Cr LJ 68.

——S. 514 — **Liability of surety.**

Section 128 only explains the quantum of a surety's obligation when the terms of the contract do not limit it and that section has no reference to the nature of the obligation of the principal. Where the original agreement is void, the surety is liable as a principal debtor. AIR (V 8) 1921 Lah 79: 63 Ind Cas 454: 2 Lah 204: 85 PLR 1921: 22 Cr LJ 662.

——S. 514 — **Discharge of Surety—Bail — Liability.**

When a person undertakes to produce an accused person before Court when called upon, and, in default, to forfeit a sum of money to Government he is not discharged though the accused paid the amount of his own bail bond. (1909) 10 Cr LJ 294: 3 Ind Cas 470 (Mad).

——S. 514 — **Discharge of Surety — Bail bond — Forfeiture.**

A surety for the production of an accused or a certain day discharges his liability by producing him in that Court on that day. He is not bound to produce before any other Court subsequently. (1909) 36 Cal 749: 10 Cr LJ 251: 3 Ind Cas 188 (DB).

**9. Validity of bond.**

See also N. 3.

——Ss. 514 and 499 — Bond only by surety — No bond by accused — Bond, if valid. See AIR (V 32)

1945 All 389: 221 Ind Cas 544: 47 Cr LJ 209: 1946 A Cr. C. 48.

**——S. 514 — Bond without jurisdiction — A nullity.**

Where a Magistrate without jurisdiction obtains a bail bond from an accused person for his appearance before another Court outside his jurisdiction and it transpires that the Magistrate was not compentent either to admit the accused to bail or to secure a bail bond from him, the bail bond of personal recognizance of the accused is a nullity. No proceedings against the accused under S. 514 can therefore be taken in respect of such bond. AIR (V 16) 1929 All 914: 120 Ind Cas 194: 10 LRA Cr 149: 31 Cr LJ 2: 1930 ALJ 199: 13 AI Cr R 2: 1929 Cr C 642 (DB).

**——Ss. 514 and 110— Security for good behaviour — Forfeiture of — Confiscation of surety bond — Validity.**

Where a person who is bound over to keep peace is convicted before the expiry of the bond and the Magistrate convicting him is not aware of the Act that a security bond has been executed by the accused with two sureties and therefore passes no order with regard to the confiscation of the security, confiscation proceedings taken by another Magistrate are not void. But if the Magistrate who tried the case was aware of the existence of the security bond and passed no order regarding it, then no other Magistrate could in subsequent proceedings confiscate the bond. AIR (V 4) 1917 Lah 224: 3 PR 1917 Cr.: 18 Cr LJ 508: 39 Ind Cas 476.

**——S. 514-B.**

**——S. 514-B — Minors.**

Section 514-B specifically provides that when the person required to execute a bond is a minor, the Court or police officer may accept in lieu thereof a bond executed by a surety or sureties only. There is no such provision for a major. AIR (V 15) 1928 Lah 318 : 29 Cr LJ 491 : 109 Ind Cas 219 : 10 AICrR 247.

**——S. 515.**

See also, Criminal P. C., S. 423.

**——S. 515 — Appellate Court's power to increase amount of security.**

Part of amount of security bond forfeited under S. 514 — Appellate Court can alter or reverse the order — "Alter" includes power to raise the amount of the security forfeited. AIR (V 30) 1943 Pesh 6: 44 Cr LJ 381: 205 Ind Cas 325.

**——S. 515 — District Magistrate's power to raise amount of security ordered to be forfeited by original Court.**

The plain meaning of S. 515, Criminal P. C., is that the District Magistrate can pass, on revision, any order which the orginal Magistrate himself might have passed. Hence the District Magistrate can revise the order of the original Court so as to raise the amount of security to be forfeited. AIR (V 28) 1941 Pesh 63 : 42 Cr LJ 754 : 195 Ind Cas 588.

**——S. 515 — Scope — All orders under S. 514 are covered by S. 515.**

The language of S. 515 is wide enough to cover an order refusing to forfeit a bond as well as an order forfeiting it. AIR (V 12) 1925 Oudh 51 : 77 Ind Cas 733 : 25 Cr LJ 445.

**——S. 516-A.**

See also Criminal P. C. S. 517.

**——S. 516-A — Jurisdiction — Property ordered to be released on security — Security furnished — Detention on ground of property being required in another case — Legality.**

An order detaining property under S. 516-A, Cr. P. Code, is neither proper nor reasonable, when there has been a previous order for release upon security and the security has been duly furnished. Detention on the pretext that the property is required as an exhibit in another case is illegal, when security has been furnished in pursuance of the prior order for release, and also arbitrary and capricious. Such an order cannot be allowed to stand. AIR (V 36) 1949 Pat 44 : 49 Cr LJ 604.

**——S. 516-A — Direction to Police to attach property, whether production before Court.**

The power of a Criminal Court to make orders as to the temporary custody or protection of property is limited by the language of S. 516-A to property which is produced before it. Mere direction to the Police to attach the property is not tantamount to production before the Court. AIR (V 29) 1942 Bom 42 : 43 Bom LR 967 : 43 Cr LJ 362 : 198 Ind Cas 426 (DB).

**——S. 516-A — Magistrate sending complaint to Police for investigation — It cannot be said that offence appeared to him to have been committed.**

When the Magistrate has sent the complaint to the Police for investigation, that in itself suggests that without further inquiry or investigation, the Magistrate was not satisfied that there was a case justifying the issue of process in which case it can hardly be said that an offence appeared to him to have been committed. AIR (V 29) 1942 Bom 42 : 43 Bom LR 967 : 43 Cr LJ 362 : 198 Ind Cas 426 (DB).

**——Ss. 516-A, 517 — Accused charged for cheating and breach of trust — Accused, having account in Bank — Magistrate, if can order Bank not to give money to accused.**

The accused was charged with cheating or, alternatively, criminal breach of trust. Accused had an account with a Bank, and the Police served a stop order on the Bank to prevent the accused from operating on his account. The Magistrate modified this by making an order that Rs. 75, out of the account, might be paid to the petitioner for the purposes of his defence, or otherwise; but the rest of the money would be detained pending the disposal of the case :

Held, that there was no jurisdiction in the Magistrate for making any such order. Sections 516 and 517 of the Criminal P. C., were clearly not applicable. The position in law was that the accused had lent this money to his bankers upon the understanding that they would re-pay it to him at any time on demand and there was no provision of law which could authorise the Court to make an order upon the accused not to ask the Bank to re-pay the money which he had lent to them. Further, there was nothing to show that the money in the Bank was part of the proceeds of the cheating or breach of trust. (1936) 164 Ind Cas 377 : 40 CWN 96 : 37 Cr LJ 935 (1) (DB).

**——Ss. 516-A, 517 — Complaint of theft — Abandonment of prosecution — Order returning property to complainant — Legality — Proper procedure.**

Where a complaint of theft is abandoned or not further prosecuted, the best course, if only to save the Criminal Court from being abused, is to hand the property back to the man who had produced it. It is not proper to hand it over to the complainant in such a case.

A complaint was made to a Magistrate alleging that the accused had taken a motor bus on hire-purchase system from the complaint, that he made default in payment of the hire, whereupon

notice was duly served on him terminating the hire-purchase agreement and the bus was lawfully recovered from his possession. It was further alleged that immediately thereafter the accused managed to get it back by strategy and craft and that he was, therefore, guilty of theft. On this, the Magistrate without making any investigation into the alleged charge of theft, called on the accused to produce the bus and when he produced it in Court, the Magistrate handed it over to the complainant. On the matter being brought to the notice of the High Court in revision, :

Held, that the Magistrate's order making over the bus to the complainant without any investigation into the alleged charge of the theft was illegal. AIR (V 18) 1931 Cal 455 : 35 CWN 198 : 32 Cr LJ 933 : 132 Ind Cas 902 (DB).

——S. 516-A — **Penal Code, S. 338 — Prosecution of motor driver under S. 338 — Detention of car, legality of.**

In a prosecution of a motor driver for an offence under S. 338, I. P. C., it cannot be said that the car has been used by the accused for the commission of the offence within the meaning of S. 516-A, Criminal P. C., and it is illegal for the Magistrate to detain the motor car pending conclusion of the trial. AIR (V 18) 1931 Lah 565 : 33 Cr LJ 347 : 33 PLR 386 : 136 Ind Cas 724 (2).

——S. 516-A — **Supardar — Bond to produce goods on demand — Failure — Second bond — Nature of.**

Where the police having seized certain goods hand it over to a Supurdar, on the latter executing a bond to produce them on demand before the Court, but on being called upon to produce them fails to do so, and being directed by the Court, executes another bond undertaking to produce them on demand, the latter bond is covered by the provisions of S. 516-A and it is not open to the petitioner to raise the objection that the bond was not executed under the section merely because the goods were not actually produced in Court. Hence the bond is one taken under the Cr. P. Code and as such S. 514 applies to it. AIR (V 16) 1929 Lah 658 : 115 Ind Cas 765 : 30 Cr LJ 527 : 1929 Cr C 215 : 12 AICrR 347 (DB).

——**S. 516-A — Nature of proceedings.**

Restitution proceedings are proceedings of a quasi civil nature. A non-applicant is not an accused and when he fails to attend, there is no reason why the case should not go on in his absence though he is unrepresented by an advocate. AIR (V 15) 1928 Rang 310: 114 Ind Cas 682 : 30 Cr LJ 346.

——S. 516-A — **Jurisdiction — To make consequential orders not expressly provided for by the Code — Cr. P. C., Ch. XLIII:—**

By the majority (Ameer Ali and Brett, JJ. dissenting). —Matters in which a consequential or incidential order may be passed in addition to a conviction are expressly set out in the code, and the powers of the court are limited to those. (1904) 31 C 691 : 8 CWN 538 (542) : 1 Cr LJ 453.

——**S. 516-AA.**

——S. 516 A-A **(Inserted by Bom. Act 46 of 1948, S. 3) — Scope — Retrospective operation — Complaint filed before amending Act without reasonable and probable cause — Costs — Jurisdiction to award.**

S. 516-AA, added to the Cr. P. Code, by Bombay Act XLVI of 1948 which came into force on 22-5-1948, is not retrospective in operation. In the case of a complaint filed before the new section was added, a Court or Magistrate has therefore no jurisdiction to pass an order for costs, even if the complaint was given without any reasonable and probable cause. (1950) 52 Bom LR 625 (DB).

——**S. 517.**

See also Criminal P. C., S. 523.

1. **Appeal.**
   See also Criminal P. C., S. 520.
2. **By return of property.**
3. **Disposal of property.**
4. **Limitation.**
5. **Power and duty of Court.**
6. **Revision.**
   See also Sec. 520 Cr. P. C., and note (1).
7. **Scope and applicability.**
8. **Time of order.**

1. Appeal.

See also Criminal P. C., S. 520.

(a) General.
(b) Forum.
(c) Notice.

(a) **General.**

——S. 517 — Order under — Court which can interfere with. See AIR (Vol 38) 1951 Ajmer 101 (2).

——**S. 517 — Order under S. 517 — Appeal if lies — Appellate Court passing order in respect of property, whether an order in appeal from S. 517.**

There can be no appeal against an order passed under S. 517. Section 520 merely confers on the Court of appeals, that is to say, the Court empowered to hear an appeal against an acquittal or conviction in respect of the original trial, certain powers in addition to the powers which it possesses as a Court of appeal hearing the appeal against the conviction or an acquittal. Section 404 directs that no appeal shall lie except as provided by the Code. Chapter XXXI of the Code deals with appeals. Section 520 does not fall under this Chapter nor does it confer a right of appeal upon anybody. All that can happen is that the Court hearing the appeal against the acquittal or the conviction in the original trial is entitled to deal with the property in respect of which the offence appears to have been committed in the same way as the trial Court and it is further empowered to annul, alter or modify the trial Court's order. That order is not passed on appeal from an order under S. 517 but is merely one of the powers which the appellate Court is entitled to use. AIR (Vol 34) 1947 Nag 33: 225 Ind Cas 525: 47 Cr LJ 742.

——**S. 517 — Power and duty of Court — Order under, by Magistrate — Right of appeal or revision — Duties of Sessions Judge.**

When an order under S. 517 is passed by a Magistrate, there is no ad hoc right of appeal or revision to the Sessions Judge. All that the Sessions Judge can do is to substitute his own order for that passed by the trial Court, if the substantive case comes before him as a Court of Appeal or a Court of Revision. All that he can do in the case of an order which comes to his notice otherwise is to report it to the High Court for revision. AIR (Vol 32) 1945 Lah 47: 47 Cr LJ 32: ILR (1944) Lah 540: 221 Ind Cas 34.

——**S. 517 — Order of acquittal and order under S. 517 — Appeal.**

An appeal from an order of acquittal and an order under S. 517, Criminal P. C., for disposal of property regarding which the offence had been committed, passed by a First Class Magistrate, lies to the Sessions Judge. AIR (Vol 28) 1941 All 143: ILR (1941) All 168: 1941 ALJ 53: 1941 OWN 237: 42 Cr LJ 469: 1941 AWR 7: 193 Ind Cas 817.

**(AIR (Vol 11) 1924 All 675, held overruled).**

——**S. 517 — An order confiscating an amount to Government is appealable. (1937) 41 CWN 512: 65 CLJ 397.**

**——S. 517 — Order under — Appeal — Order delivering keys of house, effect of.**

An order passed by a Magistrate under S. 517, Criminal P. C., is a judicial order and is open to review by the higher Courts on appeal or revision, as the case may be.

An order directing the keys of a house to be made over to a person is in fact an order directing that possession of the house be delivered to him for the purposes of S. 517, Criminal P. C. AIR (Vol 18) 1931 Lah 527: 32 Cr LJ 847: 132 Ind Cas 202.

——S. 517 — Where the appellate Court holds that the Magistrate had no jurisdiction under S. 517, it cannot say that it itself had jurisdiction under S. 520, as such jurisdiction could only arise from an order legally passed under S. 517. AIR (Vol 13) 1926 Lah 9: 7 LLJ 625: 26 Cr LJ 1453: 89 Ind Cas 973.

**——S. 517 — Appeal from order for restoration of property — Cr. P. C., S. 517 — Order under.**

An order directing restoration of property in respect of which no offence had been committed to the person in whose possession that property was found is not an order under S. 517, Cr. P. C., and consequently, no appeal lies from such order. (1903) 30 C 690 (692): 7 CWN 634 (DB).

**(b) Forum.**

**——S. 517 — Appeal against order relating to disposal of property — Forum — Additional District Magistrate if has jurisdiction to interfere with such an order.**

An appeal against an order under S. 517, Cr. P. Code, relating to the disposal of property can be taken to the District Magistrate which is described by the Code as the Court of Appeal. An Additional District Magistrate's Court cannot be regarded as a Court of Appeal. He is not straightway and by reason of his appointment vested with all or any of the powers of a District Magistrate under the Code, for S. 10 (2), Cr. P. Code, provides that the powers he shall exercise shall be those powers that may be conferred on him by the Provincial Government. S. 407 (2) indicates his subordination to the District Magistrate whose Court is regarded as the Court of Appeal. An order of the Additional District Magistrate interfering with such an order is without jurisdiction. AIR (Vol 35) 1948 Mad 114: 60 LW 580(1): 49 Cr LJ 69: (1947) 2 MLJ 254: 1947 MWN 760.

**——S. 517 — Setting aside order.**

A Sessions Judge has no power to pass any orders setting aside an order passed by a magistrate under S. 517, when no appeal lies against the conviction or sentence is pending before the Sessions Judge. AIR (Vol 15) 1928 Rang 240: 11 AI Cr R 217: 6 Rang 59: 29 Cr LJ 958: 111 Ind Cas 878.

——S. 517 — An order under S. 517 can be set aside by a court of appeal, confirmation or revision. The District Magistrate is not a court of confirmation, reference or revision, the only court which could pass orders on a reference or revision being the High Court. AIR (Vol 11) 1924 All 675: 81 Ind Cas 992: 46 All 623: 22 ALJ 505: 5 LRA Cr 91: 25 Cr LJ 1168.

**——S. 517 — Sub-Divisional Magistrate can as part of appeal to him pass an order under S. 520 — When appeal is merely concerning the disposal of property District Magistrate should hear it — No notice is necessary though it is desirable.**

The District Magistrate alone can pass orders on an application under S. 520, when such an application is made to itself. But where on hearing an appeal against a conviction, the Sub-Divisional Magistrate is asked to set aside an order under S. 517, he can, treating it as part of the proceedings in the appeal itself, make an order under S. 520, for the disposal of the property concerned in the case. When a District Magistrate has directed a case or a certain class of cases to be heard by a Sub-Divisional Magistrate, and under S. 407 he hears the appeal, his Court comes within the words "Court of Appeal" as used in S. 520 for that particular case or class of cases. Moreover, S. 423(d) authorises appellate Magistrates to pass consequential orders, and orders under S. 520 are usually consequential orders based on the findings in the Appeal. When an appeal is confined entirely to a question of disposal of property, the District Magistrate should hear the petition. Ordinarily in such cases it is desirable that notice should be given, especially if the order is not passed on the day the appeal is disposed of; but there is no rule of law that requires that such notice is absolutely necessary. The words 'and make any further orders that may be just' are quite wide enough to empower the Court to direct the return of property. AIR (Vol 10) 1923 Mad 324: 46 Mad 162: 24 Cr LJ 162: 32 MLT 104: 17 MLW 462: 44 MLJ 56: 71 Ind Cas 514.

**——S. 517 — Order under — Appeal lies to Dt. Magistrate and not to Sub-Divisional Magistrate.**

Where a Stationary Sub-Magistrate in acquitting the accused passed an order for return of jewels under S. 517, held, that an appeal lies to the Dt. Magistrate and not to the Sub-Divisional Magistrate. The words "Courts to which appeals ordinarily lie," cannot cover the case of a Sub-Divisional Magistrate, whose power to hear appeals depends upon a delegation by the District Magistrate under S. 407(2). 9 Mad 448, not followed. AIR (Vol 9) 1922 Mad 78: 67 Ind Cas 339: 1922 MWN 191: 15 MLW 534: 30 MLT 251: 23 Cr LJ 387: 42 MLJ 401 (DB).

**——Ss. 517 and 520 — Order for disposal of property — Sessions Judge — Interference.**

A Court of appeal in S. 520 means the Court of appeal to which the appeal in the particular case lies, and not the Court to which appeals would ordinarily lie. The Sessions Judge is not a Court of appeal in cases of acquittal, tried by a First Class Magistrate. AIR (Vol 5) 1918 Bom 196: 42 Bom 664: 20 Bom LR 395: 19 Cr LJ 597: 45 Ind Cas 501 (DB).

**(c) Notice.**

**——S. 517 — Appeal against restoration of stolen property — Notice to opposite side.**

Where in a theft case, the trial Court orders the restoration of the property to the owner, the appellate Court should not reverse that order without serving or hearing the other side as it would clearly be an order to the prejudice of the complainant. AIR (Vol 19) 1932 Lah 238: (1932) 136 Ind Cas 735 (1): 33 PLR 167: 33 Cr LJ 369 (1).

**——S. 517 — Appeal — Disposal of property — Notice.**

Ordinarily in such cases notice should be given, especially if the order is not passed on the day the appeal is disposed of. But there is no rule of Law that requires that such notice is absolutely necessary. AIR (Vol 10) 1923 Mad 324: 71 Ind Cas 514: 46 Mad 162: 24 Cri LJ 162.

**2. By return of property.**

**(a) General.**
**(a-1) Disputed claims.**
**(b) Joint property.**
**(c) Alienated property.**
**(d) Pledged property.**
**(e) Property in proceedings under S. 145, Criminal P. C.**
**(f) Time of return.**

(a) General.

——Ss. 517 and 523 — Applicability — Police acting on some information recovering horse from possession of A — Police not reporting seizure to Magistrate — On A's application Magistrate directing delivery of horse to A on security — Validity of order. See AIR (Vol 32) 1945 Lah 47: 47 Cr LJ 32.

——Ss. 517, 162 — Confession to police during investigation — Admissibility for purposes of S. 517.

There is no bar either in S. 25, Evidence Act, or in S. 162, Criminal P. C., to a confessional statement of an accused made to a Police Officer during investigation being used for the purpose of S. 517 to determine, firstly, whether the property is property regarding which an offence appears to have been committed, and, secondly, for determining the person to whose custody it should be delivered. The fact that the Magistrate had put this evidence on the record of the substantive trial, would, for the purposes of S. 517, Criminal P. C. be at most an irregularity curable under S. 537, Criminal P. C. AIR (Vol 30) 1943 Lah 312: 45 PLR 391: 45 Cr LJ 153: 209 Ind Cas 546.

——S. 517 — Deposit of pension papers — Criminal proceedings — Acquittal — Return of pension papers.

It is perfectly true that in an ordinary case of property or documents with which the Court is called upon to deal, under the provisions of S. 517, Criminal P. C., the proper order to pass generally is that such property or such document should in the absence of a definite finding as to the ownership, be returned to the person with whom it was found. In the case of pension papers, however, there is a marked exception to the general rule. Here there can be no question that the only person entitled to the possession of the papers is the pensioner himself, and further, the only person to whom they have any value whatsoever is the pensioner himself.

Pensioner depositing pension papers with creditor for securing loan — Grant of loan followed by criminal proceedings — Acquittal — Pensioner applying for return of papers:

Held, that the Magistrate was legally competent to return the papers to the pensioner. AIR (Vol 26) 1939 Cal 158: 182 Ind Cas 571 (DB).

——S. 517 — Case under S. 379, Penal Code — Property seized — After investigation, case referred as of civil nature — Return of property.

In a case under S. 379, I. P. C. against five persons in respect of articles used in cultivation, the Police seized the property and after investigation referred the case as one of civil nature. The Magistrate struck off the case from the Police file but on the recommendation of the station house officer, ordered that the property be returned to the complainant:

Held, that the subsequent order was wrong and the property had to be returned to the persons from whom it was seized. AIR (Vol 26) 1939 Mad 905: 1939 MWN 739 (2): 41 Cr LJ 203: 185 Ind Cas 440 (1).

——S. 517 — Property used for committing offence — Return of.

Any property or document in regard to which an offence appears to have been committed or which has been used for the commission of an offence should not be returned by a Criminal Court to the person who has been convicted. This is the criterion for applying the provisions of S. 517, Criminal P. C. AIR (Vol 21) 1934 All 207: 1934 ALJ 425: 35 Cr LJ 1389: 4 AWR 550: 151 Ind Cas 735.

——S. 517 — Property seized — Restoration — Question of title.

Where a person accused of theft is acquitted and claims as his own the property seized from him by the Police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary.

Where it appears that a person has come into possession of certain property honestly, the question whether he or another is entitled to the property is one to be decided by the Civil Court. AIR (Vol 20) 1933 Mad 434 (2): 1933 MWN 88(2): 37 LW 415: 64 MLJ 431: 34 Cr LJ 586: 56 Mad 654: 143 Ind Cas 510 (1).

——S. 517 — Order after acquittal.

Where a motor bus was sold under a hire purchase system and the hirer having defaulted the owner launched a criminal complaint for theft but the charge was not proved and it appeared that the criminal proceeding was launched merely to evade a civil suit, held, that the Magistrate should restore the property seized, namely, the motor bus to the hirer from whom it had been seized and direct the complainant to a civil suit. AIR (Vol 18) 1931 Cal 455: 35 CWN 198: 132 Ind Cas 902: 32 Cri LJ 983 (DB).

——S. 517 — Breach of trust.

Property in respect of which criminal breach of trust has been committed is as much stolen property as property the possession whereof has been transferred by theft according to the provisions of S. 410, Penal Code. Such property should be handed over by the Criminal Court back to the possession of the real owner unconditionally. Where there is a bona fide dispute as to title the procedure may be different. AIR (Vol 15) 1928 Oudh 277: 12 Ind Cas 103: 3 Luck 494: 11 AI Cr R 226: 5 OWN 281: 29 Cr LJ 983 (DB).

——S. 517 — Order after acquittal.

Where a magistrate finds the accused not guilty of the offence of cheating and acquits him, he cannot order that the property in respect of which the offence was alleged to be committed, and which is in possession of the accused should be restored to the complainant. The proper order which the magistrate should make is that the goods should remain in the possession of the person in whose custody they were found. AIR (Vol 13) 1926 Cal 1048: 27 Cr LJ 853: 95 Ind Cas 933 (DB).

——S. 517 — Where certain property alleged to be stolen during dacoity is not proved to belong to complainant or to have formed part of the property taken at the dacoity it should be delivered to the person by whom it has been produced, complainant being left to his remedy in the Civil Court. AIR (Vol 11) 1924 Lah 588: 86 Ind Cas 273: 26 Cr LJ 737: 6 LLJ 213.

——S. 517 — Dismissal of complaint of theft — Disposal of property.

On the dismissal of a complaint of theft of some logs, the proper order for the disposal of the logs under S. 517 would be that the wood should be sold and proceeds retained by the Court until shown to be payable to one or other of the parties, either under a decree of Court or a private agreement. AIR (Vol 1) 1914 Bom 225: 16 Bom LR 951: 16 Cr LJ 111: 27 Ind Cas 159 (DB).

——Ss. 517 and 518 — Stolen property, disposal of.

Where the accused says that the alleged stolen property is not his, the Court is wrong in giving it to him but it should retain it until one of the parties has established his right to it and where it has been given to the accused, the Court should order the accused to return it. 37 PWR 1913 Cr: 320 PLR 1913: 14 Cr LJ 596: 21 Ind Cas 468.

——S. 517 — Scope — Disposal — Meaning.

The course laid out in S. 517 is to restore property, to be disposed of, to the person entitled to possession. But the word "Disposal" in S. 517 does not include confiscation or destruction of property. (1909) 5 NLR 59: 9 Cr LJ 539: 2 Ind Cas 233.

**——S. 517 — Delivery of property, order directing, merely upon a complaint, illegal.**

An order passed by a Magistrate directing delivery of property to the complainant, merely upon a complaint that some accused person was detaining it unlawfully, is illegal. The High Court, as a court of revision, set aside such an order, but declined to make a further order for restoration, on the ground that it would be illegal to do so. (1907) 5 CLJ 229 (230) : 5 Cri LJ 147 (DB).

**——Ss. 517, 520 — Criminal misappropriation — Acquittal — Delivery of possession.**

Where on a charge of criminal misappropriation of an elephant the accused denied the ownership of the complainant, claimed the animal and were acquitted.

Held, that the elephant, although found to belong to the complainant, should be delivered to such of the accused persons in whose possession it was found at the time the criminal proceedings were instituted. (1905) 9 CWN 549 (550): 2 Cri LJ 269.

**(a-1) Disputed claims.**

——S. 517 — Where the title to seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable. AIR (Vol 14) 1927 Mad 797: 104 Ind 719: 50 Mad 916: 26 MLW 168: 39 MLT 18: 1927 MWN 692: 9 AI Cr R 38: 28 Cr LJ 879: 53 MLJ 309.

——S. 517 — When there is doubt as to ownership of property it should be kept in Malikhana subject to the decision of a competent Civil Court as to the rightful claimant. AIR (Vol 11) 1924 Cal 1040: 84 Ind Cas 444: 28 CWN 1094: 26 Cr LJ 300 (DB).

**(b) Joint property.**

**——S. 517 — Disposal of property — Joint property.**

S. 517 should be applied which a person charged of theft has been discharged or the charge is dismissed. The property should be handed over to person other than the one in whose possession the property is found at the time of the alleged theft.

Where the subject matter of the offence belongs partly to the accused and partly to another person jointly, it may be restored to them jointly on their passing a joint receipt. (1910) 7 MLT 179: 11 Cr LJ 138: (1910) MWN 508: 20 MLJ 425 (427): 34 M 94: 5 Ind Cas 468.

**(c) Alienated property.**

**——S. 517 — Theft of bullock — Conviction of thief — Property recovered from person who bought it from thief in good faith — Restoration of property — Right to owner or transferce from thief.**

On a conviction under S. 379, I. P. Code, for theft of a bullock which is subsequently purchased from the thief by a person in good faith from whom it is recovered, the person entitled to claim return of the bullock is the owner and not the purchaser from the thief, though he has purchased it in good faith as the latter cannot be said to have lawfully purchased it. AIR (Vol 35) 1948 Nag 249: ILR (1948) Nag 745: 49 Cr LJ 373 : 1948 NLJ 507.

**——S. 517 — Purchaser's rights — Purchaser of the commodity has a right to be heard.**

Where a question of bona fides and of title by purchase or otherwise, clearly arises the complainant should be left to his remedy in the civil court. But the jurisdiction of the criminal court is confined to an order at the conclusion of the trial for the disposal of the property, which has been stolen and which is before it in the criminal proceeding. It need not be in the possession of the court but it must be still capable of being earmarked and such an order can only be made at the conclusion of the trial and in the presence of the purchaser who has a right to be heard. AIR (Vol 11) 1924 All 189: 74 Ind Cas 708: 24 Cr LJ 804.

**(d) Pledged property.**

**——S. 517 — Pledgor acquitted of charge of theft — Return of the articles — "Legal possession" and "ownership" — Proper order.**

Section 517, Criminal P. C., authorises the Court to return the articles whether or not an offence is committed in respect thereof to the person claiming to be entitled to possession. The expression "person claiming to be entitled to possession" is important. It does not mean the owner. Ownership involves a question of title, whereas possession does not. Where the articles were seized from the custody of one who it has been found, did not come into possession of them by illegal means but by way of pledge from another person who did not commit any theft, it must be presumed at least so far as the criminal proceedings are concerned, that the pledgor came in lawful possession of the property and that he transferred the custody of it to the pledgee in a lawful manner. Whether the pledgor was directly authorised by the owner or not or whether the ornaments belonged to the owner or his wife as her stridhan would be questions material in civil proceedings that may be founded on the pledge. In such a case, to hand over the articles to the owner would be an interference with the contract in pursuance of which the pledgee held possession of the ornaments. His possession, being under a contract must be regarded as legal possession and if the contract is valid, it must be assumed that he would be the person entitled to possession thereof as against the other party to the contract.

In such a case the wife who gave the articles to the pledgor to pledge was in lawful possession and, therefore, her possession was juridical. The issue whether the contract of pledge was binding on her husband or not is a question which lies beyond the purview of the Criminal Court and unless that is decided, no one but the pledgee would have the legal right to the possession of the ornaments. AIR (Vol 29) 1942 Nag 82: 1942 Nag LJ 240: 43 Cr LJ 698: ILR (1942) Nag 769: 200 Ind Cas 347.

**——S. 517 — Held, on facts that the Magistrate's order directing notes to be returned to firm was proper.**

The manager of a certain firm misappropriated a number of currency notes belonging to the firm and deposited them with another firm to redeem certain bills of exchange, which he had pledged on his own account with that firm. The notes were identified by their numbers and most of them were seized by the Police and produced before the Magistrate who directed that they should be returned to the former firm:

Held, that the order was proper one. AIR (Vol 27) 1940 Cal 346: 41 Cr LJ 791: 189 Ind Cas 714.

——S. 517 — Restoration of pledged property repledged cannot be ordered without payment. 1932 MWN 1270.

——S. 517 — The manager of a branch of a firm pledged certain ornaments belonging to the firm. The proprietors discovered the matter and the manager was prosecuted under S. 408, Penal Code. Though the ornaments were taken possession of by the Police from the possession of the pledgee and produced before the Magistrate, the latter ordered them to be delivered to the proprietors. It was found that the pledgee had acted in good faith and the

Sessions Judge ordered them to be re-delivered to the pledgee:

Held, that all the essential elements required by S. 178, Contract Act, to render the pledge valid were present, and a pledgee had a good title against the proprietors and the order of the Sessions Judge was right. AIR (Vol 18) 1931 Lah 526: 12 Lah 304: 32 Cr LJ 960: 32 PLR 724: 132 Ind Cas 835.

——S. 517 — After having hypothecated certain movable property to the complainant as security for a loan K removed it from his possession and sold it to the petitioner. K was convicted of theft. The petitioner claimed it as purchaser in good faith. The Magistrate however directed the property to be returned to the complainant.

Held, that the magistrate was right in returning the property to the complainant. As a general rule the magistrate acting under S. 517, Cr. P. Code, should pass orders according to his discretion without making further enquiry, and the above case is not one of those exceptional cases in which further enquiry is necessary. AIR (Vol 10) 1923 Cal 598: 71 Ind Cas 702: 24 Cr LJ 238 (DB).

——**S. 517 — Stolen debentures pledged — Pledgee — Position of — Court, duty of.**

A Magistrate should not order that the stolen debentures produced in Court by the pledgee thereof in a prosecution of the pledger under S. 411 I. P. C. should be made over to the rightful owner, when there is a question between the pledgee and the owner at the time of the theft, as to which of them was the rightful owner, which question can only be determined in a civil suit. AIR (Vol 5) 1918 Cal 123: 19 Cr LJ 788: 46 Ind Cas 708 (DB).

——**S. 517 — Pawnee — Right to goods obtained fraudulently.**

M borrowed a pair of diamond Nagats worth Rs. 8,000 promising to return them the same day. He did not return them but pawned them for Rs. 4,000 to a Chetty. M was convicted of criminal breach of trust and the Chetty was directed to return the diamond Nagats to the owner. The Chetty applied in revision for a reversal of the order on the ground that the Nagats had not been obtained by offence or fraud. Held, that the proviso to S. 178 of Contract Act did not apply and the order of the Magistrate was justifiable. (1910) 3 Bur LT 111: 12 Cr LJ 88: 8 Ind Cas 1204.

——**Ss. 517, 523 — Applicability — No disposal of property when there has been trial.**

The accused who was charged with breach of trust (in respect of certain jewels) died before the commencement of trial. The complainants, the alleged owners of the property which was the subject of the breach of trust, applied for restoration of the property to them. The Magistrate held that Ss. 517 and 523 did not apply and ordered return of the property to its original custody (the pledgees):

Held, that as there was no obligation on the Magistrate to hold an enquiry simply for the purpose of deciding the ownership of the property, the Magistrate's order was right. (1906) 29 M 375 (379): 4 Cr LJ 233.

### (e) Property in proceedings under S. 145, Criminal P. C.

——**Ss. 517 and 145 (5) — Cancellation of proceedings under S. 145 (5) — Order disposing of sale proceeds of crops raised on land in dispute — Legality.**

The word "concluded" in S. 517, Cr. P. Code, is used to mean "conclusion after full hearing". When the proceedings are terminated by an order of cancellation passed under S. 145(5), Cr. P. Code, the Magistrate cannot pass any order under S. 517, Cr. P. Code, in favour of either party as regards the disposal of the sale proceeds of the crops raised on the land in dispute but should keep the same in deposit pending orders of civil Court. AIR (Vol 37) 1950 Cal 369: 51 Cr LJ 1340 (DB).

### (f) Time of return.

——**S. 517 — Property, when to be returned.**

The general rule is that when an accused has been charged with an offence in relation to certain property and he has been acquitted, that property should be returned to him. But this rule has no application where several persons are accused of an offence in respect of the same property and one is acquitted while others are convicted. AIR (Vol 24) 1937 Sind 33: 38 Cr LJ 382: 167 Ind Cas 428.

——**Ss. 517 and 523 — Scope of.**

Order for the return of property recovered by Police on private complaint before a Court can only be delivered at the end of trial or enquiry unless the property is established definitely to be the property of the complainant by a Civil Court. 1932 MWN 1345.

## 3. Disposal of property.

(a) **Discretion.**
(b) **Principles.**
(c) **Confiscation.**
(d) **Under other Acts.**
(e) **By return of property.** — See Note 2.
(f) **Converted or exchanged property.**
(g) **Cash and currency notes.**
(h) **"Or otherwise".**
(i) **Third persons.**

### (a) Discretion.

——**Ss. 517 and 520 — Discretion of Court — Article recovered from accused — Acquittal — Return of article.**

In deciding the question of possession, the Magistrate has no doubt a discretion but the general rule is that the property which is recovered from a party to the proceedings should ordinarily be returned to the party from whom it was taken, unless there are special circumstances which would render such a course unjustifiable. Thus on the acquittal of the accused on a charge of theft, the article taken from him should be returned to him and it is not advisable for the Criminal Court to launch into questions of possession. AIR (Vol 18) 1931 Mad 17: 1930 MWN 1106: 1931 Cr C 30: 59 MLJ 901: 129 Ind Cas 458: 32 Cr LJ 355.

——**S. 517 — Discretion to be exercised fairly.**

The discretion to be exercised in passing orders under S. 517, Cr P. C. is not absolute but could be corrected judicial principles. An order ignoring the principle, of property passing in a currency note by mere delivery, in the absence of fraud or bad faith of the petitioner, was upset in revision. AIR (Vol 2) 1915 Bom 265: 40 B 186: 17 Bom LR 922: 16 Cr LJ 783: 31 Ind Cas 383.

——**S. 517 — Magistrate — Order—Disposal of property — Discretion.**

Section 517 of the Criminal Procedure Code invests the Magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially, i.e., according to sound principles of law and not in an arbitrary manner. But what that means is not that the order is in the opinion of the higher tribunal of revision an improper one which it would not have passed, but having regard to the materials before the court exercising the discretion that discretion was exercised in a legal manner.

Now, if there were no materials whatever before him, the Magistrate ought to have returned

the property to the person from whom it was produced. But if there were some materials then the Magistrate's discretion came into operation and it was for him to say what order ought to be passed having regard to all the facts in the case. (1909) 11 Bom LR 16 (17): 9 Cr LJ 162: 1 Ind Cas 103 (DB).

**(b) Principles.**

**——S. 517 — Acquittal of accused due to incomplete evidence — Delivery of property to him — If necessary.**

It is an ordinary rule of law that when an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft, he is entitled to recover that property; but where the property is found to be the subject of theft and an acquittal is due to incomplete evidence, the property will not be delivered to him. AIR (Vol 36) 1949 Nag 17: ILR (1943) Nag 948: 50 Cr LJ 104: 1948 NLJ 359.

**——S. 517 — Delivery of possession of property — General rule — Special circumstances — Discretion — Interference.**

The general rule in the case of orders under S. 517, Criminal P. C., is that the property should be returned to the person from whose possession it was taken.

A felled certain trees. B took possession of them. B was charged with theft but acquitted on the ground that B had taken the trees under a bona fide claim of right and the trees were ordered to be returned to A.

Held, that there was no reason to depart from the ordinary rule and the order directing the trees to be returned to A was illegal.

Though the Court has a discretion under S. 517, Criminal P. C., the High Court can interfere with an order under that section if the lower Court has not exercised any discretion in the matter. AIR (Vol 19) 1932 Mad 495 : 1932 MWN 313 : 33 Cr LJ 783: 139 Ind Cas 340.

**——S. 517 — Return of article — General rule — Exceptions.**

Under S. 517, Criminal P. C., if no crime is made out, the Magistrate has a discretion to decide the question of possession, but as a rule, the article seized should be returned to the person from whom it was seized unless there are special circumstances which would render such a course unjustifiable.

The mere fact that two parties are quarrelling about possession is not one of the special circumstances which take a case out of the general rule.

It is advisable to keep these civil disputes out of Criminal Courts. AIR (Vol 18) 1931 Mad 17: 32 Cr LJ 355: 59 MLJ 901: 1930 MWN 1106: 33 LW 36: 129 Ind Cas 458.

**(c) Confiscation.**

**——S. 517 — Accused carrying hides in cart — Charge in respect of hides and not cart — Confiscation of cart.**

The accused was charged under S. 65, City Police Act, in connection with some hides which he was found carrying in a cart. While convicting him, the cart as well as the hides were directed to be confiscated. He was charged only in respect of the hides and not in respect of the cart:

Held, that the offence being only in respect of the hides, there was no justification for passing an order, in respect of the cart, confiscating it. AIR (Vol 31) 1944 Mad 59: (1943) 2 MLJ 447: 56 LW 647: 1943 MWN 714: 45 Cr LJ 516: 212 Ind Cas 101.

**——S. 517 — Evidence against accused not more than suspicion — Crown's right to seize property found on person — Extent of.**

However strong the suspicion may be, the Crown has no right to confiscate property seized from another's possession without proving that it does not belong to him. Section 517, Criminal P. C., confines the powers of confiscation to property "regarding which any offence appears to have been committed or which has been used for the commission of any offence." AIR (Vol 25) 1938 Nag 52: 39 Cr LJ 105: 172 Ind Cas 213.

——S. 517 — There is nothing in S. 517 to limit the applicability of an order of confiscation to cases where it is found that some offence has been committed. AIR (Vol 23) 1936 Nag 143: 38 Cr LJ 175: ILR (1936) Nag 150: 166 Ind Cas 271.

**——Ss. 517 and 518 — Sale proceeds of stolen property — Confiscation.**

The sale proceeds of stolen property are property to which S. 518, Criminal P. C., relates and, therefore, may be made over to the persons claiming it, and so long as there is any one entitled to the possession thereof, such proceeds should not be confiscated. AIR (Vol 21) 1934 Lah 247: 34 Cr LJ 581: 143 Ind Cas 358.

——S. 517 — Genuine note from which counterfeit note supposed to be forged — No evidence of any offence being committed in respect of genuine note — Order confiscating genuine note while convicting accused under Penal Code, S. 489-B, is wrong. 116 Ind Cas 243: 30 Cr LJ 588: AIR (Vol 16) 1929 Bom 128: 53 Bom 344: 31 Bom LR 148 (DB).

——S. 517 — The essential of S. 517 is that property or document must be proved to have been used in the commission of the offence. Where currency notes were found on the person of a man convicted for importing opium into British India in contravention of the Opium Act, but where it was held that no irresistible inference was possible that they represented payment of the imported opium.

Held, they should not be confiscated. 31 Ind Cas 103: 25 Cr LJ 615: AIR (Vol 11) 1924 All 618.

——S. 517 — Confiscation of property with respect to which an offence seems to have been committed is illegal under Code prior to coming into force of amendments of 1923. 84 Ind Cas 444: 28 CWN 1094: 26 Cr LJ 300: AIR (Vol 11) 1924 Cal 1040 (DB).

**——Ss. 517, 109, 110 and 117 — Enquiry — Confiscation of property.**

A proceeding under S. 117 of the Cr. P. C., is an enquiry within S. 517. Under S. 517 a Court can confiscate not only properties which have been used for the commission of an offence, but also any other property which has been produced before it. 32 Ind Cas 827, Diss. 42 Mad 9: 24 MLT 256: 8 LW 350: 20 Cr LJ 135: 49 Ind Cas 167: AIR (Vol 6) 1919 Mad 20 (DB).

**——Ss. 517 and 523 — Property — Disposal of — Forfeiture — Restoration — Discretion.**

Section 517 does not apply when a complaint is dismissed under S. 203, Cr. P. C., for there is no enquiry or trial in the Magistrate's Court.

There is nothing in S. 523 to prevent a Magistrate from ordering that the property should be at the disposal of the Government, if such order is proper under the circumstances.

A Court has jurisdiction to order forfeiture of property which, it thinks, was used by the complainant for fabricating false evidence against the accused. In such a case, even if the order purports to be under S. 517, it must be held to be under S. 523.

The power to order restoration is discretionary and a Court is not bound to exercise it. (1913) 24

MLJ 1: 14 Cr LJ 27: (1913) MWN 851: 14 MLT 431: 18 Ind Cas 171.

——S. 517 — Scope of — Disposal of property—Confiscation or forfeiture, power of a criminal court to direct — Indian Penal Code, S. 124A — Seditious writing — Gist of the offence, publication not printing.

Under S. 517, Cr. P. C., a criminal court has no power to direct forfeiture of property. The provisions of S. 517 have reference to cases of offences relating to property or relating to documents, e. g., where the court directs, as in cases of theft or criminal misappropriation, or offences of similar description, that the property which is stolen or misappropriated be restored to its owner. The last words of the section, viz., "which has been used for the commission of any offence" must refer to cases of the same nature, i. e., to instruments like guns and swords produced in court. An offence under S. 124-A, I. P. C., consists in publication. The printing press in which seditious matters punishable under S. 124-A of the Penal Code have been printed cannot be said to be property which has been used for the commission of an offence within the meaning of S. 517, Criminal Procedure Code, the press being a remote instrument. (1907) 11 CWN 1046: 6 CLJ 754: 34 Cal 986 (989, 990): 6 Cr LJ 293 (DB).

——S. 517 — Disposal of property — Order of confiscation of boats under — Whether legal.

A boat cannot be regarded as an instrument for the commission of an offence such as is contemplated in S. 517 of the Criminal Procedure Code. An order confiscating two boats alleged to have been used by persons who had gone to commit a theft was set aside. (1904) 8 CWN 887 (888): 1 Cri LJ 849 (DB).

——S. 517 — False charge of theft — Objects found in complainant's premises — Conviction under S. 182, Penal Code — Confiscation — Legality.

Accused was convicted under S. 182 of the Penal Code for having given false information charging one B with the theft of some ornaments. The ornaments had been found upon search in the accused's own premises. Whilst convicting the accused the Magistrate passed an order confiscating the ornaments.

Held, that such an order could be made under S. 517 of the Cr. P. C. The object of the section is to enable the Magistrate to direct property to be given to some person to whom it appears to belong, or to allow it to continue in the possession of the person in whose possession it was found, or to make some order of that character. (1905) 9 CWN 597: 2 Cr LJ 273 (DB).

(d) Under other Act.

——S. 517 — Applicability — Order of forfeiture on conviction for contravention of order under Essential Supplies (Temporary Powers) Act. See ILR (1950) All 280.

——Ss. 517, 518 and 523 — Applicability — Conviction under Food Grains Control Order (1942)— Order of forfeiture — Jurisdiction to pass — Order under S. 517, Cr. P. Code — Legality. See A I R (Vol 34) 1947 Bam 239 : 48 Bom LR 758.

——S. 517 — Confiscation of coins hoarded in contravention of Defence of India Rules.

Under S. 517, a Magistrate can order the confiscation of the coins which were hoarded by the accused in contravention of R. 90 (2) (e) of the Defence of India Rules, 1939. AIR (Vol 33) 1946 Bom 36 : 47 Bom LR 644 : 47 Cr LJ 484 : 222 Ind Cas 497 (DB).

——S. 517 — No confiscation is provided by order under Defence of India Rules, R. 81 (2) — No forfeiture of grain (the subject-matter of contravention) can be ordered — Court cannot exercise general powers under S. 517, Criminal P. C. AIR (Vol 31) 1944 Bom 247 : 46 Bom LR 449 : ILR (1944) Bom 429.

——Ss. 517, 550 — Conviction for selling coins at higher rates — Confiscation of coins.

Where an accused is convicted for an offence under R. 121 read with R. 90 (2) (a) of Defence of India Rules for selling rupees and small coins at higher rate, the Court has power to confiscate the coins . AIR (Vol 31) 1944 Nag 366 : 1944 NLJ 417 : 46 Cr LJ 366 : ILR (1945) Nag 413 : 218 Ind Cas 12.

——S. 517 — Section 13, Public Gambling Act does not justify seizure of money. Money is not an instrument of gambling within the meaning of that section. In so far as Public Gambling Act is concerned, the Magistrate has no authority to confiscate this money. But he has this authority under S. 517, Criminal P. C., where it has been produced before Court. AIR (Vol 25) 1938 All 209: 1938 ALJ 102: 39 Cr LJ 441: ILR (1938) All 348: 1938 AWN 118: 173 Ind Cas 556.

——S. 517 — Prosecution under S. 17 (2) (e), Bihar and Orissa Mica Act, for possession of mica not shown in account books — The offence was not of possessing illicit mica but in respect to the account book and hence the mica in excess could not be confiscated under S. 517, Criminal P. C. AIR (Vol 24) 1937 Pat 257 : 18 PLT 146 : 3 BR 486 : 16 Pat 323 : 38 Cr LJ 602 (2) : 168 Ind Cas 795 (DB).

——S. 517 — Confiscation — Gambling — Sovereigns on the person of accused — No proof that sovereigns had been staked — Confiscation — Legality.

The fact that the money is found in the pocket of waist cloth of a person engaged in gambling does not, by itself lead to the inference that it has been staked and an order for confiscation without proof that they had been staked is illegal. Section 517 of the Cr. P. C., though wide in its terms does not confer on a Court an absolute power of disposition of property regarding which an offence had been committed and which had not been used for the commission for an offence. AIR (Vol 6) 1919 Mad 889 : 34 MLJ 253 : 7 LW 528 : 19 Cr LJ 301 : 41 Mad 644 : 44 Ind Cas 205 (DB).

——S. 517 and Abkari Act (Madras 1 of 1886), S. 29 (n).

An order made under the Madras Abkari Act for the sale as also the mode of sale of confiscated property cannot be sustained, if it purports to have been made under S. 517 of the Cr. P. C. (1909) 5 MLT 256 : 19 MLJ 254 : 9 Cr LJ 149 : 1 Ind Cas 79 (DB).

(e) By return of property.

See N. 2.

(f) Converted or exchanged property.

——S. 517 — Stolen property sold to stranger and resold by him — Sale proceeds, if 'property' within S. 517.

Where the thief sold the stolen property to petitioner for Rs. 184-4-0 and he sold it to others, and the Court asked the petitioner to produce Rs. 184-4-0 and directed this sum to be paid to the defendant under S. 517, Held, that the money deposited within S. 517 in respect of which an offence had been committed as it was not the actual sum paid by the petitioner to the thief or the sums realised by the petitioner by his re-sale. AIR (Vol 5) 1918 Bom 215 : 19 Cr LJ 721 : 20 Bom LR 604 : 46 Ind Cas 401 (DB).

——S. 517 Expl. — Decree obtained "ex parte" on a forged pronote — Garden purchased in execu-

**tion sale — Whether acquired by "conversion" or "exchange" of the pronote — Meaning of the terms.**

Where the accused obtained an ex parte decree on a forged pronote and purchased the defendant's garden in execution and was subsequently convicted of forging the note and perjury and sentenced, the convicting Court cannot under S. 517 order restoration of the garden as it cannot be looked upon as property acquired by "conversion" or "exchange" of the forged pronote; such terms must be taken in their ordinary sense and to apply to such acts as melting down gold and silver ornaments or exchanging notes for cash. (1911) 4 Bur LT 211: 12 Cr LJ 473: 12 Ind Cas 81.

**(g) Cash and currency notes.**

——S. 517 — When a person was being prosecuted for embezzlement it transpired that he had been utilising the money to pay off his creditors. The police traced one of these payments and the creditor concerned handed over the amount to the police.

Held, that the Court could order the payment of the money to the complainant under S. 517. AIR (Vol 13) 1926 All 47: 23 ALJ 889: 26 Cr LJ 1232 : 88 Ind Cas 848 (DB).

**——S. 517 — Cash is not strictly speaking property except if it can be identified in specie — Procedure pointed out.**

Cash is not, strictly speaking, property except in so far as it is capable of being possessed and identified in specie. If it is certain that the actual coins found on the thieves or receivers of stolen property are the actual coins which have been subject of theft then it is permissible to treat such cash as stolen property. It is often safer in such cases to inflict a fine and apply the coins found on the person of the accused towards the payment of fine, and then to apply the amount of time if necessary to compensation. But in no conceivable way can coins which have been put into circulation and passed on to the public be treated in the same way as stolen coins actually remaining in the possession of the thieves. The principle of caveat emptor never applies to currency coins. AIR (Vol 13) 1926 Sind 17: 89 Ind Cas 259: 18 SLR 218: 26 Cr LJ 1315 (DB).

**——S. 517 — Theft of currency note — Delivery —Effect on person legally entitled.**

On conviction of a person for theft of a currency note which had passed by delivery to other persons, the Magistrate should direct the return of the note to the person from whom it was taken unless he finds that some other person is legally entitled to it. (1911) 1 MWN 370 : 12 Cr LJ 400 : 11 Ind Cas 584.

**——Ss. 517 and 520 — Currency notes and coins erroneously disposed of — Remedy.**

A superior Court can order repayment of an equivalent sum under S. 520, if currency notes and coins have been erroneously disposed of under S. 517. (1911) 5 SLR 153 : 13 Cr LJ 21 : 13 Ind Cas 213 (DB).

**——S. 517 — Theft of money — Receipt by third person of money not "bona fide" — Restoration to true owner — Effect if coins not identical.**

Where an accused stole certain money and handed over to a third person who does not receive it bona fide, a Magistrate can under S. 517, Cr. P. C., order restoration of the money to the true owner; it makes no difference if the coins ordered to be restored are not the identical coins sold. (1910) 4 SLR 255 : 12 Cr LJ 397 : 11 Ind Cas 581 (DB).

**——Ss. 517, 520 — Order for the disposal of property regarding which an offence has been committed — Half currency notes.**

When a question arises between two persons who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer. Hence where A made over to B halves of certain currency notes as security for payment to B of the price of goods delivered, having previously parted with the other halves to C. It was held that B was entitled to recover possession of the halves originally made over to him from C to whom they had been delivered under an order of the Court, or to obtain compensation from C if C had parted with them inasmuch as it was C's negligence which enabled A to perpetrate a fraud upon B. (1905) 27 All 630 : 1905 AWN 139 : 2 ALJ 424 (427) : 2 Cr LJ 331.

**——S. 517 — Property — Money — Babashai coin.**

Any coin which is not customarily current in a locality and will not therefore pass by mere delivery may, if brought before the Court as stolen property, be dealt with under S. 517, Cr. P. C., and awarded to the complainant. Coins called babashai so awarded to the complainant as they were not shown to be legal tender in British India. (1901) 3 Bom LR 392 : 25 Bom 702 (706) (DB).

**(h) "Or otherwise."**

**——Ss. 517, 51 — 'Or otherwise' in S. 517 — Interpretation of.**

Money found on person of accused — Money placed in safe custody under S. 51 — Accused fined — Order to recover fine from money found on accused :

Held, that the money was in the custody of the Court and Government had no title to possession of it which would justify the making of an order in their favour and that the order could not be justified under the general words "or otherwise" since the section provides for the disposal by various methods "or otherwise" of any property in the custody of the Court as the words "or otherwise" must be read as ejusdem generis to the methods of disposal previously enumerated, and do not confer upon the Court a general power to make any order for disposal which it may deem fit :

Held, also that the order could, however, be justified under the power to confiscate as the Court had power to make an order for the disposal of this money by confiscation, and the effect of the order which the Court made was to impose a fine and direct that that fine should be recovered by confiscation of the money in Court. AIR (Vol 21) 1934 Bom 193 : 36 Bom LR 324 : 35 Cr LJ 1344 : 151 Ind Cas 472 (DB).

**(i) Third persons.**

**——S. 517 — Order disposing property under S. 517 made in property register without hearing parties.**

An order disposing the property under S. 517, Criminal P. C., not made on the application of any party and after notice but made in the property register probably at the instance of the office cannot be upheld. AIR (Vol 26) 1939 Mad 916 : 1939 MWN 740 : 41 Cr LJ 275 : 186 Ind Cas 224.

**——S. 517 — Dispute about rights.**

Right to possession in dispute between complainant and third person — Opportunity of being heard should be given to other party before ordering restoration. AIR (Vol 14) 1927 Rang 322 : 5 Rang 553 : 28 Cr LJ 932 : 105 Ind Cas 452.

**4. Limitation.**

**——S. 517 — Powers under — No limitation for application under S. 517, exists.**

No period of limitation is prescribed for an application for restoration of property under S. 517, it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged. The words "and make any further orders that may be just," in S. 520 are obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under S. 517. AIR (V 11) 1924 Lah 75 : 4 Lah 49 : 3 PWR Cr 1923 : 24 Cr LJ 713 : 73 Ind Cas 937.

5. Power and duty of Court.

(a) General.
(b) Power to grant compensation.

(a) General.

——S. 517 — **Property taken by force under colour of civil right — Duty of Criminal Court.**

A question of title to property cannot be satisfactorily decided by a Criminal Court; but where property is taken by violence by one person under the colour of a civil claim, the Criminal Court should ordinarily order the property so taken by violence to be returned to the person from whom it was taken; otherwise, Criminal Courts would be encouraging persons to take the law into their own lands, break into other persons' houses, and take property from them under colour of a right which they might not in fact possess. AIR (V 30) 1943 Mad 392 : 1943 MWN 163 : 56 MLW 254 : (1943) 1 MLJ 277 : 44 Cr LJ 554 : 206 Ind Cas 591.

——S. 517 — **Duty of Court — No communal considerations.**

No communal considerations can or ought to weigh with the Court in deciding a matter in which the simple question is, which of two parties, if any, has made out a claim to be entitled to possession of a disputed bull. AIR (Vol 25) 1938 Cal 17 : 41 CWN 1376 : 39 Cr LJ 245 : 172 Ind Cas 959.

——S. 517 — **Disposal of property exhibited in criminal case.**

Section 517, Criminal P. C., invests a Magistrate with discretionary power as to the disposal of exhibits after the conclusion of a criminal case but that discretionary power must be exercised judicially, and not arbitrarily. If there are no materials whatever before him, the Magistrate must return the property to the person from whom it was produced; but if there are materials, the Magistrate must then exercise his discretionary power judicially. If the person disposing of the property belongs to any of the classes mentioned in Ss. 27 to 30, Sale of Goods Act, inasmuch as he can make a valid pledge or sale provided the requirements of the provisos are fulfilled, the property should be returned not to the owner but to the pledgee or the buyer, as the case may be. But where he does not belong to any of the classes mentioned above, he is not entitled to make either a valid pledge or sale; and the property must be returned to the owner. AIR (Vol 24) 1937 Rang 385 : 39 Cr LJ 25 : 171 Ind Cas 897.

——S. 517 — **Restitution by Criminal Court — Scope of powers of Court.**

The primary object of criminal proceedings is the punishment of the offender. Restitution to the injured party is also a desirable thing, but the Criminal Courts are not always in a position to deal with that. AIR (Vol 21) 1934 Bom 74 : 36 Bom LR 88 : 58 Bom 152 : 35 Cr LJ 1028 : 149 Ind Cas 1005 (DB).

——S. 517 — **Power under.**

Section 517 does not limit the power of the trying Magistrate or Judge, who has omitted to pass an order for disposal of exhibits as part of his judgment convicting the accused, so as to deprive him of all power to subsequently pass orders for disposal of the property; similarly it does not limit the powers of a Court of Appeal or revision. AIR (Vol 12) 1925 Rang 183 : 26 Cr LJ 518 : 3 Bur LJ 302 : 85 Ind Cas 358.

(b) Power of granting compensation.

——Ss. 517, 561-A — **Order for restitution of property — Party disposing of property — Order, if ultra vires — Payment of equivalent value.**

Where restitution of property is ordered, the fact that the property has been disposed of does not render the Court's order ultra vires. Even if the property has been converted into other property, the Court still retains the jurisdiction of passing orders about the property into which it has been converted. In such circumstances, the Court can order payment of equivalent value. A I R (Vol 22) 1935 Pesh 98 : 36 Cr LJ 1237 : 157 Ind Cas 763.

6. Revision.

See also S. 520, Criminal P. C.

(a) General.
(b) Powers of High Court.

(a) General.

——Ss. 517, 520, 435, 439 — **Order under S. 517 — Only High Court can set it aside on reference or revision — No revision before Sessions Judge — Revision direct to High Court is maintainable.**

The conviction of the accused under S. 411, Penal Code, having been set aside by the High Court in revision, the accused applied to the trying Magistrate for restoration of the amount which had been recovered from him and made over to the complainant. His application was rejected. He then, without moving the Sessions Judge in revision first, applied direct to High Court in revision against the order under S. 517 :

Held, that an order passed by a Magistrate under S. 517 could be set aside under S. 520, only by a Court of appeal, confirmation, reference or revision and the only Court which could pass an order on a reference or revision was the High Court. Hence, the High Court alone had the power to set aside the order of the Magistrate. The Sessions Judge could not have passed any final orders which could be passed only by the High Court upon a reference. Accordingly, the failure of the accused to file a revision in the Court of the Sessions Judge before going up in revision before the High Court did not render the revision before the High Court direct, incompetent. AIR (Vol 31) 1944 Oudh 310 : 1944 AWR 223 (2) : 46 Cr LJ 756 : 220 Ind Cas 437.

——Ss. 517, 520 — The Additional Sessions Judge has jurisdiction to revise the order passed by the Magistrate, although the order was passed in a case in which accused was acquitted. (1936) 64 CLJ 542 : 40 CWN 862 (DB).

——Ss. 517 and 439 — **Order disposing property— Revision.**

An order directing the delivery of proprety to complainant, under S. 517, Cr. P. C., cannot be interfered with in revision. 96 PLR 1911 : 50 PWR 1911 Cr : 12 Cr LJ 400 : 11 Ind Cas 584.

——Ss. 517 and 523 and Penal Code S. 323.

Where the petitioner's case of forcible dispossession by another is true, the Magistrate must pass orders under Ss. 517 and 522, Cr. P. C., for restoration of the property and a High Court can interfere in revision with orders passed under

S. 522. (1909) 13 CWN 77 : 36 Cal 44 : 9 Cr LJ 294 : 1 Ind Cas 202 (DB).

**(b) Powers of High Court.**

**——Ss. 517 and 520 — Powers of High Court to interfere with order for restoration of property by Court below.**

Under S. 520, the High Court can interfere with or amend an order made by the Lower Court under S. 517. Where an accused was convicted of theft of certain properties found in his possession and they were taken custody of by the Court, and were directed to be handed over to the complainant, and the accused was subsequently acquitted by the High Court, it is proper to pass an order directing that the properties found in the possession of the accused, should be restored to him. AIR (Vol 1) 1914 Cal 658 : 15 Cr LJ 184: 18 CWN 959: 22 Ind Cas 760 (DB).

**——Ss. 517, 522 — Restoration of property — Complainant dispossessed — Conviction under S. 323, Penal Code — High Court's power to interfere in revision with the order under S. 522, Cr. P. C.**

The High Court has power to interfere in revision with an order passed by a Magistrate under S. 522, Cr. P. C. Where, on the complaint of the petitioner charging the opposite party with having forcibly dispossessed him (the petitioner) of a bunglow and its contents, the Magistrate found the case to be true and convicted the opposite party under S. 323, I. P. C., for having forcibly dispossessed the petitioner of both the bunglow and its contents :

Held, under the circumstances of the case it was the duty of the Magistrate to pass orders under Ss. 517 and 522, Cr. P. C., directing restoration to the petitioner of the bunglow and its contents. (1909) 13 CWN 77 : 36 Cal 44 (47) : 9 Cr LJ 294 : 1 Ind Cas 202 (DB).

**7. Scope and applicability.**

**(a) General.**
**(a-1) Applies only to moveables.**
**(b) Nature of proceedings.**
**(c) Nature of order — Conditional orders.**

**(a) General.**

**——Ss. 517 and 520 — Sections do not settle rights or confer titles.**

Orders under S. 517 and S. 520 do not settle any rights nor do they confer any title. These are merely empowering sections which empower the Criminal Courts to dispose of the property which has been seized in the course of enquiry or trial in a summary way and all that is necessary is that the Court should be satisfied that an offence appers to have been committed with respect to that property. (1946) 225 Ind Cas 525: 47 Cr LJ 742: AIR (Vol 34) 1947 Nag 33.

**——S. 517 — Power of the Magistrate to restore property.**

Under S. 517, no doubt a Magistrate has power to restore property to the possession of any party but this is only at the conclusion of the enquiry or trial that has been held relating to the offence with which the property is concerned. But in a case when no such enquiry or trial has been held, S. 517 cannot come into operation. AIR (Vol 32) 1945 Lah 47: 47 Cr LJ 32: 221 Ind Cas 34: ILR (1944) Lah 540.

——S. 517 — It is clear from the provisions of S. 517 (1), Criminal P. C., itself that something more than the subject-matter of an offence is contemplated and sub-s. (1) does not speak of anything which is the subject-matter of an offence but anything regarding which an offence appears to have been committed. AIR (Vol 31) 1944 Sind 207: ILR (1944) Kar 142 : 46 Cr LJ 92: 215 Ind Cas 274 (DB).

**——Ss. 517, 523 — S. 523, applicability of — Whether there must be trial or inquiry — Order for delivery not possible because of dispute — Order under S. 523, if can be made — Custody of property.**

In order that S. 517, Criminal P. C., may apply, one of the conditions is that there must have been an inquiry or trial in any Criminal Court and that such enquiry or trial must have been concluded. If by reason of a disputed claim to possession, an order for delivery cannot be made, or the property may not be finally disposed of by destruction or confiscation or otherwise, the Court will not make any order under this section at all, but leave the parties to their remedy in a Civil Court, if any. Meanwhile, it will be quite proper to make an order under S. 523, where the property is property seized in the manner stated in the section. This section will equally apply where there has been and there has not been an inquiry or trial, or where the property has been or has not been produced in Court; in other words, even in a case which comes under S. 517. If on the facts, the Court finds itself unable to make an order for the disposal of the property in the manner indicated therein, it will be open to it to deal with the matter under S. 523.

But in no circumstances, whether the case be one under S. 517 or under S. 523, can an order be made for detention in Court custody or in the custody of one of the parties, conditional on a civil suit being instituted; for, this might mean detention for an indefinite period, if no such suit is brought. AIR (Vol 25) 1938 Cal 17: 41 CWN 1376: 39 Cr LJ 245: 172 Ind Cas 959.

——Ss. 517, 520 — Case under S. 380 read with S. 411, Penal Code —Police sending accused and stolen property to Magistrate under S. 190, Criminal P. C. — Magistrate without examining witnesses discharging accused — Order regarding disposal of property passed.

Held, that the order comes under S. 517, Criminal P. C., since the inquiry had been initiated and concluded. The Sessions Judge, therefore, can deal with the application filed before him under S. 520, Criminal P. C. AIR (Vol 25) 1938 Rang 278: 1938 Rang LR 143: 39 Cr LJ 763: 176 Ind Cas 451.

**——Ss. 517, 520 — Magistrate directing goods seized to be returned — District Magistrate acting under S. 520, setting aside order and directing them to be sold and proceeds retained in deposit awaiting decision of Civil Court as to their ownership — Burden of proof — Order for sale.**

The petitioner was a trader in Kendu-leaves which were used for the manufacture of biris. The opposite party had taken a lease from the zamindar of the right to collect leaves in jungle and waste lands of the zamindar. The exclusive right to dispose of the leaves in jungle and waste lands was with the zamindar. The petitioner was prosecuted for theft on account of certain leaves in his possession, but the case ended in acquittal in the Sessions Court. The monopolist (opposite party) had, in the meantime, applied to the Magistrate to seize the Kendu-leaves in the petitioner's phandis in various villages on the ground that they had been collected from jungle and waste lands. The Police accordingly seized a large number of leaves but the Magistrate came to the conclusion that it could not be proved that the leaves came from jungle and waste land, and he, therefore, directed that they should be returned to the petitioner. The District Magistrate, acting under S. 520, Criminal P. C., set aside this order, directing that the leaves should be sold and that the sale proceeds should be retained in criminal deposit

awaiting the decision of a Civil Court as to their ownership:

Held, that in order that the District Magistrate should have jurisdiction to dispose of property, it was only necessary that he should find that it appeared that an offence had been committed in respect of that property, and it was not necessary that the property should be proved to have been stolen:

Held, also that the existence of a monopoly of this kind cannot be held to cast upon another person the onus of proving that Kendu-leaves in his possession were not taken from the jungle; and if the monopolist was unable to prove that the property is stolen, the presumption of law was that it was not. That presumption ought to have been applied in the present case, and even if parties talked of going to the Civil Court, the Magistrate ought not, by the application of S. 520, Criminal P. C., to have made an order tantamount to attachment before judgment in a civil suit. AIR (Vol 24) 1937 Pat 591: 18 PLT 441: 3 CLT 43: 38 Cr LJ 1091: 4 BR 40: 171 Ind Cas 589.

——**S. 517 — Property restored to persons, though no offence proved against property belonging to them — Persons found to be owners — Order, whether proper.**

Section 517, Criminal P. C., not only refers to property in respect of which an offence has been committed but also to the property before the Court and in its custody.

The accused not being mercantile agents within the meaning of S. 2(9), Sale of Goods Act, deposited ornaments with the third accused G who received them not in good faith. All of the three were tried under S. 406, Penal Code, for criminal breach of trust. G was acquitted and the Magistrate ordered the ornaments produced before him to be restored not only to those three persons to whom they belonged but also to six others, though no offence had been proved against the property belonging to them. G claimed that as he had been acquitted of the offence with which he had been charged in relation to the property, so he was entitled to an order that the property should be returned to him:

Held, that G was not protected by S. 178, Contract Act, and was not entitled to possession under S. 517, Criminal P. C., whether possession means judicial or physical.

Held, further, that an order restoring property to six others who were found to be owners, was within the provisions of S. 517, Criminal P. C. AIR (Vol 24) 1937 Sind 33: 38 Cr LJ 382: 167 Ind Cas 428.

——S. 517 — There is nothing to prevent an order being made under S. 94 for the production of a thing in anticipation of an order to be made under S. 517 at the conclusion of the trial, and there may be cases in which it is very proper to make such an order. But before doing so, the Court ought to consider the nature of the order which it will be in a position to make under S. 517. AIR (V 21) 1934 Bom 74 : 36 Bom LR 88 : 58 Bom 152 : 35 Cr LJ 1028 : 149 Ind Cas 1005 (DB).

——S. 517 — If the property is neither produced before the Court nor is it in its custody, the Court has no authority to pass order under S. 517, Cr. P. C. (1934) 1934 MWN 566.

——**S. 517 — Applicability — Delivery of property.**

Section 517, Criminal P. C., applies only to property produced before the Criminal Courts or in its custody or regarding which an offence appears to have been committed or which has been used for the commission of any offence. The section has no application to a case where the property concerned has never been produced before the Criminal Courts and it is not denied that no offence has been committed in relation to the property claimed. AIR (Vol 19) 1932 Oudh 218: 9 OWN 434: 33 Cr LJ 569: 138 Ind Cas 156.

——**S. 517 — Interpretation.**

'Property regarding which an offence has been committed' in S. 517 (1) includes moveable property regarding the possession of which a quarrel is begun or a riot is begun, whatever may be the offence that might ultimately be committed in the course of the quarrel or fight. 108 Ind Cas 65: 51 Mad 606: 1 M Cr C 89: 9 AI Cr R 538: 29 Cr LJ 322: 27 MLW 132: AIR (Vol 15) 1928 Mad 194: 54 MLJ 312.

——**S. 517 — Applicability.**

Section 517 is not applicable to a case where the property has already passed out of the custody of the Court S. 517 does not contemplate double restoration. 65 Ind Cas 494: 3 PLT 228: 23 Cr LJ 110 : 1921 PHCC 128 : AIR (Vol 10) 1923 Pat 84.

——**S. 517 — Property produced before Court.**

Under S. 517 of the Cr. P. C., the property to be disposed of need not have been used for the commission of an offence nor is it necessary that some offence should appear to have been committed regarding it. The Court can make an order for the disposal of any property "produced before it or in its custody." 21 Cr LJ 414: 56 Ind Cas 62: AIR (Vol 7) 1920 Nag 219 (DB).

——**Ss. 517 and 524 — Disposal of property produced in Court — Suit to contest order — Limitation.**

The power of a Criminal Court with regard to property is limited to making arrangements for the custody and protection of the property while in the custody of government and making a transfer of possession to such person as it thinks proper. These sections do not empower the government to confiscate the property or conclude the right of the person from whose possession the property has been taken or of any other person, to contest the decision of the Criminal Court by civil suit. 5 Pat LJ 321: (1920) Pat 253: 1 PLT 451: 21 Cr LJ 475: 56 Ind Cas 507: AIR (Vol 7) 1920 Pat 182 (DB).

——**S. 517 — Scope — Possession.**

An order under the section decides the question of possession and not that of ownership and title. 11 Bur LT 267: 20 Cr LJ 332: 50 Ind Cas 668 : AIR (Vol 6) 1919 Low Bur 51.

——**S. 517 (1) — Absence of offence.**

Section 517, Cr. P. C., has no application to the case where it did not appear from the record or any finding to the effect that any offence had been committed with respect to any property intended to be disposed of by an order of Court. 16 Cr LJ 811: 31 Ind Cas 827: AIR (Vol 3) 1916 Mad 839 (DB).

——**S. 517 — Order directing delivery of property in the absence of any criminal proceeding or inquiry without jurisdiction.**

Where an order directing delivery of property is made by a Magistrate without any criminal proceeding before him or any other Magistrate, but merely on the application of the person in whose favour such order is made, such an order is entirely without jurisdiction. S. 517 of the Cr. P. C., cannot apply to the case. (1907) 6 CLJ 707 (708): 6 Cri LJ 402 (DB).

——**S. 517 — Restoration of property — Property in court — No offence committed.**

Under S. 517 of the Criminal Procedure Code of 1898, the Court before which any property has been produced has jurisdiction to order that it be restored to the true owner, even though no

offence appears to have been committed in respect of it. 30 Cal 690, Diss. from and not foll. (1906) 5 CLJ 44: 34 Cal 347 (350): 5 Cr LJ 48 (DB).

**(a-1) Applies only to moveables.**

**——Ss. 517 and 522 — Immoveable property — Restoration of possession to person dispossessed — Forcible ejection.**

Section 517, Cr. P. C., applies to moveable property only and does not extend to immoveable property to which the section applicable is S. 522. 18 CWN 1116; 36 Cal 44, Foll. In order that S. 522 may be applicable, it is not necessary that force should be an ingredient of the offence of which the accused is convicted; it is enough if the use of force appears from the evidence. 12 LW 227: 59 Ind Cas 414: AIR (Vol 7) 1920 Mad 652 (1): 22 Cri LJ 110.

**——Ss. 517 and 522 — Applicability to immoveable property.**

Section 517 does not apply to immoveable property. 15 Cr LJ 175: 18 CWN 1146: 22 Ind Cas 751: AIR (Vol 1) 1914 Cal 629 (DB).

**(b) Nature of proceedings.**

**——Ss. 517 and 520 — Scope of inquiry — Nature of orders under — Orders when made.**

When orders are passed under S. 517 or S. 520, Cr. P. Code, those orders do not settle any rights; nor do they confer any title. The sections merely empower the Criminal Court to dispose of property which has been seized in the course of an inquiry or trial, in a summary way. The only requisite is that the Court should be satisfied that an offence appears to have been committed with respect to that property. ILR (1946) Nag 940: AIR (Vol 34) 1947 Nag 33: 225 Ind Cas 525: 47 Cr LJ 742: 1946 NLJ 610.

——S. 517 — A proceeding under S. 512 (1), Criminal P. C., is neither an enquiry nor a trial within the meaning of S. 517, Criminal P. C. AIR (Vol 24) 1937 Rang 42: 14 Rang 633: 38 Cr LJ 358: 167 Ind Cas 245 (DB).

**——S. 517 — Proceeding under S. 512 is neither 'inquiry' nor 'trial' — Order under S. 517 must be made only after inquiry — No order for restoration should be made in doubtful cases.**

A proceeding under sub-s. (1) of S. 512 is neither an inquiry nor a trial within the meaning of S. 517. But a magistrate is bound, in any case, to hold an enquiry of some sort before he can make order for the disposal of property which has been seized and produced before him. Where there is no adjudication on the question of the accused's guilt or innocence an order under S. 517 is bad. Even where there has been a finding against the person charged with an offence, questions of some nicety may arise which involve a consideration of civil law and it is not the function of a criminal court to decide such questions for the purpose of ordering the return of property to one or other of two contending parties. Where there can be no doubt whatsoever that the pledge is involved, or in other words, that the pledgee is not entitled to retain possession of the articles pledged because it had been obtained from the original owner by what is palpably and unmistakably an offence or fraud, or because the circumstances clearly indicate impropriety, or an absence of good faith on the part of the pledge, a magistrate is justified in directing its return to the original owner. But where there is a doubt, not necessarily a strong doubt, not even a reasonably arguable one, such as may arise where the decision involves a contentious point of civil law, the normal course of restoring the property to the person from whom it was seized should be followed, and the dissatisfied party should be left to seek his remedy in a civil court. 81 Ind Cas 154: 2 Bur LJ 85: 25 Cr LJ 666 : AIR (Vol 10) 1923 Rang 248.

**(c) Nature of order — Conditional orders.**

**——S. 517 — Validity of order.**

Where house is not property in respect of which offence is committed no order under S. 517 can be made. Where during the pendency of the case, the key of the house was by order of the magistrate delivered to the complainant and the accused after he was acquitted, applied for an order directing the complainant to hand over the key to him, held (1) that the order as to key was passed by a competent court and complainant's possession was not unlawful; (2) when the accused applied for the return. Neither the house nor the key was in the custody of the court and therefore the court had no power to make the order. 120 Ind Cas 197: 31 Cr LJ 6: 1930 Cr C 51: AIR (Vol 17) 1930 All 35.

**——S. 517 — Order awarding possession of property to complainant till determination by a Civil Court.**

The accused was acquitted of the offence of cutting and removing bamboos from the clump of the complainant. The Magistrate directed that in order to avoid a breach of the peace, the complainant should retain possession of the clump till ousted by a Civil Court. The order was illegal. 20 CWN 1302: 18 Cr LJ 442: 38 Ind Cas 1002: AIR (Vol 4) 1917 Cal 591 (DB).

**——S. 517 — Nature of order under.**

Order under S. 517 cannot direct the party to whom the property is delivered, to produce it if called upon. (1910) 11 Cr LJ 65: 19 MLJ 516: 4 Ind Cas 875.

**——S. 517 — Conditional order that recipient of property should produce the article when required, bad.**

An order under S. 517, Cr. P. C., that the petitioner is to receive the property on condition of her producing the property or its equivalent value when ordered by a competent civil court is bad. (1908) 19 MLJ 516.

**8. Time of order.**

**——S. 517 — Order under, when can be passed — Order passed after lapse of time — Notice to party.**

Section 517, Criminal P. C., cannot be read as requiring that the order for disposal of property must be passed simultaneously with the judgment of the case unless the words that are not there are read into the section. Section 517 gives jurisdiction to the Court to pass necessary orders for the disposal of property either at the time of the conclusion of the trial or at a later date. Though the passing of such orders should not be unreasonably postponed, yet the lapse of time does not relieve the Court of the duty and the corresponding jurisdiction to pass orders for the disposal of property which is in the Court's custody or under its control.

Where an order under S. 517 is passed simultaneously with the judgment in a criminal case a separate notice to the parties to show cause why the order should not be passed is not necessary. But when an application is made after some lapse of time, it is proper on general principles of law that the party to be affected by the proposed order should have notice of the application. AIR (Vol 27) 1940 Pat 198: 21 PLT 448: 19 Pat 337: 6 BR 621: 41 Cr LJ 559: 188 Ind Cas 260 (DB).

**——S. 517 — Effect of acquittal.**

A certain elephant was seized by Police from the accused on a charge of abetment of theft of

elephant, the accused, on his claiming to be the purchaser of certain shares in the animal, was acquitted.

Held, that the animal should have been made over to the accused on failure of the case against him and not to complainant. 102 Ind Cas 482: 54 Cal 283: 28 Cr LJ 546: 8 AI Cr R 179: AIR (Vol 14) 1927 Cal 532 (DB).

——S. 517 — **Court can pass order at or after the passing of judgment.**

No order can be passed under S. 517, until the case is concluded. After that, and within a reasonable time, the magistrate, who heard the case, is empowered to act. He may do so at the time of pronouncing his order or later. It cannot be laid down that an order under S. 517 can only be passed in favour of a person from whose possession the property was recovered. 7 Lah LJ 625: 26 Cr LJ 1453: 89 Ind Cas 973: AIR (Vol 13) 1926 Lah 9.

——S. 517 — **Order must be passed at the close of trial and not subsequently.**

Accused was charged with being in possession of a stolen bullock but acquitted, but no order was passed about the restoration of the bullock. After some days, the complainant applied to the Magistrate for restoration of the bullock and his application was allowed.

Held, the order was illegal. An order for the disposal of the property regarding which an offence has been committed can only be made upon the conclusion of the inquiry of a trial before any criminal court, and not on the application of a person subsequently made by him to the court after the conclusion of the trial. 76 Ind Cas 20: 4 Lah 460: 25 Cr LJ 84: AIR (Vol 11) 1924 Lah 261.

——S. 517 — **Accidental omission to pass order under S. 520 — Successor can pass the same.**

Where an appellate magistrate disposing of a criminal appeal fails to pass an order under S. 520 it will be open to his successor to do so, in spite of S. 369, if there is only an accidental slip or omission. Though an order under S. 517, Cr. P. Code, should be made at the time of passing judgment in the criminal case itself, an order made subsequently is not illegal or made without jurisdiction. 15 MLW 664: 1922 MWN 494: 31 MLT 367: 71 Ind Cas 511: 24 Cr LJ 159: AIR (Vol 9) 1922 Mad 329: 43 MLJ 87.

——S. 517 — **Time of making order — Fresh enquiry if necessary.**

An order under S. 517, Cr. P. C., should be made at the time of passing judgment and where the Magistrate had before him the evidence for the prosecution in the enquiry, the order need not follow a fresh enquiry after giving opportunity to the party to produce new or further evidence. 18 Cr LJ 469: 39 Ind Cas 309: AIR (Vol 5) 1918 Mad 709.

——S. 518.

——S. 518 — The sale proceeds of stolen property are property to which S. 518, Criminal P. C., relates and therefore may be made over to the persons claiming it, and so long as there is any one entitled to the possession thereof, such proceeds should not be confiscated. AIR (Vol 21) 1934 Lah 247 (248): 34 Cr LJ 581: 143 Ind Cas 358.

——S. 518 — **Scope and effect.**

An order under S. 518 of the Cr. P. Code was passed in 1873 and the accused was convicted under S. 188, Penal Code, for disobeying the same in 1920 held, that the order under S. 518, Cr. P. Code could not enure for all time but had a temporary operation only and that the conviction could not be sustained. AIR (Vol 7) 1920 All 223: 59 Ind Cas 34: 22 Cr LJ 2: 18 ALJ 857.

——S. 518 — **Accused acquitted — Stolen property — Restoration.**

When on acquittal of a person accused of theft, it is proved that the stolen articles belonged to the complainant, the articles should be handed over to the complainant. (1917) 9 Cr LR 95 (All).

——S. 519.

——Ss. 519, 545 — **Stolen property — Innocent purchaser — Fine — Money on the person of accused — Compensation.**

Under S. 545, compensation to innocent purchaser of stolen property ought not to be given out of the fine imposed; but under S. 519 compensation may be given out of the moneys found in the possession of the accused. (1901) 3 Bom LR 764 (765) (DB).

——S. 520.

See also S. 517 Criminal P. C.

1. Scope of the section.
2. Applicability.
3. Orders under S. 517.
4. Court of Appeal.
5. Court of Revision.
6. Stay.
7. Notice.
8. Reference to Civil Court.
9. Restoration.
10. Restitution.
11. Recovery of property.
12. Limitation.
13. Powers of High Court.

### 1. Scope of the section.

——S. 520 — **Construction and scope — If confers right of appeal — Order under S. 517 — If appealable — Application under S. 520 — Limitation.**

No appeal is permissible against an order under S. 517, Cr. P. Code. S. 520 confers no right of appeal. It merely confers on the Court hearing an appeal against an acquittal or a conviction in respect of the original trial certain powers to deal with the property in respect of which the offence appears to have been committed in the same way as the trial Court, and further empowers it tc annul, alter or modify the trial Court's order. That order is not one passed on appeal from an order under S. 517, but is merely one of the powers which a Court of appeal is entitled to use. No question of limitation can arise in respect of an application under S. 520, made to the Court of appeal. AIR (Vol 34) 1947 Nag 33: ILR (1946) Nag 940: 225 Ind Cas 525: 47 Cr LJ 742: 1946 NLJ 610.

——Ss. 520 and 517 — **Scope of S. 520 — Order of restoration under S. 517 carried out — High Court can still exercise powers under S. 520.**

Section 520 is very wide and confers extensive powers on the High Court not only to modify, alter or annul any order passed by a Subordinate Court, but to pass any further orders that it considers just. The fact that the order under S. 517 for restoration of property has been carried out by the Magistrate cannot preclude the High Court from exercising the power conferred upon it by S. 520. It is also not necessary that the order of the Magistrate should have been stayed before the High Court can exercise its jurisdiction in either setting aside the order or passing such further order as it thinks just. AIR (Vol 31) 1944 Oudh 310: 1944 AWR 223 (2) : 220 Ind Cas 437 : 46 Cr LJ 756.

——S. 520 — Order under S. 517, Criminal P. C. — Application made to High Court under S. 520, Criminal P. C., against the order — Held, that the application could be treated as revision application under S. 435, Criminal P. C. AIR (Vol 31) 1944 Oudh 310: 1944 AWR 223(2): 220 Ind Cas 437: 46 Cr LJ 756.

**2. Applicability.**

——**S. 520 — Applicability.**

Section 520 refers only to orders passed under the Code and not to orders passed under other Acts or Ordinances. AIR (Vol 33) 1946 Cal 1: 49 CWN 548: 222 Ind Cas 459 (DB).

——S. 520 — S 520 does not apply to an order not relating to property and not passed under S. 517, 518 or 519. So under S. 520 an order restoring a child to his parents cannot be passed. AIR (V 13) 1926 Lah 487 : 94 Ind Cas 142 . 27 Cr LJ 574

**3. Orders under S. 517.**

——**Ss. 520 and 517 — Court which can interfere with order under S. 517.**

An order passed by a Magistrate under S. 517, Cr. P. Code, irrespective of the final result of the case could be modified, or altered or annulled by any "Court of appeal, confirmation, reference or revision" under S. 520, Cr. P. Code. AIR (Vol 38) 1951 Ajmer 101 (2): 52 Cr LJ 1532.

——**S. 520 — Order under S. 517 — Interference by Court of appeal or revision — Substantive case not before it.**

A Court to which ordinarily an appeal or a revision would lie can interfere under S. 520, Cr. P. Code, with an order passed under S. 517, Cr. P. Code, by the trial Court even without the substantive case having come before the Court in appeal or revision. AIR (V 37) 1950 Lah 148 : Pak L R (1950) Lah 138 : 51 Cr LJ 1323.

——Ss. 520 and 517 — Powers of Court under S. 520 — Carrying out of orders under S. 517 — If a bar to exercise of powers under S. 520. See 46 Cr LJ 756: AIR (Vol 31) 1944 Oudh 310.

——S. 520 Case under Ss. 380, 411, I. P. C. — Police sending accused and stolen articles to Magistrate, under S. 190, Criminal P. C. — Magistrate without examining witnesses discharging accused — Order regarding disposal of property passed — Order, held one under S. 517, Criminal P. C., and could be interfered with under S. 520, Criminal P. C. by Sessions Judge. AIR (Vol 25) 1938 Rang 278: 39 Cr LJ 763: 1938 Rang LR 143: 176 Ind Cas 451.

——S. 520 — Under S. 520 as well as under S. 423 (1)(d) the appellate Court has the power to pass appropriate orders for the disposal of the property produced at the trial in a case under S. 411, Penal Code, even though the trial Magistrate has omitted to do so. AIR (Vol 15) 1928 Lah 567: 111 Ind Cas 314 : 11 AI Cr R 18 : 29 Cr LJ 810 : 10 Lah 187 (DB).

**4. Court of appeal.**

——**Ss. 520, 517 — Order as to disposal of property challenged — Court of Appeal or Revision.**

The Court of Appeal or Revision referred to in S. 520, Criminal P. C., is the Court which ordinarily is the Court of Appeal or Revision, as the case may be, to which the Court passing the order as to the disposal of property is as such, ordinarily subordinate, when the order which is challenged is the order as to property alone. It does not mean only the Court to which the principal order could be brought in revision or appeal. If the principal order is challenged, no question as to which is the Court of Appeal or Revision would arise because that Court would necessarily be the Court before which the appeal or revision application against the principal order had been made. AIR (Vol 29) 1942 Sind 1: ILR (1941) Kar 442: 43 Cr LJ 386: 198 Ind Cas 493 (DB).

——**S. 520 — Additional Sessions Judge, if a Court of appeal — If a Court of revision within S. 520.**

The Court of appeal mentioned in S. 520, Criminal P. C., must be a Court of appeal as contemplated by Chap. 31 thereof. There is nothing in the terms of S. 520 justifying the view that the words "Court of appeal" in that section mean only a Court to which either of the parties to the criminal case has appealed or could appeal. The Court of appeal is any Court which has powers of appeal, that is, any Court to which appeals ordinarily lie from the decision of the Magistrate by whom the case was tried.

An Additional Sessions Judge is also a Judge of the Court of Sessions, and hence he constitutes a Court of appeal within the meaning of S. 520. But as the Court of revision within the meaning of S. 520, must be a Court of revision, as contemplated by Chap. 32 of the Code, the Sessions Judge or Additional Sessions Judge is not a Court of revision within the meaning of S. 520. AIR (Vol 23) 1936 Cal 185 : 62 Cal 861 : 37 Cr LJ 541 : 162 Ind Cas 255.

——**Ss. 520, 517 — "Court of Appeal", meaning of — Jurisdiction.**

The words "Court of Appeal" as used in S. 520, Criminal P. C., are not limited to a Court before which an appeal from an order of acquittal could lie, and the jurisdiction of the Court of Appeal to deal with an order for disposal of property found in the possession of persons charged under S. 411, I. P. C., is not dependent upon the question in what Court an appeal from an order of acquittal might have been brought, which, in matter of fact, had not been brought. AIR (Vol 23) 1936 Cal 21: 40 CWN 287 : 37 Cr LJ 318 : 160 Ind Cas 591 (DB).

——S. 520 — An appellate Court has jurisdiction to pass an order regarding the disposal of movable property even when the trial Court has not passed any such order. 1934 MWN 956.

——**S. 520 — Interpretation.**

An application made under S. 520 to a "Court of appeal, confirmation, reference or revision," is not in the nature of an appeal. 104 Ind Cas 719: 50 Mad 916: 26 MLW 168: 39 MLT 18: 1927 MWN 692: 9 AI Cr R 38: 28 Cr LJ 879: AIR (Vol 14) 1927 Mad 797: 53 MLJ 309.

——**S. 520 — A Session Judge cannot interfere with the order passed by a Sub-Divisional Magistrate on appeal under S. 520.**

The trial Court handed over the subject-matter of theft to the complainant on conviction of the accused. On appeal the Sub-Divisional Magistrate while acquitting the accused declined to interfere with the order about the restoration of the subject-matter of theft. The Sessions Judge reversed the order of the trial Court on appeal.

Held, he was not authorised to do so by S. 520 AIR (V 11) 1924 Mad 899 : 47 MLJ 481 : 82 Ind Cas 175 : 20 MLW 521 : 1924 MWN 806 : 25 Cr LJ 1247.

——**S. 520 — 'Court of Appeal' — Meaning.**

The words 'Court of Appeal' in S. 520 Cr PC mean the Court to which appeals would ordinarily lie. 96 PLR 1911: 50 PWR 1911 Cr: 12 Cr LJ 400: 11 Ind Cas 584.

**5. Court of Revision**

——**S. 520 — Additional Sessions Judge — If a Court of appeal or a Court of Revision within S. 520.**

An additional Sessions Judge is also a Court of Sessions and hence he constitutes a Court of appeal within the meaning of S. 520. But as a Court of Revision within the meaning of the Section must be a Court of Revision, as contemplated by Chap. 32 of the Code, the Sessions Judge or Additional Judge is not a Court of Revision within the meaning of S. 520. AIR (Vol 23) 1936 Cal 185 (185, 186): 62 Cal 861: 162 Ind Cas 255: 37 Cr LJ 541: 1936 Cr C 307.

——**S. 520 — Disposal of property — Revision — Sessions Judge, jurisdiction of — Interpretation of S. 520.**

An application for revision under S. 520, Criminal P. C., from an order of a trying Magistrate for disposal of property following upon an order of acquit-

tal lies to the Sessions Court or the District Magistrate's Court.

Section 520, Criminal P. C., means that any Court, which has powers of appeal, confirmation, reference or revision in respect of the trial Court, that being the Court subordinate thereto referred to in section, can make any substantive order it thinks fit in respect of property dealt with by the trial Court under Ss. 517, 518 or 520. AIR (V 19) 1932 Bom 534: 34 Bom LR 1203: 56 Bom 369: 33 Cr LJ 807: 139 Ind Cas 433 (FB).

**(Overrules AIR (Vol 5) 1918 Bom 186 : 42 Bom 664 : 19 Cr LJ 597 : 45 Ind Cas 501.)**

**——S. 520 — Power to interfere — Additional District Magistrate.**

Where an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by S. 10(2), Cr. P. Code, with the powers of a Court of revision, he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property. AIR (Vol 17) 1930 Mad 769: 126 Ind Cas 594: 31 Cr LJ 1085: 1930 Cr C 895.

**——S. 520 — District Magistrate.**

In the case of an acquittal by the trial Court, both the Sessions Judge and District Magistrate as a Court of revision have power, under S. 520, to interfere with the order of the trial Court passed under S. 517 regarding disposal of property in respect of which the offence was committed and in the case of a conviction by a First Class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under S. 517 by the trial Court. 6 Rang 259: AIR 1928 Rang 240: 111 IC 878, Overruled. 115 Ind Cas 901: 7 Rang 345: 30 Cr LJ 540: 12 AI Cr R 350: AIR (Vol 16) 1929 Rang 97 (FB).

**——S. 520 — Revision.**

Where an appeal has been filed from a conviction by a subordinate Court, the District Magistrate has got jurisdiction to interfere as a Court of revision under S. 520, with an order passed by the trial Court under S. 517. AIR (Vol 10) 1923 Rang 227: 74 Ind Cas 1050: 1 Rang 199: 2 Bur LJ 241: 24 Cr LJ 858 (DB).

**——S. 520 — Venue for stay proceedings.**

When the case is one in which confirmation is required, the person aggrieved must go to the Court of confirmation. When there is an appeal, he must go to the Appellate Court. When there is no appeal and no confirmation, he must go to the Court of revision or reference. (1911) 13 Bom LR 131: 35 B 253: 12 Cr LJ 169: 9 Ind Cas 947 (DB).

### 6. Stay.

**——S. 520 — Suspension.**

The suspension of the order is not a necessary preliminary to the exercise, by the Court of appeal, of the powers conferred by the last words of S. 520. 105 Ind Cas 452: 5 Rang 553: 28 Cr LJ 932: AIR (Vol 14) 1927 Rang 322.

### 7. Notice.

**——S. 520 — Order in absence of opposite party — Due notice of hearing issued — Party having opportunity of appearing — Order, if one behind back of party.**

Where the appellate Court passes an order under S. 520, in the absence of the opposite party after issuing successive notices to him and giving him an opportunity to appear, the order cannot be afterwards challenged on the ground that it was passed behind his back and without giving him an opportunity of being heard. 225 Ind Cas 525: 47 Cr LJ 742: AIR (Vol 34) 1947 Nag 33.

**——S. 520 — Necessity for.**

Though S. 520 of the Cr. P. C. does not prescribe the issue of notice to any person before an order under that section is passed, yet it is a general principle of law that an order duly passed by a competent authority in favour of any person should not be set aside without that person being heard. 20 Cr LJ 823: 53 Ind Cas 823: AIR (Vol 5) 1918 Nag 65.

**——S. 520 — Confiscation of property the subject of offence — Notice to complainant.**

No order for the confiscation of property, the subject of an offence, can be passed under S. 520 without giving notice to the complainant and hearing his objections. AIR (Vol 3) 1916 Low Bur 69: 17 Cr LJ 207: 9 Bur LT 193: 34 Ind Cas 319.

**——S. 520 — Procedure.**

Notice to the other side is necessary before an order can be passed under S. 520. (1911) 13 Bom LR 131 : 35 B 253 : 12 Cr LJ 169 : 9 Ind Cas 947 (DB).

### 8. Reference to Civil Court

**——S. 520** — An Appellate Court has full power under S. 520 of the Code to order that the parties should have their title to the property in dispute established in the Civil Court. (1913) 11 ALJ 452: 35 A 374: 14 Cr LJ 526: 20 Ind Cas 1006.

### 9. Restoration.

**——S. 520 — High Court.**

It is clearly just that when a subordinate Court has made over property to a person who is not entitled to its possession, the High Court, on appeal should remedy the error by restoring the property to the person properly entitled to its possession. 4 L. B. R. 14, Diss from. 5 Rang 553: 28 Cr LJ 932: 105 Ind Cas 452: AIR (Vol 14) 1927 Rang 322.

**——S. 520— Appellate Court cannot direct restoration, where trial Court has not.**

One Onkar filed a complaint under S. 506 against the three accused to the effect that they were demanding under threats the restoration of certain Bahis which were in the complainant's possession. These Bahis had been in the possession of Onkar for the last 10 or 11 years but the trying Magistrates found that they really belonged to two of the accused. They, however, passed no order with regard to the restoration of the Bahis but added that if they wanted to get them back they should seek their remedy in a proper Court. In an appeal the Appellate Court directed that the Bahis be returned to the accused.

Held, that the offence of criminal intimidation was complete but the order of restoration was bad. AIR (Vol 11) 1924 All 213: 21 ALJ 877: 5 LRA Cr 14:

### 10. Restitution

**——Ss. 520 and 523 — Restitution — Power of.**

S. 520 of the Cr. P. C. empowers a Court of reference or revision to order restitution if justice so requires. Where a remedy is allowed by law the tribunal invested with jurisdiction can enforce its order in the manner it considers most suitable even though there is no express provision for doing the same. 19 Cr LJ 995: 48 Ind Cas 175: AIR (Vol 5) 1918 Pat 304.

### 11. Recovery of property.

**——S. 520 — Property not of complainant.**

Where certain property alleged to be stolen during dacoity is not proved to belong to complainant or to have formed part of the property taken at the dacoity, it should be delivered to the person by whom it has been produced, complainant being left to his remedy in the Civil Court. AIR (Vol 11) 1924 Lah 588: 86 Ind Cas 273: 26 Cr LJ 373: 6 Lah LJ 213.

### 12. Limitation

**——S. 520 — Powers under — No limitation for application under S. 517 exists.**

No period of limitation is prescribed for an application for restoration of property under S. 517; it can be made within a reasonable time from the

date on which an accused person is acquitted of the crime with which he is charged. The words "and make any further orders that may be just," in S. 520 are obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under S. 517. 73 Ind Cas 937: 4 Lah 49: 24 Cr LJ 713: AIR (Vol 11) 1924 Lah 75.

**13. Powers of High Court.**

**——S. 520 — Power of High Court to dispose of property.**

Under S. 520 Cr. P. C. the High Court has ample powers to issue orders to dispose of property on the merits of the case. 16 Cr LJ 813: 31 Ind Cas 829: AIR (Vol 3) 1916 Mad 840 (DB).

**——S. 521.**

**——S. 521 — Objectionable passages in book — Proper order.**

The order of the Sessions Judge directing the destruction of the books containing objectionable passages cannot be sustained but the pages containing those passages should be directed to be destroyed. AIR (Vol 27) 1940 Mad 953 : 1940 MWN 532: 52 LW 118: 42 Cr LJ 119: 191 Ind Cas 84.

**——S. 522.**

**1. Appeal.**
**2. Applicability.**
**3. Notice.**
**4. Order against third party.**
**5. Powers of Court of appeal, revision or reference.**
**6. Remedy of third person.**
**7. Time for order.**

See also N. 5.

**1. Appeal.**

**——S. 522 (3) — Applicability — Right of appeal.**

Sub-section (3) of S. 522, Criminal P. C., only applies to the Court which is dealing with the original matter either as a Court of appeal, confirmation, reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under S. 522. AIR (Vol 27) 1940 Lah 95: 41 Cr LJ 458: 43 PLR 534: ILR (1941) Lah 377:187 Ind Cas 407.

**——S. 522 — Restoration of immoveable property by Magistrate — Order set aside — Effect — Power of Magistrate to deliver possession.**

An order of the High Court setting aside restoration of immoveable property to complainant by a Magistrate empowers the latter to redeliver possession of the same to the accused. AIR (Vol 1) 1914 Cal 275 : 15 Cr LJ 222 : 18 CWN 1147 : 22 Ind Cas 1006 (DB).

**——S. 522 — Appellate Court — Jurisdiction.**

Order under S. 522 can only be made by the Court which convicts of an offence attended with criminal force, and therefore an Appellate Court cannot make such an order restoring possession of immoveable property. (1912) 39 Cal 1050: 16 CWN 811: 13 Cr LJ 608: 16 Ind Cas 176 (DB).

**——S. 522 — Revision — Conversion of application under S. 439, Cr. P. C. into one under S. 622, C.P.C. (1882) — Cr. P. C., S. 476.**

In this case the Court entertained as an application under S. 622 of the C.P C., an application purporting to be one presented in accordance with the provisions of S. 439 of the Cr. P. C. for revision of an order passed by a Civil Court under S. 476, Cr. P. C. 1904 AWN 170: 1 ALJ 481 (482).

**2. Applicability.**

**(a) Scope.**
**(b) "Is convicted."**
**(c) Offence attended by Criminal force etc.**

See also Note 2(d).

**(d) Dispossession.**

**(a) Scope.**

**——S. 522 — Applicability.**

Section 522 has no application when the accused is convicted of criminal trespass not attended with criminal force. AIR (Vol 32) 1945 All 26: 1944 ALJ 432: 1944 AWR 280: 1944 OWN 228: 46 Cr LJ 211: 217 Ind Cas 170.

**——S. 522 — Applicability.**

An order for restoration of possession cannot be made under S. 522, Criminal P. C., where the criminal force attending the dispossession complained of is used not against the person dispossessed but against the property in his absence. Section 522 applies only to criminal force used against the person. AIR (Vol 30) 1943 Mad 257: (1943) 1 MLJ 160: 1943 MWN 130: 44 Cr LJ 769: ILR (1943) Mad 900: 56 LW 67: 208 Ind Cas 279.

**—— S. 522 — Criminal force — Order under S. 522 Jurisdiction — Penal Code, 350.**

An order under S. 522, Criminal P. C., can only be passed in cases where criminal force as defined in S. 350, Penal Code, has been used and where a finding to that effect has been recorded. In the absence of use of criminal force, an order passed under S. 522 is one without jurisdiction and must be set aside. AIR (Vol 22) 1935 Lah 477: 37 PLR 176: 36 Cr LJ 1161 (1) : 157 Ind Cas 471 (1).

**——S. 522 — Conditions to be fulfilled before order under, can be passed — Criminal force — Delivery of possession of property.**

In order to support an order under S. 522, Criminal P. C., there must be dispossession by the use of criminal force as defined in S. 350 of the Penal Code.

Where the accused are acquitted and are held not guilty of the offence of which they stood charged and the offence was not attended by any criminal force or show of criminal force or by any criminal intimidation, nor was there any evidence to show that by such force or show of force or criminal intimidation, the complainant had been dispossessed of his immovable property:

Held, that an order under S. 522, Criminal P. C., to deliver possession of the disputed property to the complainant should not be passed. AIR (Vol 21) 1934 Oudh 199 : 11 OWN 372 : 35 Cr LJ 686(2) : 148 Ind Cas 436.

——S. 522 — When use of criminal force is wanting, criminal Courts have no jurisdiction to act under S. 522. If possession has been given, it is the duty of the Court to restore the parties to the position in which they were before possession was wrongly given. AIR (Vol 9) 1922 Mad 188: 68 Ind Cas 38: 15 MLW 533: 1922 MWN 356: 31 MLT 20: 23 Cr LJ 502.

**——S. 522 — Action under — Validity.**

No action can be taken under S. 522 unless the dispossession of the property was attended with criminal force. In criminal trespass, criminal force may be used as a matter of fact, but the use of criminal force is not an essential of the offence. Where there is no finding of use of criminal force, an order under S. 522 is not right. (1910) 11 Cr LJ 594 : 8 Ind Cas 219 (All).

**——S. 522 — Restoration of possession.**

Under S. 522, Cr. P. C., whenever an accused is convicted of an offence attended by show of force,

the court has the power to order the person who has been dispossessed by the accused of any immoveable property by such show of criminal force to be restored to the possession of the same. (1907) 11 CWN 467: (469, 470): 5 Cr LJ 278 (DB).

——S. 522 — **Order under, restoring possession of immoveable property.**

In order to justify an order under S. 522, there should be two conditions precedent: (1) The offence of which the accused is convicted should have been attended by criminal force; (2) a person should have been dispossessed of immoveable property by the use of such force. (1903) AWN 59: 25 A 341 (342, 343).

(b) **"Is convicted".**

——S. 522 — **Ingredients of offence — Court can make consequential order on finding that complainant was dispossessed by force — Conviction of all accused is not necessary.**

There is no reason for putting a narrow construction upon S. 522. Section 522 gives the convicting Court the power to make a consequential order which naturally follows from its findings that the complainant was dispossessed by force. A conviction is undoubtedly necessary in S. 522 but not necessarily the conviction of all the accused. AIR (Vol 18) 1931 Bom 77 : 32 Bom LR 1496 : 32 Cr LJ 275 (DB).

——S. 522 — **Conviction set aside.**

Where Court convicts accused and orders under S. 522 restoration of property to complainant on his application and where the conviction is subsequently set aside, the accused is entitled to get back the possession even though the equities of the case are in favour of the complainant as conviction alone can sustain an order under S. 522. AIR (Vol 16) 1929 Lah 849 (2) : 30 Cr LJ 902 : 118 Ind Cas 391.

——S. 522 — Where a conviction is set aside the order under S. 522 resulting therefrom must also be set aside. Once it has been held that no offence has been committed the consequences arising from the commission of the offence must automatically cease to be. The irregularity in first dealing with order under S. 522, Cr. P. Code, before taking up the appeal from conviction under S. 447, Penal Code, which ultimately results in acquittal is only a technical irregularity. AIR (Vol 10) 1923 Lah 15 : 24 Cr LJ 493 : 72 Ind Cas 957.

——S. 522 — **Acquittal, effect of.**

A Magistrate, after acquitting an accused person of trespass u/s. 447, I. P. C., cannot proceed to pass an order u/s. 522, Cr. P. Code, and put the complainant in possession of the land in dispute. Section 522, Cr. P. Code, gives jurisdiction to the Court only when a person is convicted of an offence attended by criminal force. AIR (Vol 9) 1922 Oudh 144 : 23 Cr LJ 260 : 24 OC 352 : 66 Ind Cas 324.

——S. 522 — **Criminal trespass, conviction for — Order for restoration of immoveable property, whether may be passed.**

The Court has no power to order a restoration of immoveable property, on conviction for an offence of criminal trespass. AIR (Vol 1) 1914 Cal 629 : 15 Cr LJ 175 : 18 CWN 1146 : 22 Ind Cas 751 (DB).

(c) **Offence attended by criminal force, etc.**

See also Note 2(d).

——S. 522 — **"Show of force" or "Criminal force" — Meaning.**

The words "criminal force" and "show of force" must be given the same meaning as those expressions have in the Penal Code as the Cr. P. Code is in pari materia with the I. P. Code. They deal with the use of force to a person and not to any inanimate object like property. Show of force may consist in the physical presence of the accused and his companions in such a way that the true owner is put to the fear that if he tried to regain possession by force, he will be met by force. AIR (Vol 36) 1949 All 228 : 1948 ALW 315 : 50 Cr LJ 338 : 1948 ALJ 467 (DB).

——S. 522 — **"Attended by" — Meaning.**

Criminal force or show of force or criminal intimidation as mentioned in S. 522, Cr. P. Code, need not necessarily be an ingredient of the offence at all. The words "attended by" should include an act done simultaneously with or immediately after the act in question. AIR (Vol 36) 1949 All 228 : 1948 ALW 315 : 50 Cr LJ 338 : 1948 ALJ 467 (DB).

——S. 522 (1) and (3) — **Conviction for trespass — Offence attended by criminal force and dispossessed by show of force or use of force — Order denying restoration of possession to complainant — Legality.**

To pass an order for restoration of possession on conviction for trespass, what all is required is that the offence should have been attended by criminal force or by show of force or by criminal intimidation and it should appear that by such force or show of force the complainant was dispossessed. Hence, where an offence of trespass was attended by criminal force, and the complainant was dispossessed of the land by show of force or use of force, it would be wrong to deny restoration of possession to the complainant. 60 LW 201 : 1947 MWN 231 : (1947) 1 MLJ 225.

——S. 522 — **S. 522 contemplates force applied to human body.**

The only force that is contemplated by S. 522, Criminal P. C., is force as applied to a human body. Hence where the complainant was dispossessed of his house in his absence, it cannot be said that criminal force was used to any person. In such a case, order under S. 522 cannot be passed. AIR (Vol 27) 1940 Lah 460 : 42 PLR 791 : 42 Cr LJ 160 : ILR (1941) Lah 512 : 191 Ind Cas 373 (DB).

**(Overrules AIR (Vol 25) 1938 Lah 839 : 40 PLR 923 : 180 Ind Cas 501).**

——S. 522 — **"Force" and "criminal force".**

The definitions of "force" and "criminal force" in Ss. 349 and 350, Penal Code, contemplate criminal force being used to any "person" and do not take into account such force being used to a "matter of substance." A conviction for an offence of criminal trespass will not necessarily entitle the complainant to seek his remedy under S. 522 Cr. P. C., unless there is finding of the Court that the offence with which the dispossession happened was attended with the use of criminal force on the person of the complainant.

Hence where the complainant's allegation is not that any "force" or "show of criminal force" had been made to him, his remedy, if any, lies in a Civil Court and any order passed under S. 522, Criminal P. C., is illegal. AIR (Vol 27) 1940 Lah 84: 41 PLR 908: 41 Cr LJ 387 : 186 Ind Cas 895.

——S. 522 — **"Force" and "criminal force" contemplate use of force to person and not to thing.**

Section 522, Criminal P. C., contemplates not only criminal force but criminal intimidation too, and it is inconceivable how a person can criminally intimidate an inanimate object. The term "force" is defined in S. 349, Penal Code and the term "criminal force" is defined in S. 350, Penal Code, and both sections contemplate the use of

force to a person and not to a thing. In a case, therefore, where the complainant himself alleges that the house was locked when the unlawful entry was effected, it can, by no stretch of language, be argued that the offence of criminal trespass was attended by criminal force or by criminal intimidation, and in such a case an order under S. 522, Criminal P. C., is illegal. AIR (Vol 26) 1939 Lah 184 : 41 PLR 63 : 40 Cr LJ 781 : ILR (1939) Lah 513 : 183 Ind Cas 340.

**——S. 522 — Want of criminal force.**

Where the act of trespass on immovable property was not attended by criminal force, or by criminal intimidation

Held, that possession of the property trespassed upon cannot be restored under S. 522. AIR (Vol 14) 1927 Lah 833 : 28 PLR 238 : 28 Cr LJ 320 : 100 Ind Cas 544.

**——S. 522 — Finding of force.**

In the absence of any finding that criminal force was used by an accused person, an order under S. 522 is without jurisdiction. AIR (Vol 14) 1927 Lah 792 : 28 Cr LJ 819 : 104 Ind Cas 435.

——S. 522 — A complaint was filed against the applicants under Ss. 447 and 323 and they were convicted under S. 447 and fined Rs. 5 each. But the Magistrate disbelieved the story of any beating, and held that only an altercation had taken place. There was, therefore, no conviction under S. 323. Later on the complainant filed an application before the Court under S. 522. The Magistrate allowed this application and passed orders directing delivery of possession of the fields to the complainant.

Held, that an essential ingredient of S. 522 is that the offence of which the person concerned is convicted must have been attended by criminal force, or, at the very least, by the show of criminal force and therefore S. 522 did not apply to the case. AIR (Vol 11) 1924 All 84 : 21 ALJ 593 : 4 LRA Cr 129 : 25 Cr LJ 42 : 75 Ind Cas 730.

**——S. 522 — Criminal force applied to property and not to person does not come within S. 522.**

In causing dispossession of any person from immovable property by means of an offence, the offence must be attended by criminal force to the person. A conviction for an offence of criminal trespass will not necessarily entitle the complainant to seek his remedy under S. 522 of the Cr. P. Code unless there was a finding of the Court convicting the accused that the offence with which the dispossession happened was attended with use of criminal force.

The definition of "force" and "criminal force" given in the Penal Code in Ss. 349 and 350 would apply to those terms used in S. 522 of the Cr. P. Code. AIR (Vol 8) 1921 Pat 391 : 2 PLT 120 : 22 Cr LJ 329 : 61 Ind Cas 57.

**——S. 522 — Causing violence to fencing.**

An order under S. 522 should not be passed when an accused is convicted of the offence of rioting for causing violence to a fencing as there is no use of criminal force to any individual. AIR (Vol 2) 1915 Cal 131 : 18 CWN 1150 : 15 Cr LJ 720 : 26 Ind Cas 168 (DB).

**——S. 522 — Order under — Conviction under S. 448, I. P. C.**

Conviction under S. 448, I. P. C., does not justify an order under S. 522, Cr. P. C., unless the offence is attended by criminal force, and not mere show of criminal force. AIR (Vol 5) 1918 Pat 26 : 20 Cr LJ 270 : 50 Ind Cas 30.

**——S. 522 — "Attended by criminal force" — By the Full Bench — (Prinsep J. in particular).**

Criminal force need not be an ingredient of the offence in order to empower the Magistrate to make an order under S. 522. It is enough if it is merely "attended by criminal force". (1904) 8 CWN 538 (541) : 31 Cal 691 (FB).

**——S. 522 — Penal Code, S. 447 — Criminal trespass — Criminal force, use of.**

The use of criminal force is not a necessary ingredient of an offence under S. 477 of the Penal Code. Under S. 522 of the Criminal Procedure Code two conditions must be satisfied — (1) Some person must have been convicted of an offence attended by criminal force. (2) Some person must have been dispossessed of immoveable property by such force. In order to satisfy the first condition it is not necessary that the offence should involve, as a necessary element, the use of criminal force. It is enough if the offence, though not involving the use of criminal force as an ingredient, is yet attended by the use of criminal force. 25 Cal 434, Dissented from. Where, therefore, petitioners were convicted of criminal trespass under S. 447, Penal Code, and the Magistrate made an order under S. 522, Criminal Procedure Code, directing that the complainant should be restored to possession without finding that such trespass was attended by criminal force or that the complainant was dispossessed by such force :

Held, on revision, that the order was made without jurisdiction. (1902) 12 MLJ 447 : 26 Mad 49 (50).

**(d) Dispossession.**

**——S. 522 — Applicability — Absence of dispossession by use of force or show of force or criminal intimidation — Order for restoration of possession — Power to make.**

A complainant, if dispossessed by criminal force or show of criminal force or intimidation, may recover the property from which he was dispossessed under S. 522, Cr. P. Code. But the section has no application when there has been no dispossession as a result of force or show of force or criminal intimidation, and no order for restoration of possession can be made in such a case by the Court under S. 522. AIR (Vol 36) 1949 Cal 111 : 50 Cr LJ 172.

**——S. 522 — Applicability — Absence of dispossession by show of force — Order under section if justified.**

Where there is no evidence as to dispossession by show of force, an order under S. 522 of the Cr. P. Code would not be justified. AIR (Vol 35) 1948 Oudh 246 : 1948 OA (CC) 105 : 1948 AWR (CC) 105 : 49 Cr LJ 384 : 1948 OWN 223.

**——S. 522 — Criminal trespass — Complaint by zamindar's agent — Zamindar found dispossessed — Delivery of possession to zamindar, held right.**

The complaint that the accused had committed criminal trespass on the property in possession of the zamindar was made by kotwal who was the agent of the zamindar. The accused were convicted and the Magistrate ordered delivery of possession to the zamindar. It was argued that the delivery should not have been ordered to be made to the zamindar as he was not the complainant :

Held, that as the complainant was the agent of the zamindar and the finding was that the zamindar was dispossessed of the land by show of force, the order for delivery to zamindar was right. AIR (Vol 31) 1944 Mad 473 : 1944 MWN 436 : 1944-2 MLJ 380.

**——S. 522 — Trespasser entering upon property and preventing rightful possessor — Action under.**

Where the criminal trespasser enters upon property and prevents the rightful possessor from coming upon the property, a dispossession may be

said to have taken place and if the trespasser was guilty of some force or intimidation when he prevented the other party from returning to the property, a Magistrate would be justified in acting under S. 522, Criminal P. C. AIR (Vol 30) 1943 All 7 : 1942 ALJ 587 : 44 Cr LJ 164 : 1942 AWR 339 : ILR (1943) All 33 : 204 Ind Cas 183.

——S. 522 — Possession is not lost because trespassers come without licence and plough the land. It would put the rightful owner of land in an almost impossible position if after getting possession of the land through a civil Court a single act of trespass is deemed sufficient to take away his possession and to deprive him of recourse to the criminal Court. A complainant who has exhausted the resources of a Civil Court in obtaining possession should receive assistance from the Criminal Courts. (1936) 18 NLJ 307 : 37 Cr LJ 720 : 162 Ind Cas 813.

**——S. 522 — "Without force or show of force" — Order under S. 522, legality of — "Force," in S. 549, Penal Code, meaning of.**

"Force" as defined in S. 349, Penal Code, contemplates the presence of the person using the force and of the person to whom the force is used. Where, therefore, the lock was broken in the absence of the possessor of the house and it was clear that possession was taken by the accused without any "force or show of force", an order under S. 522, Criminal P. C., cannot be passed. AIR (Vol 21) 1934 Lah 454 : 36 PLR 91 : 36 Cr LJ 59 : 15 Lah 786 : 152 Ind Cas 162.

**——S. 522 — Absence of use of force — Restoration of possession.**

Where it appeared that there was no occasion for the use of any force or show of force on the part of the accused when they took possession of the property as the complainant was absent and it appeared that the complainant still was fighting out the question of his dispossession from the property in certain criminal cases :

Held, that an order for restoration of possession to the complainant was not proper. AIR (V 21) 1934 Oudh 185 (1) : 11 OWN 472 : 35 Cr LJ 788 (1) : 148 Ind Cas 790.

**——S. 522 — Trespass in absence — Order restoring possession cannot be made where trespass is made in absence of complainant.**

An order to restore possession of immovable property under S. 522 can be made only where dispossession was by the use of criminal force as defined in S. 350, I. P. C. It cannot be made in a case where the trespass was committed in the absence of the complainant. AIR (Vol 14) 1927 Lah 830 : 26 PLR 500 : 28 Cr LJ 964 : 105 Ind Cas 676.

**——S. 522 — Restoration when justified.**

Accused fencing land and preventing complainant by show of force from taking possession — Restoration is justified. (1926) 27 Cr LJ 495 : 93 Ind Cas 895 (Lah).

**——S. 522 — Applicability.**

Where the accused succeeded in taking possession of the house by means of criminal trespass threatening to use force to the complainant and his men,

Held, that their act clearly came under S. 522. AIR (Vol 12) 1925 Pat 689 : 4 Pat 438 : 7 PLT 285 : 27 Cr LJ 137 : 91 Ind Cas 809.

**——S. 522 — Vague finding.**

Vagueness of finding as to trespass being committed on the day mentioned by complainant vitiates application for possession. AIR (Vol 11) 1924 All 762 : 5 LRA Cr 147 : 26 Cr LJ 159 : 83 Ind Cas 719.

**——S. 522 — Criminal force — Ingredients constituting criminal force indicated.**

Where it was proved that the complainant who had halted in front of the ploughs was obliged to run away by reason of the accused's rushing at him with sticks and lathis and using threats towards him.

Held, that it was a resort to criminal force as defined in Ss. 349 and 350 of the Indian Penal Code. Where the complainant came up while the acts of criminal trespass were still in progress and he had not already been effectively dispossessed, and that only took place when the complainant was actually driven off his lands by the accused rushing towards him with sticks and lathis and using threats.

Held, that the possession was not obtained peacefully. AIR (V 10) 1923 All 333 : 74 Ind Cas 1049: 45 All 25 : 24 Cr LJ 857.

——S. 522 — Taking advantage of temporary absence of the owner from the house, the wife, who had deserted him, along with some others broke open the outer lock of the house, and entered into unlawful possession of the house, and when the husband returned he was driven out by force.

Held, an order restoring possession under S. 522, Cr. P. Code, is a very proper order to pass. AIR (V 10) 1923 Mad 237 : 72 Ind Cas 892 : 31 MLT 388 : 24 Cr LJ 476.

——S. 522 — To make S. 522 applicable to movable property force need not be an ingredient of the offence of which the accused is convicted provided the use of force appears from the evidence. AIR (V 7) 1920 Mad 652 : 59 Ind Cas 414 : 12 MLW 227 : 22 Cr LJ 110.

**——S. 522 — Dispossession not accompanied by criminal force — Order to restore possession.**

An order to restore possession of immoveable property under S. 522 of the Cr. P. C. can be made only where dispossession was by the use of criminal force as defined in S. 350 Penal Code and could not be made where the trespass was committed in the absence of the complainant. AIR (V 6) 1919 Lah 248 : 16 PR (Cr) 1919 : 20 Cr LJ 488 : 51 Ind Cas 472.

**——S. 522 — Show of criminal force.**

Dispossession as contemplated by S. 522 must be accompanied by the use of criminal force and must be the result of such force. Mere show of criminal force is not enough. AIR (V 5) 1918 Pat 523 : 4 PLW 329 : 19 Cr LJ 516 : 45 Ind Cas 276.

**——S. 522 — Applicability of.**

Where there is no evidence that a person has been dispossessed of property by the use of criminal force, no order under S. 522 can be passed. AIR (V 4) 1917 Lah 104 : 62 PLR 1917 : 38 PWR 1917 Cr : 18 Cr LJ 898 : 42 Ind Cas 130.

——S. 522 — No order under S. 522 can be passed unless there has been dispossession from immoveable property. AIR (V 1) 1914 Cal 478 : 18 CWN 399 : 15 Cr LJ 302 : 23 Ind Cas 510 (DB).

**——S. 522 — Criminal force, definition of — Show of force — Dispossession — Restoration.**

The term 'criminal force' used in S. 522 of the Code of Criminal Procedure must be understood as defined in S. 350 of the Penal Code and to justify an order for the restoration of possession of immoveable proprty under S. 522, Cr. P. C., the dispossession must have been by the actual use of criminal force and not merely by the show of such force. (1901) 5 CWN 250 (252) (DB).

### 3. Notice.

**——S. 522 — Notice to person dispossessed.**

It is not absolutely necessary to issue notice to the person dispossessed before passing an order

under S. 522, Criminal P. C. Order without notice would be valid unless substantial injustice is shown to have resulted from absence of notice. AIR (V 30) 1943 All 7 : 1942 ALJ 587 : 44 Cr LJ 164 : 1942 AWR 339 : ILR (1943) All 33 : 204 Ind Cas 183.

**——S. 522 — Order under S. 522, when can be passed — Notice.**

For an order under S. 522, Criminal P. C. it must be shown that the owner or occupier of the land was dispossessed by reason of the force shown to him. The order of the Court must be passed within one month from the date of the conviction. It is not sufficient that the application to the Court to exercise its powers should be made within one month of the conviction. In view of the wording of this section it would appear that it was not the intention that notice should be issued to the opposite side before orders should be passed; otherwise it would be easy for convicted persons to bring it about that the Court should never be able to pass order within one month from the date of conviction. AIR (V 24) 1937 Rang 248 : 38 Cr LJ 918 : 170 Ind Cas 368.

**——S. 522 — Notice is not absolutely necessary for order under S. 522.**

Though in case of an order under S. 522, a notice may be proper and is usually given particularly to third parties — It is not in law necessary absolutely and its absence does not render the order bad. AIR (V 18) 1931 Bom 77 : 129 Ind Cas 337 : 32 Cri LJ 275 : 32 Bom LR 1496 (DB).

**——S. 522 — Power of Court to make order under — Notice.**

Where a complaint is made against several accused and some of them are convicted, it is competent to the Court to make an order under S. 522, Criminal P. C., restoring the complainant to possession of the property in dispute even though some of the accused are acquitted.

Though notice is usually given, particularly to third parties, before an order under S. 522, Criminal P. C., is made, absence of notice will not render the order illegal. AIR (V 18) 1931 Bom 77 : 32 Bom LR 1496 : 32 Cr LJ 275 : 55 B 155 : 129 Ind Cas 337 (DB).

**——S. 522 — Order restoring possession — Setting aside without notice.**

Where an order under S. 522 was directed to be in abeyance pending a reference to the High Court by the Sessions Judge who subsequently in the absence of the complainant declared it to be void.

Held, that the Sessions Judge's order should not have been made behind the back of the party affected by it. AIR (V 6) 1919 Cal 8 : 23 CWN 862: 29 CLJ 167 : 20 Cr L J 846 : 53 Ind Cas 942 (DB).

### 4. Order against the third party.

**——S. 522 — Order when justified — Third person may be dispossessed if Court finds complainant was in possession and was dispossessed by force.**

A third person who was not a party may be dispossessed if the Court finds that possession was in the complainant and the latter was dispossessed by force; a fortiori in the case of an accused person who had an opportunity of disproving complainant's possession and proving his own such an order is in law good. AIR (V 18) 1931 Bom 77 : 32 Bom L R 1496 : 129 Ind Cas 337 : 32 Cr LJ 275 (DB).

**——S. 522 — Dispossession of third person.**

A third person who was not a party may be dispossessed if the Court finds that possession was in the complainant and the latter was dispossesed by force; a fortiori in the case of an accused person who had an opportunity of disproving complainant's possession and proving his own such an order is good in law. AIR (V 18) 1931 Bom 77 : 129 Ind Cas 337 : 32 Cr LJ 275 : 32 Bom LR 1496 : 1931 Cr C 46.

**——S. 522 — Order under, binds only parties and their representatives.**

Section 522 of the Cr. P. Code, can only be binding between the parties to the order and can have no finality in favour of one who is not a party and does not claim under a party. AIR (V 12) 1925 Mad 799 : 48 MLJ 372 : 86 Ind Cas 744 (DB).

**——S. 522 — Nature of order.**

An order under S. 522 is passed not against any person but in favour of the person dispossessed if there are circumstances justifying the passing of such an order. (1921) 62 Ind Cas 591 : 22 Cr LJ 575 (Pat).

### 5. Powers of Court of appeal, revision or reference.

**——S. 522 (3) — If can be invoked when there is no appeal or revision against conviction.**

Sub-clause (3) of S. 522, Criminal Procedure Code, can be invoked only when the main conviction is taken before the Court of appeal, reference or revision and not otherwise. It is wrong to think that it gives unfettered right to the party to go to a Court to which appeals ordinarily lie from the Court of first instance even if there has been no appeal against the conviction. It is not open to the complainant to initiate new proceedings as it were by application to the appellate Court under sub-clause (3) of S. 522 and ask for a relief which the trial Court could not have given after a month of the disposal of the criminal case. AIR (V 37) 1950 Mad 665 : (1950) 1 MLJ 670 : 63 LW 575 : 1950 MWN 421 (DB).

**——S. 522 (3) — Revision of order under S. 522 — Power of High Court to restore property to complainant.**

Under S. 522 (3), Cr. P. Code, the High Court, while revising an order under S. 522, is competent to pass an order restoring the property to the compiainant of which he had been dispossessed by criminal force. ILR (1948) 1 Cal 228.

**——S. 522 (3) — Jurisdiction — "Court of revision" — High Court hearing revision against order as to possession — Jurisdiction to make order under S. 522 (1) when there is no revision against conviction.**

The High Court hearing a revision application against an order restoring or refusing to restore possession under S. 522, Cr. P. Code, is a Court of revision within the meaning of S. 522 (3), though there may be no revision against conviction, and has, when hearing such revision application, jurisdiction to make an order under S. 522 (1). AIR (V 35) 1948 Nag 250 : 49 Cr LJ 383 : ILR (1948) Nag 296 : 1948 NLJ 229.

**——S. 522 (3) — Order by Court of appeal — Time limit.**

An order contemplated by S. 522 (3), Cr. P. Code, is an original order by the Court of appeal, confirmation, reference or revision. It is not merely a modification of an order passed by the Court of first instance. The Court of appeal, confirmation, reference or revision is subject to the same limitation as the Court of first instance and must pass the order of restoration of possession when upholding the conviction or at any time within one month from the date of the order in appeal, confirmation, reference or revision upholding the order of conviction. It cannot pass an original order under the section at any time. AIR (V 34) 1947 Cal 390: ILR (1948) 1 Cal 153 : 48 Cr LJ 908.

**——S. 522 — Order under — If can be passed by Court to which reference is made by the trial**

**Court regarding petition under S. 522 — No revision against conviction.**

Where an application under S. 522, Cr. P. Code, is referred to the Chief Court, that Court can in a proper case make an order under S. 522 for restoration of possession of immovable property even though there may not be any revision petition against the conviction pending before that Court. AIR (V 34) 1947 Oudh 1 : 225 Ind Cas 423 : 1946 AWR (CC) 166 : 47 Cr LJ 718 : 1946 OWN 298 : 1946 OA (CC) 166: 1946 A Cr C 123: 21 Luck 555.

**——Ss. 522 and 439 — Conviction set aside — Order under S. 522 should be rescinded under S. 439 read with S. 423 (1) (d).**

Where the conviction of the accused under S. 448, Penal Code, is set aside on appeal, the possession of the house given to the complainant under orders under S. 522, Criminal P. C., must be restored to the accused. High Court has power as a Court of revision under S. 439 read with S. 423 (1) (d), Criminal P. C., to reverse the order passed by the magistrate under S. 522. AIR (V 32) 1945 All 226: 1945 AWR (HC) 68 (1) : 1945 OWN (HC) 109 : 1945 ALJ 233 : ILR (1945) All 282 : 47 Cr LJ 89 : 221 Ind Cas 141.

**——Ss. 522 (3), 439 — High Court — Revision.**

The High Court does not normally entertain applications in revision, unless an application has previously been made to the Sessions Court or the District Magistrate as the case may be. But where an application is made within due time to the Sessions Court and the Sessions Judge has dismissed the application, the applicant can come in revision to the High Court. If, however, he withdraws his application, that course is not open. But so far as the High Court rules are concerned, it can take the application to the Sessions Court as sufficient compliance with the spirit of the rule, and it can, therefore, properly entertain the application in revision against the Magistrate's order. AIR (V 29) 1942 Bom 148 : 44 Bom LR 246 : 43 Cr LJ 708 : ILR (1942) Bom 249 : 200 Ind Cas 724 (DB).

**——Ss. 522 (3), 439 — High Court can pass order for possession under S. 522 (3), in proper case in revision.**

Notwithstanding that there was not before the Court any application in appeal or revision against the conviction of the accused, and notwithstanding that the Magistrate had rightly dismissed the application for an order for possession under S. 522 (1), Criminal P. C., because made more than a month after the conviction and although that order is only brought up in revision, still the High Court can, under sub-s. (3) of S. 522, make an order for possession in a proper case in revision. AIR (V 29) 1942 Bom 148 : 44 Bom LR 246 : 43 Cr LJ 708 : ILR (1942) Bom 249 : 200 Ind Cas 724 (DB).

**——Ss. 522 (3), 438, 433 — Court of reference.**

A Court of reference in sub-s. (3) of S. 522, Criminal P. C., can only be interpreted as meaning a Court which has the power to refer and that is only a Court empowered under S. 433. A Court which has power to refer the case for orders to the High Court under S. 438 is not a Court of reference. AIR (V 27) 1940 Lah 95 : 41 Cr LJ 458: 43 PLR 534 : ILR (1941) Lah 377 : 187 Ind Cas 407.

**——S. 522 — Order under, if can be passed in revision.**

In a proper case, the Court of Appeal or the Court of Revision can pass an order under S. 522, Criminal P. C., if such Court is satisfied that an order of the nature is necessary in the interest of justice. AIR (V 27) 1940 Pat 409 : 6 BR 366 : 21 PLT 697 : 41 Cr LJ 311 : 186 Ind Cas 423.

**——S. 522 (3), if imposes period of limitation on Court of Appeal or Revision — Order of restoration by Appellate Court more than one month after conviction — Interference.**

Sub-section (3) of S. 522, Criminal P. C., imposes no period of limitation on a Court of Appeal or Revision. A Court of Appeal can, therefore, pass an order restoring possession more than one month after the date of conviction and High Court would not interfere in a revision by convicts against the Appellate Court's order restoring possession. AIR (V 25) 1938 Lah 839 : 40 PLR 923 : 40 Cr LJ 380: 180 Ind Cas 501 .

**——S. 522 — Delivery of possession — Judge becomes functus officio, one month after conviction — S. 522, sub-cl. (3).**

Under S. 522, Criminal P. C., a month after the date of conviction, the trial Judge becomes functus officio in the matter of delivering possession. It would be illogical to hold that in spite of the lower Court having ceased to have the power of giving possession, the Revisional Court can, when moved to consider the order of that Court refusing to give possession on the ground of limitation, enlarge that period and grant the relief. Sub-clause (3) of S. 522 comes into play when an appeal or revision has been preferred against the conviction. It is then that the Appellate or Revisional Court is seized of the jurisdiction to restore possession although the original Court may not have done so and such higher Courts are not bound by the limitation of one month in doing so. But this clause does not help if the Court of Revision is considering the order of the trial Court under S. 522, Criminal P.C., refusing to grant possession because the time for making the order had passed. AIR (V 24) 1937 Pesh 7 : 38 Cr LJ 333 : 166 Ind Cas 872.

**——S. 522 (1) (3) — Order under, by Court of Appeal — Order within one month of date of disposal — Remand.**

While the convicting Court which has already considered the whole matter, may only pass an order under sub-s. (1) of S. 522, Criminal P. C., when convicting the accused or at any time within one month from the date of the conviction, there is no such limitation under sub-s. (3) which provides that an order under the section may be made by any Court of appeal, reference or revision.

It is open to the Appellate Court to pass an order under S. 522, not only on the date of disposal of the appeal and within one month thereafter which is the extent of the powers of the trying Magistrate but also without any limitation of time.

Although it is open to the High Court to remand a case to the lower Appellate Court to pass an order under S. 522, sub-s. (3), there is no point in doing so when all the materials are before the High Court and the High Court is authorised to make the same order in the exercise of its revisional jurisdiction. AIR (V 21) 1934 Pat 154 : 15 PLT 163 : 35 Cr LJ 1158 : 150 Ind Cas 787 (DB).

**——S. 522, Cl. (3) — Time limit for acting under — Order to restore property more than a month after disposal of appellate or revisional proceedings.**

Clause 3 of S. 522, Criminal P. C., added in 1923, does not impose any time limit within which a Court of appeal, confirmation, reference or revision must act. Therefore, it is competent to such a Court to pass an order for restoring the property to the complainant even after the expiry of one month from the disposal of the appellate or revisional proceedings. In enacting the clause the Legislature has relied on the discretion of Appellate and Revisional Courts not to exercise their powers under S. 522 in cases where there has been

undue or excessive delay in moving the Court for its use. AIR (Vol 20) 1933 Pat 617: 34 Cr LJ 940: 14 PLT 696: 12 Pat 787: 145 Ind Cas 327 (DB).

**——S. 522 — Ex parte order for restoration — Power of Appellate Court.**

An order for restoration of possession under S. 522, Criminal P. C., should not be passed without hearing the objections of the party against whom it is passed.

Under S. 522 (3), Criminal P. C., the Appellate Court has jurisdiction to pass such an order. AIR (Vol 19) 1932 Lah 17: 33 Cr LJ 123: 32 PLR 758: 135 Ind Cas 206.

——S. 522 — An order under the section may be passed by the Courts of appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. Thus, where a Magistrate passes an order under S. 522 beyond the prescribed one month, though the order by the Magistrate is illegal, yet it is competent to the High Court as Court of Revision to order the restoration of possession to the person dispossessed. AIR (Vol 12) 1925 Pat 689: 91 Ind Cas 809: 4 Pat 438: 7 PLT 285: 27 Cr LJ 137.

**——S. 522 — Appeal and revision.**

An appellate Court has no power to pass an order under S. 522 if the trial Court had made no order at all. But under the new Code brought into effect on the 1st September 1923 the High Court under S. 522, sub-clause (3) has in a reference or revision, power to make an order of restoration even though no such order might have been made by the trial or appellate Court. AIR (Vol 11) 1924 All 212: 83 Ind Cas 910: 46 All 92: 21 ALJ 871: 5 LRA Cr 11: 26 Cr LJ 206.

——S. 522 — A Court of appeal or revision cannot compel the trial Court to pass an order under S. 522 where the latter in the exercise of its discretion, has declined to do so. AIR (Vol 11) 1924 All 183 (1) : 73 Ind Cas 773 : 45 All 553 : 21 ALJ 459 : 4 LRA Cr 86 : 24 Cr LJ 677.

**——S. 522 — Order by Appellate Court — Validity.**

An order under S. 522 of the Cr. P. C., directing restoration of immoveable property to the person entitled thereto, cannot be made by the Appellate Court, where the trial Court has for some reasons or other, refrained from taking action under that section. AIR (Vol 6) 1919 Lah 399: 14 PR Cr 1919: 33 PLR 1919: 1 PWR Cr 1919: 20 Cr LJ 30: 48 Ind Cas 510.

### 6. Remedy of third person.

**——S. 522 — Possession of property — Object of section — Jurisdiction of court.**

The object of the provisions of S. 522 of the Code of Criminal Procedure is to enable the criminal court by a summary order, to restore the state of things which existed at the time of the dispossession by the convicted person or persons, and the criminal court cannot go behind the state of affairs at the time of the dispossession by the convicted person or persons. Sub-S. (2) of S. 522 provides that any right or interest which a third party may have in the property cannot be affected, and such third party, in case of eviction under an order under S. 522, must seek his remedy in the civil court. (1901) 5 CWN 374: (375, 376) (DB).

### 7. Time for order.

See also N. 5.

**——S. 522 — Order for restoration of property — Jurisdiction to pass after order dismissing revision petition by the accused, long after the conviction by trial Court.**

Though literally interpreting S. 522 of the Cr. P. Code, the Court can pass an order for restoration of property only when convicting persons committing the offence or at any time within a month from the date of the conviction, that could not have been the intention of the Legislature. Cl. 3 of the section indicates that the revisional Court can pass such an order at the time of dismissing the revision application or within a month of that date, though it may be long after the conviction by the trial Court. AIR (Vol 36) 1949 Mad 191: 61 LW 590: 50 Cr LJ 223: 1948 MWN 688: (1948) 2 MLJ 257.

**——S. 522 — Order on an application under, made after one month from date of conviction, cannot be upheld — Interference by High Court under S. 522 (3), whether competent.**

An order by a Magistrate on an application under S. 522, made one month after the date of conviction is bad and cannot be upheld. But the High Court can under sub-s. (3) make an order for possession in revision. AIR (Vol 34) 1947 Oudh 1: 1946 OWN 298: 1946 OA (CC) 166: 1946 AWR (CC) 166: 47 Cr LJ 718: 225 Ind Cas 423.

——S. 522 — On 16th October 1942 an order passed directing delivery of possession, within one month of conviction — Pending appeal by accused, execution of order stayed—Stay vacated on disposal of appeal — On 7th April 1943 Magistrate directing delivery of possession, as per original order :

Held, that the order dated 7th April 1943 was not the order passed under S. 522. That order was passed on 16th October 1942 itself. It was only given effect to later as, till then, there was a stay by the Appellate Court. Thus the order for delivery of possession was made within one month from the date of the conviction. AIR (Vol 31) 1944 Mad 473: 1944 MWN 436: (1944) 2 MLJ 380.

**——S. 522 — Jurisdiction — Another Bench, if can order under S. 522.**

Where a Special Bench of Honorary Magistrates which has convicted an accused is subsequently abolished, another Bench has no jurisdiction to pass an order under S. 522, Criminal P. C., upon an application of the complainant. AIR (Vol 27) 1940 Lah 84: 41 PLR 908: 41 Cr LJ 387: 186 Ind Cas 895.

**——S. 522 — Order under, after delay of more than two months after conviction.**

Obiter.—Where an order under S. 522 was made more than two months after the conviction under S. 448, Penal Code, and the delay was not due to any fault on the part of the complainant the order is not bad. AIR (Vol 27) 1940 Pat 409: 21 PLT 697: 6 BR 366: 41 Cr LJ 311: 186 Ind Cas 423.

**——S. 522 (3) — Restoration of possession beyond period of one month.**

Where a Magistrate passes an order under S. 522, Criminal P. C., beyond the prescribed one month, though the order by the Magistrate is illegal, yet it is competent to the High Court under S. 522 (3) as Court of Revision to order the restoration of possession to the person dispossessed. There is no limitation of one month for an order under sub-s. (3). AIR (Vol 26) 1939 All 662: 1939 ALJ 595: 1939 AWR 566: 40 Cr LJ 958: ILR (1939) All 863: 184 Ind Cas 384.

——S. 522 — Where the order under S. 522, Criminal P. C., has been made more than one month after the decision of the case, it is manifestly illegal and it is wholly immaterial to say that the application for restoration of possession was made within one month of the decision of the case. (1939) 41 PLR 877.

**——S. 522 — Scope — Restoration of property after more than one month after conviction.**

One month is the time limit fixed for the trial Court in sub-s. (1) of S. 522, Cr. P. C., for order restoring possession of property but there is nothing in sub-s. (3) to show that this limitation applies to a Court of Appeal. If it did, the result would be that sub-s. (3) would be of little or no practical use, as case will not usually reach the Appellate Court before the expiry of the month. The Court of Appeal, therefore, can pass such order at any time, however long, after conviction. AIR (Vol 25) 1938 Nag 316: 39 Cr LJ 342: ILR (1938) Nag 454: 173 Ind Cas 620.

——S. 522 — Order under — **Jurisdiction.**

The accused was convicted of an offence under S. 448, I. P. C. The opposite party filed a petition under S. 522, Criminal P. C., to be restored to possession. On the representation of the accused that an appeal had been filed against his conviction, the Magistrate adjourned the case until after the disposal of the appeal. The appeal was dismissed and an order was passed under S. 522, but the date of order was more than one month after the date of conviction :

Held, that the Magistrate had no jurisdiction to pass the order, such jurisdiction having ceased to exist a month after conviction. AIR (Vol 19) 1932 Cal 750 (1): 59 Cal 1153: 36 CWN 624: 33 Cr LJ 868: 140 Ind Cas 66 (1) (DB).

**——S. 522 — Restoration of possession — Order after one month from date of conviction — Court of Appeal.**

An order for restoration of possession under S. 522 (1), Criminal P. C., cannot be made after the expiry of one month from the date of the conviction.

The words "Court of Appeal, confirmation, reference or revision" in S. 522 (3) refer to the Courts dealing with the original conviction or trial and do not apply to the High Court in reference from the order restoring possession. AIR (Vol 19) 1932 Lah 210: 33 Cr LJ 191: 33 PLR 481: 135 Ind Cas 679.

——S. 522 — Where appeal was filed against conviction to the 1st class Magistrate, but was dismissed and then a revision was made to the High Court against the conviction which was also dismissed, an order of restoration passed by the High Court within one month of the date of dismissal of revision is valid. AIR (Vol 14) 1927 Nag 131: 99 Ind Cas 863: 28 Cr LJ 191.

**——S. 522 — Limitation.**

The operation of Art. 47 is not confined to orders under Chapter XII of the Cr. P. Code. An order restoring possession under S. 522 is an order respecting the possession of property within the meaning of Art. 47. AIR (Vol 12) 1925 Mad 799: 86 Ind Cas 744: 48 MLJ 372 (DB).

**——S. 522 — Order under, when to be made.**

An order under S. 522, Cr. P. C., may be made without unreasonable delay after conviction. S. 522 applies to cases where the complainant is forcibly dispossessed from the land, though no criminal force is used by way of assault or bodily removal of the complainant. AIR (Vol 7) 1920 UB 62: 3 UBR (1918) 111: 20 Cr LJ 115: 49 Ind Cas 99.

**——S. 522 — Order for possession after order for conviction — Jurisdiction.**

An order for possession could properly be made after the conviction of the accused. AIR (Vol 5) 1918 All 407: 19 Cr LJ 734: 16 ALJ 489: 46 Ind Cas 414.

**——S. 522 — Whether mandatory — Order passed 20 months after decision of criminal case — Whether legal.**

An order under S. 522, which however, is not mandatory, need not be passed simultaneously with the conviction, so that where an order passed 20 months after, but the delay was duly explained, the order was upheld as properly passed. AIR (Vol 1) 1914 Lah 325: 14 PWR 1914 Cr: 112 PLR 1914: 15 Cr LJ 275: 15 PR 1914 Cr: 23 Ind Cas 483 (DB).

**——S. 522 — Order four days after conviction — Jurisdiction.**

An order for restoration of possession passed four days after the conviction of an accused, on the express findings in the judgment without any fresh materials and without any notice to the accused is good. (1913) 14 Cr LJ 172 : 19 Ind Cas 172 (Cal) (DB).

**——S. 523.**

1. **Sections 517 and 523 compared.**
2. **"As he thinks fit".**
3. **Disposal of property.**
4. **Production and custody.**
5. **Order of confiscation.**
6. **Proclamation.**
7. **Inquiry.**
8. **Revision.**
9. **Reference.**

**1. Sections 517 and 523 compared.**

——Ss. 523, 517 — Case under S. 379, I. P. C. — Magistrate finding that article was stolen by accused from complainant and sold to X — Order to return article to complainant — X applying and claiming article — Magistrate holding complainant entitled to possession and directing X to file civil suit against accused to recover money paid :

Held, as there was neither an enquiry nor a trial in any Criminal Court, S. 517, Criminal P. C. was clearly inapplicable. The section applicable to the case was S. 523. AIR (Vol 29) 1942 Sind 89: ILR (1942) Kar 72: 43 Cr LJ 804: 202 Ind Cas 220.

——S. 523 — In order that S. 517, Criminal P. C., may apply, there must be an enquiry or trial in any Criminal Court and such enquiry or trial must be concluded. If by reason of a disputed claim to possession, an order for delivery cannot be made, or the property may not be finally disposed of by destruction or confiscation, the Court will not make any order under this section at all, but leave the parties to their remedy in a Civil Court, if any. Meanwhile, it will be quite proper to make an order under S. 523, where the property is properly seized in the manner stated in the section. This section will equally apply where there has been and there has not been an inquiry or trial or where the property has been or has not been produced in Court, in other words, even in a case which comes under S. 517. If, on the facts, the Court finds itself unable to make an order for the disposal of the property in the manner indicated therein, it will be open to it to deal with the matter under S. 523. AIR (Vol 25) 1938 Cal 17: 41 CWN 1376: 39 Cr LJ 245: 172 Ind Cas 959.

——S. 523 — Property recovered by police on a private complaint before Court can be returned to the party entitled after a summary inquiry under S. 523. 1932 MWN 1345.

**2. "As he thinks fit".**

**——S. 523 — Property seized under S. 550 — Disposal of.**

The disposal of property seized by the Police under S. 550, Criminal P. C., cannot be indefinitely postponed. The Magistrate should deal with it under S. 523, Criminal P. C. AIR (Vol 29) 1942 Mad 319 (1): 1941 MWN 1039: 43 Cr LJ 536: 198 Ind Cas 671.

**——S. 523 — Disposal of property — Discretion.**

Where a case is struck off as being of a civil nature, it means that the Magistrate has come to the conclusion that a criminal offence has not been

made out and that it is only after adjudication by a Civil Court that the ownership of the property can be determined. He is, therefore, bound to return the property to the person from whom it is taken and to direct the complainant to have recourse to a Civil Court if he is so advised. Where the Magistrate is of opinion that an offence had been made out, but, that it was one of misappropriation and not of the receipt of stolen property knowing or having reason to believe the same to be stolen, he has discretion in disposing of property and is not bound to return the property to the person from whom it was recovered. AIR (Vol 28) 1941 Mad 416: 1941 MWN 229: 53 LW 394: (1941) 1 MLJ 421: 42 Cr LJ 635: 195 Ind Cas 228.

**——Ss. 523, 144 — Refusal to take proceedings under S. 144 — Interference.**

Where a Magistrate after having refused to take proceedings under S. 144, Criminal P. C., thinking that he was not competent to investigate the question as to who was in possession of the property seized, directs the Police to retain it in their custody; and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court, he has not judicially exercised the discretion which S. 523 confers on him and the High Court can, therefore, interfere with his order. In such a case, he must exercise the discretion conferred by S. 523 and if he decides that one or other of the parties was in possession at the time the Police seized the property, the proper order to be passed will be to restore that party to possession. If he is unable to decide who is in possession, he should issue a proclamation under sub-s. (2) of S. 523 and proceed in accordance with the provision of that sub-section. AIR (Vol 27) 1940 Pat 32: 20 PLT 712: 6 BR 250: 41 Cr LJ 234: 185 Ind Cas 773.

**——S. 523 — Power of Commissioner of Police to act under Madras City Police Act (III of 1888), S. 7 — Return of jewels.**

Section 7, Madras City Police Act, constitutes the Commissioner of Police ex-officio a Presidency Magistrate and in this capacity, he can exercise the power under S. 523, Criminal P. C., in the absence of a Government Order stating that he shall not exercise such a power. This discretion must be judicially exercised.

Where certain jewels pledged with the petitioners were seized by the Police alleging that the pledger came into possession of them by cheating and by fraudulent means and the Commissioner of Police passed orders under S. 523, Criminal P. C., directing the delivery of the jewels to the alleged owners:

Held, that the order could not be upheld as the general rule is that where the offence charged is not made out, the property seized should be returned to the person from whom it was taken. AIR (Vol 19) 1932 Mad 428: 62 MLJ 632: 1932 MWN 106: 35 LW 625: 33 Cr LJ 539: 138 Ind Cas 126.

**——S. 523 — Ownership.**

There is always a presumption that a person actually in possession of the property is, unless the contrary is shown, the owner thereof. AIR (Vol 12) 1925 Sind 316: 87 Ind Cas 968: 19 SLR 133: 26 Cr LJ 1048.

**——S. 523 — Court's duty — Enquiry on oath.**

The Magistrate should have sufficient material before him to decide whom the property belongs to. He need not, on an application, hold a judicial enquiry on oath. AIR (Vol 7) 1920 Low Bur 36: 12 Bur LT 266: 57 Ind Cas 81.

**——S. 523 — Magistrate's duty — Interference by High Court.**

Under S. 523 the Magistrate while ordering delivery of property is to decide a question of possession and not a question of title. The High Court will not interfere with the discretion exercised by the Magistrate in such cases. (1910) 12 Bom LR 232: 11 Cr LJ 339: 5 Ind Cas 972 (DB).

**——S. 523 — Disposal of property — Magistrate — Discretion.**

The discretion given by the word "such order as he thinks fit respecting the disposal of such property," in S. 523, Cr. P. C., must be judicially exercised and where there is nothing to show the title to the property produced, it should be ordered to be delivered to the person in whose possession it was at the time of the attachment. (1903) 5 Bom LR 25 (26).

**——Ss. 523, 517, 96, 94 — Security required for production of ornaments — Penal Code, S. 404 — Executive order.**

When a Magistrate thinks that there are in a person's possession articles in respect of which some criminal offence has been committed, he should, in order to secure their production, proceed under S. 94 or 96 or any other section of the Cr. P. C. No section of the Code enables him to demand security from the person in possession of the articles for their production when required. Where on a complaint made by one B. M. the Magistrate ordered a preliminary enquiry into it by a Subordinate Magistrate, and after receiving that report passed an order to the following effect:— "P. B. is to execute a surety bond to the extent of Rs. 400 and to hold the ornaments in deposit with him in trust and to produce them when required. In the meantime the complainant should have his claim proved by a competent court":— Held, that the order having been made in a matter which had come before the Magistrate in his judicial capacity could not be regarded as an executive order merely, and that as a judicial order it was made without jurisdiction. That if the Magistrate did not think fit to take proper steps under the law to secure the production of the property before the court, the only course which was open to him, when he referred the complainant to the civil court, was to leave it to the civil court to take such steps as it might think fit for the production and custody of the property in question. (1903) 7 CWN 522 (524) (DB).

**——S. 523 — Property liable to decay — Order before adjudication — Speedy remedy — Jurisdiction.**

A Magistrate has jurisdiction to make an order under S. 523 of the Code of Criminal Procedure for disposal of property taken charge of by the Police as stolen property when he considers that an immediate order is necessary to save the property from possible loss or decay before a formal adjudication of the case of theft, especially when the case has broken down by reason of non-prosecution and when both the parties apply to the Magistrate for such an order. (1901) 5 CWN 415 (416) (DB).

### 3. Disposal of property.

**——S. 523 — Order for delivery of article — Principles governing.**

According to S. 523, the article concerned should be made over to the person found entitled to possession. Where the article has been taken by violence, the status quo must be restored. AIR (Vol 35) 1948 Pat 180.

**——S. 523 — Order under — Whether Magistrate can substitute another order.**

An order under S. 523 directing delivery of property or security to the person from whom it was recovered was passed by the Magistrate. Later on, after some enquiry, the Magistrate passed

another order directing the delivery of property to another person, i.e., the complainant :

Held, that the second order amounted to a review of the first order and as a Criminal Court could not review its own judgment the Magistrate could not substitute another order for the previous one. AIR (Vol 32) 1945 Lah 47: 47 Cr LJ 32: ILR (1944) Lah 540: 221 Ind Cas 34.

——**S. 523 — Return of property.**

Where no offence is established, the property seized during the investigation of a crime should, except in exceptional cases, be restored to the person from whose possession it was taken and not to any other person claiming to be its rightful owner. AIR (Vol 29) 1942 Oudh 128: 1941 OWN 1304: 43 Cr LJ 164: 1941 AWR 395: 17 Luck 430: 197 Ind Cas 404.

——**Ss. 523, 107 — Stolen property — Restoration — Enquiry.**

If it is established that the property has recently been stolen or acquired dishonestly in some other way, the thief, or the receiver, or, whoever he may be, is obviously not the person entitled to possession, so the Courts have a discretion to find out in a summary way who is so entitled, and have power to hand the property over to him. But the position is very different when no charge is established against the person in possession. Criminal Courts have no jurisdiction to enter upon a roving enquiry about the rights to possession of pieces of property when they are entirely unconnected with specific allegations of crime in respect of them. That is the business of the Civil Courts. (1937) 167 Ind Cas 848: 19 NLJ 264: 38 Cr LJ 467.

——**S. 523 — Property stolen — Accused absconding — Property in possession of person not rightful owner.**

Where the known facts plainly show that the property has been stolen, it would be intolerable to allow the person in whose possession the property is found to retain it as against the rightful owner, and force the latter to a civil suit for its recovery if the accused absconds. AIR (Vol 24) 1937 Rang 450: 39 Cr LJ 73: 172 Ind Cas 106.

——**S. 523 — Duty of Magistrate — Burden of proof.**

Under S. 523, Criminal P. C., what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the Police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the Police have seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that that person is entitled to possession of property. If the complainant considers that the applicant has no title to the property, he has a remedy in a Civil Court, but the burden will be upon him to prove his title. If the property is handed over to the complainant, the applicant will have to prove his title in a Civil Court. The burden of proof in a civil suit will not be affected by the seizure by the Police of property in relation to which no offence is proved. AIR (Vol 23) 1936 Bom 171: 38 Bom LR 117: 60 Bom 183: 37 Cr LJ 573: 162 Ind Cas 265 (DB).

——**S. 523 — Magistrate to whom report is made can dispose of matter — Orders of First Class Magistrate are necessary only when S. 524 applies.**

Under S. 523 it is the business of the Magistrate himself to whom the report is made to dispose of the matter in the first instance, and it is only when S. 524 applies that the orders of the Sub-Divisional Magistrate or specially empowered First Class Magistrate intervene. AIR (Vol 12) 1925 Sind 316: 87 Ind Cas 968: 19 SLR 133: 26 Cr LJ 1048.

——**S. 523 — Right to sue in Civil Court.**

Although the claim to property seized on suspicion by an accused has been decided against him under S. 523 Cr. P. Code, that does not deprive him of the right of suit to establish his claim. AIR (Vol 2) 1915 Bom 227: 40 Bom 200: 17 Bom LR 979: 31 Ind Cas 498.

——**S. 523 — Order disposing of property — Subsequent variation of — Jurisdiction of Magistrate.**

A Magistrate has no jurisdiction to vary an order once passed directing that property taken by the Police should be returned to the person from whom it was taken. (1902) 4 Bom LR 12 (14) (DB).

### 4. Production and custody.

——S. 523 — In no circumstances whether the case be one under S. 517 or S. 523, can an order be made for detention in court custody or in the custody of one of the parties, conditional on civil suit being instituted; for this might mean detention for an indefinite period if no such suit is brought. AIR (Vol 25) 1938 Cal 17 (20): 41 CWN 1376: 39 Cr LJ 245: 172 Ind Cas 959.

——**S. 523 — Complaint against a Municipal Councillor — No sanction — Proceedings void — Section inapplicable.**

A complaint was made to the District Magistrate against one B to the effect that he being a member of the Municipal Board acquired a share in a contract with the Board. Thereupon, the District Magistrate immediately took cognizance and started an enquiry under Ss. 190 and 202, Cr. P. Code. The account-books of B were taken possession of after a search of the house and examined under the order of the District Magistrate to discover whether the complaint as to his contract with the Municipality contrary to law was correct or not. No sanction of the Local Government was obtained.

Held, that the District Magistrate had no jurisdiction whatsoever to take cognizance as he had done. When the law has provided safeguards, there must be some reason for providing them and a Magistrate cannot be permitted to behave as if no safeguards had been provided by law.

Held further, that the provisions of S. 523, Cr. P. Code, had no application whatsoever to the case. AIR (Vol 15) 1928 All 756: 113 Ind Cas 78: 9 LRA Cr 140: 10 AI Cr R 450: 30 Cr LJ 62: 1929 ALJ 57: 51 All 377.

### 5. Order of confiscation.

——**S. 523 — Confiscation — Proclamation.**

The mere fact that there may be confiscation under S. 524, after proclamation as prescribed by S. 523 (2) does not preclude confiscation at once under S. 523 (2) without issuing such a proclamation. But the Court would be slow to pass an order for forfeiture in cases of mere suspicion under S. 523. AIR (Vol 23) 1936 Nag 266: 19 NLJ 244: 38 Cr LJ 262: 166 Ind Cas 690.

### 6. Proclamation.

——S. 523 — On the finding that the owner of the animal was unknown held that the Magistrate had jurisdiction to detain it but it was obligatory to issue the proclamation requiring any person who had a claim to the animal to establish that claim within six months. On the expiry of that period if no such claim has been established and the person in whose possession the animal was actually found, is unable to show that it was legally acquired by him it shall be at the disposal of the Government. (1939) 69 CLJ 96 (DB).

——S. 523 — Period of limitation of six months applies only to the person other than the original possessor. AIR (Vol 12) 1925 Sind 316: 87 Ind Cas 968: 19 SLR 133: 26 Cr LJ 1048.

### 7. Inquiry.

**——S. 523 — Order under — Need for judicial enquiry — Appeal — Revision.**

Under S. 523, Cr. P. Code, the Magistrate to whom the seizure of the property by the police is reported must pass an order respecting the delivery of that property after making a judicial enquiry into the question as to who is entitled to the possession thereof. An order merely passed at the request of the police confirming the custody of the property in the possession of the party to whom the police had handed over the property during the course of the investigation, is bad and is liable to be set aside. AIR (Vol 37) 1950 Assam 86: 51 Cr LJ 598 (DB).

**——S. 523 — Duty of Magistrate — Accused asserting that property did not belong to him.**

Under S 523, Criminal P. C., the Magistrate is bound to order that the property be given to the person entitled to possession. The duty of the Magistrate is to make an inquiry as to the person entitled to possession and to order possession to be given to him. Where the accused asserts that the property does not belong to him, he is not entitled to possession and the Magistrate should not pass an order returning the property to the accused. AIR (Vol 29) 1942 Mad 726 (1): 44 Cr LJ 168: (1942) 2 MLJ 575: 55 LW 713: 1942 MWN 727: 204 Ind Cas 37.

**——S. 523 — Order under — Enquiry, when necessary.**

It is not obligatory on a Magistrate called upon to take action under S. 523 (2), Criminal P. C., to make an inquiry before passing his order. An order under S. 523 can be passed on the materials before the Magistrate without any independent enquiry regarding the ownership of the property. Section 523 provides for an enquiry only in the case where the person entitled to possession is unknown. AIR (Vol 29) 1942 Sind 89 : ILR (1942) Kar 72 : 43 Cr LJ 804 : 202 Ind Cas 220.

——S. 523 — In S. 107 proceedings, all that the Magistrate has to determine is whether there was a likelihood of a breach of the peace, and it is enough for his purposes to find that both parties claimed a right to possession and were ready to fight about it. An elaborate enquiry about ownership and title is entirely out of place. That is the business of the Civil Courts. (1937) 19 NLJ 264 : 38 Cr LJ 467 : 167 Ind Cas 848.

**——S. 523 — Validity of order.**

An order passed by a Magistrate on the police papers alone and not on any enquiry made by him is not necessarily wrong. AIR (Vol 11) 1924 Lah 76 : 4 Lah 38 : 24 Cr LJ 670 : 73 Ind Cas 702.

**——S. 523 (2) — Gambling — Currency note not traced to any person.**

Where certain currency notes are found in the course of gambling and in the trial they are not traced to the ownership of any person, the Magistrate is entitled to treat them as ownerless property and deal with them as such. AIR (Vol 3) 1916 Mad 617 : 16 Cr LJ 254 : 28 Ind Cas 110.

**——Ss. 523 and 524 — No offence proved — Possessor unable to explain possession — Order of disposal.**

On a suspected charge of theft accused's house was searched and some jewels etc., were taken from his house by the Police. There was no evidence of guilt against the accused nor was the property claimed by any one else, though steps were taken under S. 523 to give others an opportunity to claim it, the accused was unable to show that it was legally acquired by him. The Magistrate thereupon ordered that the property should be at the disposal of the Government. Held, that the Magistrate's proceedings, were not illegal but, in circumstances of the case, the intention and spirit of Ss. 523 and 524 had been disregarded and the order of the Magistrate should be set aside. AIR (Vol 2) 1915 Bom 295 : 17 Bom LR 79 : 16 Cr LJ 207 : 27 Ind Cas 767 (DB).

**——S. 523 (2) — Magistrate's duty.**

The duty of the Magistrate is to decide who is entitled to possession of the property and not who was in possession at the time of seizure. He is not bound to hold an inquiry. (1911) 5 SLR 3 : 12 Cr LJ 108 : 9 Ind Cas 634.

**——S. 523 — Magistrate — Order as to delivery of property — Delivery — Disposal.**

Section 523 of the Criminal Procedure Code, 1898, says that a Magistrate may order its delivery, if he thinks fit, to the person entitled thereto. The Magistrate does not decide the question of title, but merely decides the question of possession. The fact that the accused had been in possession of the property when the charge was made is not conclusive. The question is, who is entitled to its possession. (1910) 12 Bom LR 232 (234) : 11 Cr LJ 339 (i) : 5 Ind Cas 972 (1) (DB).

**——S. 523 — Search warrant — Property attached belonging to a third person — Magistrate's power to inquire into claim.**

Where a third party appears before a Magistrate and alleges that the things seized by the police under a search warrant are his property, and are not the subject of the alleged offence, the Magistrate is bound to hear that party and, if necessary, to restore the things to the owner. There is a power inherent in every Court to satisfy itself that the things produced before it under a search warrant are the things which it is necessary or desirable should be kept in its custody : Whether S. 523, Cr. P. C., does not apply. (1902) 4 Bom LR 276 (278, 279) : 26 Bom 552.

### 8. Revision.

**——S. 523 — Order under — Right of appeal under S. 524 and not under S. 523.**

Under S. 523, there is no right of appeal to, or of revision by, the Sessions Judge against an order passed under that section. A right of appeal is given under S. 524, but that is only against an order which is passed by the Magistrate that the property is to be at the disposal of the Provincial Government on the ground that nobody has been able to establish his claim to the property and the person in whose possession it was found has been unable to show how it was legally acquired by him. AIR (Vol 32) 1945 Lah 47 : 47 Cr LJ 32 : ILR (1944) Lah 540 : 221 Ind Cas 34.

——S. 523—Decision based on plenty of material before Magistrate — No interference in revision is called for. AIR (Vol 29) 1942 Sind 89 : ILR (1942) Kar 72 : 43 Cr LJ 804 : 202 Ind Cas 220.

——Ss. 523, 517, 512 — The object of the provisions of S. 512 (1), Criminal P. C., is solely to record, in a particular way, and under particular circumstances, depositions of witnesses which may, in future, be used against the accused person when he is apprehended and brought to trial. There is no enquiry, for there is nothing into which an enquiry can be made. The sub-section is, in fact, directed merely to the record of evidence and nothing more. It is in contradistinc-

tion with sub-s. (2) of S. 512, under which there has to be an enquiry whether an offence punishable with death or transportation has been committed or not by some unknown person. Consequently, an order made at the conclusion of proceedings for disposal of property produced before the Court is made under S. 523 and not under S. 517, and hence no appeal lies against such order. AIR (Vol 24) 1937 Rang 42 : 14 Rang 633 : 38 Cr LJ 358 : 167 Ind Cas 245.

——S. 523 — High Court — Interference.

High Court can interfere with an order under S. 523. AIR (Vol 7) 1920 Low Bur 36 : 12 Bur LT 266 : 57 Ind Cas 81.

9. Reference.

——S. 523 — An order made under the provisions of S. 523, Cr. P. Code, is not an order against which an appeal can be preferred to the Court of Session. All that the Sessions Judge is competent to do is to make reference to the High Court under S. 438, Cr. P. Code. AIR (Vol 37) 1950 Assam 86 : 51 Cr LJ 598 (DB).

——S. 523 — Order under — Nature of — Reference under S. 438 in respect of such an order — Competency. See AIR (Vol 35) 1948 Pat 180.

**——S. 524.**

**——S. 524 — Property seized as stolen — Order for sale and forfeiture, legality of — Suit to recover possession of — Limitation.**

An order under S. 524, Cr. P. C., directing the property seized on suspicion of being stolen to be forfeited and sold and sale proceeds to be credited to Government is illegal. The section only permits to sell it or hold it as trustee. A suit to recover it though brought one year after order of forfeiture is maintainable. AIR (Vol 7) 1920 Pat 182: 5 PLJ 321: (1920) Pat HCC 253: 1 PLT 451 : 21 Cr LJ 475 : 56 Ind Cas 507 (DB).

**——S. 524 — Seizure of property by Police — Presumption in favour of possessor — S. 110, Evidence Act.**

The words "is unable to show that it was legally acquired by him" in S. 524, Cr. P. C., must be read consistently with the ordinary law of evidence. Therefore where a proclamation regarding certain property seized under S. 523 remained in force for over 6 months, no one excepting the accused claimed the ownership of the property attached and there is no evidence to show clearly that the claim is false, the proper procedure is to give effect to the presumption in S. 110, Evidence Act and to hold the accused as owner. AIR (Vol 1) 1914 Sind 34 : 8 SLR 141 : 16 Cr LJ 138 : 27 Ind Cas 202.

**——S. 526.**

See also, Criminal P. C., Ss. 528 and 556.

**1. Adjournment.**
See also N. 12.
2. **Affidavit by accused.**
3. **Applicability.**
4. **Apprehension.**
5. **Costs.**
6. **Duty of counsel.**
7. **Duty of Court.**
See also N. 1.
8. **Fair trial.**
9. **Grounds.**
See also N. 4.
10. **Jurisdiction.**
11. **Power of High Court.**
12. **Procedure.**
See also N. 7.
13. **Right of accused.**
14. **Stay.**
See also N. 1.
15. **Who can apply.**

**1. Adjournment.**
See also N. 12.
**(a) General.**
**(b) Duty of Court.**
**(c) Refusal to adjourn.**

**(a) General.**

**——S. 526 — Accused must not only intimate his intention to apply to High Court but must comply with his undertaking to do so within time fixed by trial Court.**

Where an accused person desires an adjournment under S. 526 (8), Criminal P. C., it is necessary for him not only to intimate his intention to apply to the High Court, but also to comply with his undertaking to do so within a reasonable time fixed by the trial Court. Where he fails to take advantage of the opportunity, he cannot be allowed to come forward and say that actually he spent the time in applying first to the District Magistrate and that it was his intention to apply subsequently to the High Court should his application be refused by the District Magistrate. AIR (Vol 31) 1944 Oudh 7 : 1943 OWN 315 : 44 Cr LJ 797 : 1943 AWR 89 : 19 Luck 294 : 208 Ind Cas 534.

**——S. 526 — Power of Magistrate and Sessions Judge — Distinction — Sessions Judge's refusal to adjourn based on wrong opinion does not vitiate trial unless failure of justice is caused.**

Under the provisions of S. 526, a Magistrate, on intimation being given of an intention to apply for a transfer, if it is the first intimation and is made in a case to which the section applies, must grant an adjournment. He has no discretion in the matter; no jurisdiction to refuse an adjournment. The intimation operates, as it were, as a statutory stay.

A Judge, presiding in a Court of Session, however, has been in a different position from a Magistrate with reference to the provisions of S. 526, Criminal P. C., ever since sub-section (9) of S. 526 was enacted by the Criminal P. C., Amendment Act of 1923. A Judge presiding in a Court of Session has a discretion in the matter.

He is empowered to refuse an adjournment, if in his opinion, the application could and should have been made at an earlier stage. That being so, by forming a wrong opinion and refusing to grant an adjournment, it cannot be said that he has infringed a mandatory provision of the Code and committed an error which cannot be cured by the provisions of S. 537.

Hence the wrong opinion and the consequent refusal to grant an adjournment if it has not occasioned a failure of justice, cannot vitiate the trial. AIR (Vol 31) 1944 Mad 78 : 56 LW 640 : 1943 MWN 706 (2) : (1943) 2 MLJ 524 : 45 Cr LJ 368 : 211 Ind Cas 350 (DB).

**——S. 526 — First application for transfer — Order staying proceedings in lower Court is not necessary — Subsequent application — Magistrate, if bound to adjourn.**

In the case of first application for transfer under S. 526, Criminal P. C., no order of stay of proceedings in the lower Court is necessary at all. The statute in such a case, itself stays the proceedings until an order is obtained from the High Court.

Sub-section (8) to S. 526, Criminal P. C., enjoins two things upon the Magistrate; first, that he shall fix a "reasonable" time in which the party is to make an application, and secondly, that he shall adjourn the hearing for a time "sufficient" not only for the application to be made but also for an order to be obtained on it.

It is difficult to construe "reasonable" and "sufficient" as merely synonymous.

The Magistrate having once adjourned under this provision should continue to adjourn either until the date for making the application has passed and no application has been made, or if an application has been made, until an order has been obtained upon it. He cannot constitute himself a Judge of how long it ought to take the High Court to pass orders after having been moved.

No doubt he may fix a date soon after the expiry of the period fixed for making the application in order to ascertain whether an application has been made. If he finds that it has been made, he would, on this view, be bound to go on adjourning the case until he received such orders as permitted him to continue.

But on a subsequent application under S. 526 the Magistrate is not bound to adjourn. He has full jurisdiction to proceed until such time as he is ordered by competent authority to stop. AIR (Vol 30) 1943 Lah 191 : 45 PLR 176 : 44 Cr LJ 751 : ILR (1943) Lah 331 : 208 Ind Cas 242 (FB).

**——S. 526 (8) — "Party" in S. 526 (8) if includes informant under S. 107.**

The word "party" within the meaning of S. 526 (8), Criminal P. C., does include an informant under S. 107. AIR (Vol 26) 1939 Sind 238 : 40 Cr LJ 803 : ILR (1940) Kar 113 : 183 Ind Cas 460.

**——S. 526 (8) — Adjournment granted on condition that applicant should move High Court for transfer within reasonable time.**

Where an adjournment under S. 526 (8), was granted to the applicant on condition that he should, within reasonable time, apply to the High Court for transfer of the case, and the applicant, in mistake, according to the original circular of the High Court which was subsequently cancelled, moved the local Court for transfer :

Held, that the mistake was bona fide, and if made for the first time, the applicant should be pardoned the delay. AIR (Vol 25) 1938 Sind 66 : 39 Cr LJ 425 : 174 Ind Cas 521 (DB).

**——S. 526 — Ample opportunity to file application — Test to determine.**

In considering the question whether or not the applicant had ample opportunity before to file an application for transfer, regard must be had to the fact whether or not the ground on which the application for transfer is proposed to be based, did exist earlier. Where the applicant has had no reasonable opportunity to apply for transfer, the case does not fall under S. 526 (9), Criminal P. C. AIR (Vol 24) 1937 All 171 : 1936 AWR 967 : 38 Cr LJ 416 (2) : 167 Ind Cas 515.

——S. 526 — Quaere. — Whether an application for adjournment under S. 526 is entertainable after the defence witnesses have been examined but before the close of the argument. AIR (Vol 24) 1937 Pat 131 : 17 PLT 627 : 3 BR 379 : 38 Cr LJ 484 : 167 Ind Cas 881.

**——S. 526 (8) — Accused's right to apply for time.**

The provision of law contained in S. 526, sub-s. (8), Criminal P. C., is imperative in its terms and where the Magistrate does not grant an adjournment as provided in the said provision, all the subsequent proceedings are illegal and, except as regards any emergent order that may be found necessary in the interests of justice, without jurisdiction.

The inquiry of a case is not deferred till the Magistrate begins to record evidence but commences with the appearance of the accused in response to the processes before the Magistrate to answer the charges. So the accused is within his rights in applying under sub-s. (8) of S. 526 as soon as he appears before the Magistrate and that right cannot be delayed till the Magistrate chooses to record evidence. On such an application, the Magistrate is also bound under the law to adjourn the case so as to afford the accused a reasonable time to make the application for transfer.

Where the Magistrate refused time to the accused and fixed the next day for his appearance and, on his failing to appear, forfeited the recognizance bonds, it was held that the order of forfeiture was contrary to law. AIR (Vol 18) 1931 Bom 411 : 33 Bom LR 668 : 32 Cr LJ 1161 : 134 Ind Cas 361 (DB).

**——Ss. 526, 537 — Intimation of intention to move for transfer after case is closed but before judgment — Refusal to adjourn — Validity of proceedings.**

Under S. 526, Criminal P. C., an application for transfer can be made even after the defence is closed and the case has been adjourned for arguments and judgment only; and if the Magistrate refuses to adjourn the case, he acts contrary to the provisions of the said section.

But the proceedings of the Magistrate cannot be set aside as invalid if the notification of intention to move for transfer was given mala fide for the purpose of delay and to defeat the ends of justice. A refusal to adjourn in such a case is a mere irregularity which can be cured by applying S. 537, Criminal P. C.

Section 526 (8), Criminal P. C., does not require any application for adjournment. A notification of the intention to apply to the High Court is enough. AIR (Vol 18) 1931 Cal 626 : 35 CWN 1112 : 33 Cr LJ 31 (2) : 55 CLJ 34 : 59 Cal 478 : 134 Ind Cas 1057 (DB).

——S. 526 — Section 526 (8) applies only where the complainant or the accused notifies to the Court, before which his case is pending, his intention to make an application for transfer to the High Court. The onus lies on the applicants to show that the information required by S. 526 was given to the Magistrate. AIR (Vol 17) 1930 All 835 : 1930 ALJ 1320 : 1930 Cr C 1232 : 32 Cr LJ 363.

**——S. 526 — Second adjournment to approch High Court cannot be claimed as of right.**

If an application for adjournment is made on the ground that the accused desired a transfer, it would of necessity be presumed that the application was to be made to the High Court and not to the District Magistrate. Once a case has been adjourned and the accused has not taken advantage of the adjournment to appear before the High Court and plead his case he would not be entitled to a second adjournment to give him another opportunity to appear before the High Court when he neglected to take advantage of the first opportunity. AIR (Vol 15) 1928 All 753 : 9 LRA Cr 145 : 10 AI Cr R 485 : 111 Ind Cas 855 : 29 Cr LJ 935 : 1929 ALJ 60.

——S. 526 — After an application is made to a Court under S. 526 for adjournment to enable an accused person to apply for transfer of the case, the Court does not become incompetent to make ancillary orders not affecting the merits of the case, such as requiring an accused to execute a bond under S. 117 (3). 3 SLR 155 and 1 SLR Cr. 35, Diss. from: AIR (Vol 14) 1927 Sind 148 : 21 SLR 93 : 7 AI Cr R 326 : 99 Ind Cas 605 : 28 Cr LJ 173 (DB).

**——S. 526 — Transfer of case — Adjournment, application for — Examining witnesses after application — Rule nisi for transfer, issue of —**

**Communication by vakil — Examining witness after communication — Reasonable apprehension that fair trial would not be had.**

Where on an application being made by the accused to the trying Magistrate for time to enable him to move the High Court for transfer of the case pending against him, the Magistrate did not pass an order at once but examined 13 witnesses for the prosecution and then passed an order allowing 14 days' time, and where, after the fact of the issue of a rule by the High Court on the application for transfer, had been communicated by a telegram from a vakil of the High Court, the Magistrate instead of postponing the case, at once examined four witnesses and then made an order for adjournment.

Held, that those proceedings on the part of the Magistrate were sufficient to justify the transfer of the case from his file. (1907) 11 CWN 507 (508) : 5 Cr LJ 291 (DB).

**——S. 526, Cl. (8) — Commencement — "Intention" — Bona fides — "Before the accused is called on for the defence" — Refusal, effect of.**

A refusal to grant an application for postponement under S. 526, Cl. (8) does not necessarily vitiate all subsequent proceedings. It is at least competent to the Magistrate to proceed with the case up to the point at which the accused would be called on for their defence. Unreasonable delay before the commencement of the trial or total abstention from moving the High Court might well be taken into account in considering the bona fides of the accused in notifying his intention to the trying court. (1904) 8 CWN 910 : 31 C 715 (720) (DB).

**——S. 526, Cl. (8) — Commencement of the hearing.**

The words "commencement of the hearing" in S. 526, Cl. (8), of the Criminal Procedure Code means the commencement of the hearing in the court objected to i.e., in the court in which the notification subsequently referred to in the section applies or is made. Where an application which fell under Cl. (8) of S. 526 was refused, all the proceedings before the Magistrate subsequent to the refusal were set aside as bad. (1904) 8 CWN 77 (79, 80) : 1 Cr LJ 46 (DB).

**——S. 526 (8) — Adjournment to enable party to apply for transfer — Stage beyond which the trial is not to proceed on such adjournment — Examination of complainant's witnesses, legality of.**

Section 526 (8) only requires that a reasonable time should be given before the accused is called upon for his defence. It is therefore competent for a Magistrate to proceed with the trial up to the point of calling on the accused to enter on his defence before granting adjournment. The Magistrate can, therefore, examine the complainant's witnesses even after an application is made for adjournment. (1902) 6 CWN 717 (720) (DB).

**——S. 526, Cl. (8) — Adjournment of Sessions trial, on application, before first hearing — Transfer, opportunity to apply for — Court, duty of, to grant time — Powers of adjournment, exercise of, whether imperative or discretionary — Non-compliance with the provisions of S. 526, Cl. (8), effect of — Procedure — Transfer.**

Under the provisions of Sub-S. (8) of S. 526 of the Code of Criminal Procedure a court is bound on an application made before the commencement of the hearing of the case, to grant the application for postponement for a reasonable time. The refusal to grant such an application is illegal and the whole of the proceedings that follow cannot be supported. (1902) 6 CWN 251 (252) : 29 Cal 211 (DB).

**(b) Duty of Court.**

**——S. 526 (8) — Magistrate doubtful whether person asking for adjournment is 'party' within meaning of cl. (8) — Safe course for him to be followed, stated.**

Where a Magistrate is doubtful whether a person applying for stay of proceedings under S. 526 (8) is or is not a party within the meaning of that sub-section the safe course for him is to grant an adjournment of the case because, if he refuses the adjournment and it is afterwards found that such person is 'party' within the meaning of S. 526 (8), all proceedings from the date of refusal would be illegal. AIR (V 26) 1939 Sind 238 : 40 Cr LJ 803 : ILR (1940) Kar 113: 183 Ind Cas 460.

**——S. 526 — The proceedings being only in inquiry stage the Magistrate having regard to the words of S. 526 (8), Criminal P.C., was not bound to grant an adjournment for making the application for transfer.** 1934 MWN 743 (1).

**——S. 526, cl. (8) (as amended by Act XXI of 1932) —Adjournment to enable party to apply to High Court for transfer.**

Clause (8) to S. 526, Criminal P.C., as amended in 1932, makes it obligatory on the trying Magistrate to grant one adjournment to enable a party to apply to the High Court for transfer. The failure of the Magistrate to conform to the mandatory provisions of cl. (8) gives the party a just cause to complain that he would not receive a fair trial at the hands of the Magistrate and affords a good ground for transfer of the case from his Court. AIR (V 20) 1933 Sind 307: 34 Cr LJ 1144: 146 Ind Cas 20 (2).

**——S. 526 — Section is mandatory — Deviation makes proceedings illegal.**

Section 526 (8) embodies a statutory mandate which Courts ought to respect and obey and consequently if subsequent to an application under that section the Magistrate without granting adjournment proceeds with the case, the trial becomes illegal and not merely irregular and curable under S. 537. AIR (V 17) 1930 All 263: 124 Ind Cas 17: 31 Cr LJ 590: 1930 ALJ 547: 1930 Cr C 375.

——S. 526 — Where the accused in the course of a trial applies for an adjournment for the purpose of moving the High Court for transfer and the Court rejects the application on the ground that it had been made after the trial had begun, such rejection is contrary to the terms of S. 526 (a) and vitiates the whole proceedings. AIR (V 17) 1930 Mad 187: 57 MLJ 763: 124 Ind Cas 501: 31 Cr LJ 715: 1930 Cr C 187: 53 Mad 165: 2 M Cr C 222: 30 MLW 883: 1930 MWN 78. (DB).

**——S. 526 — Proceedings under S. 145.**

In proceedings under S. 145 it is not obligatory upon the Magistrate to grant an adjournment on receipt of an application filed by a party, intimating him that an application would be made for transfer under S. 526, and asking him to adjourn the case for that purpose. The application should be overruled and the rejection is not in violation of the provisions of the Code. AIR (V 16) 1929 Cal 778: 57 Cal 869: 124 Ind Cas 522: 31 Cr LJ 698: 1929 Cr C 522: 50 CLJ 331: 34 CWN 59 (DB).

——S. 526 — The Magistrate is not bound to entertain an application for adjournment, for applying to High Court for transfer, if it does not state the grounds or if it is made at a very late stage of the proceedings, e.g., when the evidence of one party has been closed. AIR (V 16) 1929 Cal 778: 57 Cal 869: 124 Ind Cas 522: 31 Cr LJ 698: 1929 Cr C 522: 50 CLJ 331: 34 CWN 59 (DB).

——S. 526 — **Imposing condition is illegal.**

Where it is notified to the Court that an application is intended to be made and a postponement prayed for, the Court has no discretion but to grant postponement and the order of the Court imposing a condition while complying with the prayer is illegal. AIR (V 16) 1929 Lah 702: 119 Ind Cas 327: 30 PLR 657: 30 Cr LJ 1048: 1929 Cr C. 216.

——S. 526 — The Magistrate must adjourn the case on notification of intention of the accused to make an application. The disobedience on the part of the Magistrate of a statutory mandate is sufficient to entitle the applicant to obtain a transfer of the case. AIR (V 15) 1928 All 660 (1): 9 LRA Cr. 127: 10 AI Cr R 352: 26 ALJ 1321: 29 Cr LJ 671: 110 Ind Cas 223.

——S. 526 — When an accused notifies to the Court before which his case is pending, his intention to make an application under S. 526, Cl. (8), for a transfer of his case, it is the duty of the Magistrate to grant adjournment. The Magistrate has no power to proceed with the hearing of the case until a reasonable postponement has been granted. All the subsequent proceedings after his refusal are unwarranted by law and ought to be set aside. AIR (V 15) 1928 Lah 850: 109 Ind Cas 360: 29 Cr LJ 536.

——S. 526 — Under the amended S. 526 (8) as soon as the Public Prosecutor, Complainant or the accused person notifies to the Court his intention to make an application to the High Court for transfer, the Magistrate is bound to adjourn the case and it is not competent to him, after such an application has been made, to record any evidence at all. AIR (V 15) 1928 Lah 1: 9 Lah 537: 29 Cr LJ 815: 111 Ind Cas 319.

——S. 526 — When an application is made for postponement of the case in order to enable the petitioner to apply for transfer, it is highly improper for the trying Magistrate to make a preliminary enquiry into the grounds for transfer and decide himself the merits of the grounds. This circumstance is sufficient to order a transfer of the case. AIR (V 13) 1926 Lah 236: 92 Ind Cas 894: 27 Cr LJ 382: 27 PLR 67.

——S. 526 — **Obligation to adjourn.**

Where an application is made to adjourn a case to enable the accused to apply for transfer, it is not for the Magistrate to decide whether the applicant had an apprehension that he would not receive a fair trial at his hands. He is bound to adjourn the case unless in his judgment he was bona fide satisfied that the applicant had no intention to make an application for transfer:

A refusal to adjourn the case without just cause is by itself a sufficient ground for transfer under S. 526. AIR (V 13) 1926 Sind 288: 20 SLR 122: 27 Cr LJ 935: 96 Ind Cas 391.

——S. 526 — Whenever an intention to make an application under S. 526 of the Cr. P. Code is notified to the Court, the Magistrate is not bound to adjourn or postpone the case, unless he is satisfied that the accused person has a bona fide intention to make an application to the High Court. AIR (V 13) 1926 Sind 137: 20 SLR 54: 27 Cr LJ 40: 91 Ind Cas 72 (DB).

——S. 526 — The court is only bound to give such adjournment as will afford a reasonable opportunity for an application for transfer being made and an order obtained thereon. AIR (V 7) 1920 All 277: 18 ALJ 1145: 22 Cr LJ 88: 59 Ind Cas 376: LR 1 A (Cr) 179.

——S. 526 (8) — **Duty of Magistrate — Application for adjournment by accused to enable them to apply for transfer — Duty of Magistrate.**

Where before the trial began the accused applied for an adjournment on the ground that they intended to apply for transfer of the case and the adjournment could not have been asked earlier, the Magistrate ought under S. 526 (8) grant the adjournment for the purpose of making an application for transfer before the High Court. (1914) 1 OLJ 218: 15 Cr LJ 507: 24 Ind Cas 595 (DB).

——S. 526 — **Duty of Magistrate to adjourn — Transfer — Application to Superior Magistrate.**

A Magistrate is not bound to adjourn a case because an application is being made to a superior Magistrate for transfer; S. 526 confines that duty to cases where application is made to the High Court. (1912) MWN 1121: 13 Cr LJ 828: 17 Ind Cas 572.

——S. 526 (8) — **Duty of Magistrate — Adjournment.**

Though S. 526 (8) only makes it obligatory to postpone a case when it is notified to the Court before commencement of the hearing yet when it appears that a bona fide application for transfer is about to be made, it would usually be well for the Magistrate, at any stage, to grant a reasonable time to enable it to be made. Dock is the accommodation provided in courts for persons accused of criminal offences and it is entirely an act of indulgence on the part of a Court to allow an accused person to remain outside it. (1912) 13 Cr LJ 584: 15 Ind Cas 1000: 5 Bur LT 137.

(c) **Refusal to adjourn.**

——Ss. 526 (8), 537 — **'Second or subsequent intimation' — There was held 'intimation' to Court —Refusal of Court to adjourn case, held amounted to illegality vitiating trial.**

The provisions of S. 526 (8) are mandatory and if they are infringed, the whole trial becomes illegal and not merely irregular.

An application was made by one of the accused to the trying Magistrate that as he wanted to produce the Magistrate as a defence witness, he might transfer the case to some other Court. The Magistrate sent that application to the District Magistrate. The District Magistrate asked the Magistrate whether any of the facts were within his personal knowledge and on his replying in the negative, he ordered him to proceed with the case.

Subsequently an application was put in on behalf of another accused that he would put in an application for transfer of the case before the District Magistrate and in case of necessity in the Chief Court and so the proceedings might be adjourned. That application was refused:

Held, that the proviso to sub-s. (8) of S. 526 did not apply to the case. No 'intimation' was given to the Court in the first application but the subsequent application was an 'intimation' to the Court that the applicant intended to move the Chief Court and, therefore, the Magistrate was bound to adjourn the proceedings. As the provisions of S. 526 (8) were infringed, the trial was illegal. AIR (V 29) 1942 Oudh 429 : 1942 OWN 448 : 44 Cr LJ 97 : 1942 AWR 290 : 203 Ind Cas 524.

——S. 526 — **Application for adjournment refused.**

Where the accused who remained absent for some time on the plea of illness but the Magistrate disbelieved the plea and did not accept the medical certificate produced by them and the application for adjournment under S. 526 (8) was also refused:

Held, that a flagrant disobedience of the obligation to adjourn the case under S. 526 (8) was sufficient reason for granting a transfer and although the disobedience in the present case may have been inadvertent yet, in view of the fact that

the accused declared that they would not claim a de novo trial, the case should be transferred. AIR (V 23) 1936 Nag 146 : 37 Cr LJ 1146 : 165 Ind Cas 425.

——S. 526 — Refusing an adjournment to the accused when his Vakil's absence was due to sudden bereavement :

Held, that the case was fit to be transferred. 1935 MWN 815.

——Ss. 526 (8), 537 — **Rufusal of adjournment — Subsequent proceedings, if validated by S. 537.**

Where an application under S. 526 (8), Criminal P. C., is made, the question whether there is or is not good ground upon which High Court might order a transfer is not a question for the trial Judge himself. The section gives him no discretion. It is imperative. The application having been made it is his duty to adjourn the case for a reasonable time, and any proceedings taken thereafter would be unwarranted by law. And where such irregularity is not devoid of any probability of failure of justice, S. 537 will not justify the subsequent proceedings being taken. AIR (V 22) 1935 Sind 27 : 36 Cr LJ 885 : 29 SLR 161 : 156 Ind Cas 223 (DB).

——S. 526 — There is no provision in the Code for granting adjournment for the trial of questions of law in revision during a trial and refusal to grant such an adjournment is no ground for transfer. AIR (V 20) 1933 Sind 17 : 26 SLR 255 : 33 Cr LJ 908 : 139 Ind Cas 791 (DB).

——S. 526 — **Application after close of case.**

The pronouncing of judgment is no part of the trial and hence application for transfer made after the case is closed but before the pronouncing of judgment is not made in the course of the trial. Court's refusal to adjourn case, on such application being made does not violate the provisions of S. 526 (8). AIR (V 16) 1929 Mad 201 : 52 Mad 355 : 29 MLW 108 : 1929 MWN 60 : 2 MCrC 1 : 118 Ind Cas 274 : 30 Cr LJ 908 : 56 MLJ 216.

——S. 526 (8) — **Grounds — Application for adjournment to apply to High Court for transfer — Refusal.**

Where an accused had presented an application for transfer to the High Court on the first day possible after the receipt of notice of hearing, the refusal of the Magistrate to adjourn the appeal presented to him on the ground of delay on the part of the accused is improper and the proceedings in appeal are liable to be set aside. AIR (V 2) 1915 Mad 1163 : 16 Cr LJ 244 : 28 Ind Cas 100.

**2. Affidavit by accused.**

——S. 526 — One of the purposes of Ss. 526 (4) and 539-A is to discourage the making of false and scandalous statements. AIR (V 31) 1944 Sind 155 : ILR (1944) Kar 133 : 46 Cr LJ 223.

——S. 526 — Where an affidavit has been sworn before an officer of the District Judge's Court and not before the High Court as required by S. 539 and is filed along with an application under S. 526, the affidavit not being sufficient for purposes of S. 526 (4), the transfer application cannot be entertained. AIR (V 26) 1939 Pesh 38: 40 Cr LJ 847 : 184 Ind Cas 10.

——S. 526 — **Affidavit, necessity of.**

Section 526 (4), Criminal P. C., provides that application for transfer must be supported by an affidavit, the mode of swearing the affidavit being provided for in S. 539, Criminal P. C. When not so accompained by an affidavit, it cannot be entertained. AIR (V 23) 1936 Lah 356 : 37 PLR 80 : 37 Cr LJ 510 (1) : 161 Ind Cas 921.

——S. 526 — **S. 342 (4), if applies to application for transfer.**

Every person, whether accused or not, except the Advocate-General, who makes an application under the section must support his application by an affidavit. Section 342 (4), Criminal P. C., applies only to the conduct of trials and to the examination of the accused at trial and does not apply to any proceeding outside the trial, such as an application to the High Court for transfer. AIR (V 20) 1933 Nag 201 : 34 Cr LJ 1035 : 29 NLR 338 : 145 Ind Cas 445.

——Ss. 526 (4), 539 — **Application for transfer — Affidavit sworn before District Court, whether sufficient.**

Under S. 539, Criminal P. C., an affidavit supporting an application under S. 526 must be sworn before the High Court or the clerk of the crown or any commissioner, or other person appointed by the High Court for that purpose.

Where an affidavit filed along with an application for transfer under S. 526 was sworn before an officer of the District Judge's Court :

Held, that the said affidavit was not sufficient for the purposes of S. 526 (4) and the application for transfer could not be entertained. AIR (V 18) 1931 Cal 710 (1) : 33 Cr LJ 61 : 134 Ind Cas 1278 (1) (DB).

——S. 526 — **Practice — Allahabad High Court.**

According to the practice approved by the Allahabad High Court, an accused person can legally tender his own affidavit in support of an application for transfer, whether the affidavit is tendered and the application made in a subordinate Court or in the High Court, and he can be prosecuted in regard to any false statement made in the affidavit. AIR (V 15) 1928 All 182 : 29 Cr LJ 336 : 9 AICrR 91 : 108 Ind Cas 124 : 9 LRACr 3.

——S. 526 — A person making an affidavit containing a false statement made in support of an application for transfer of a case pending in one Criminal Court to another under S. 526, is guilty under S. 191. AIR (V 14) 1927 Sind 113 : 99 Ind Cas 341 : 28 Cr LJ 133.

——S. 526 —**Application for transfer of a criminal case — False statements made therein can be basis of a prosecution under Penal Code, S. 193.**

An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by S. 342 of the Cr. P. Code, upon answers to questions put to the accused by the Court trying the case. 28 All 331 and 33 All 163 Diss. AIR (V 13) 1926 Lah 12: 26 Cr LJ 1369: 89 Ind Cas 457.

**3. Applicability.**

**(a) General.**

**(b) Proceedings under S. 145.**

(a) Ge eral.

——S. 526 (8) — **Construction — "At any stage before the defence closes its case" — Meaning.**

The words "at any stage before the defence closes its case" in S. 526 (8) of the Cr. P. Code, does not mean, at any stage before the arguments begin but have reference to the stage when the defence evidence has been concluded. 1950 ALJ 166: AIR (Vol 37) 1950 All 312: 51 Cr LJ 886: 1950 AWR 391.

——S. 526 — **Transfer to particular Judge is not contemplated.**

The Criminal P. C. does not contemplate the transfer of a case for trial by a particular Judge specified by the accused. Mere preference for a particular

tribunal or a particular Judge is no ground for the transfer of a case. AIR (Vol 33) 1946 Sind 1: ILR (1945) Kar 275: 47 Cr LJ 455: 222 Ind Cas 431.

——S. 526 — Necessity for amending the section.

Necessity for amending S. 526, Criminal P. C., pointed out. AIR (Vol 20) 1933 Cal 582: 34 Cr LJ 958: 37 CWN 982: 60 Cal 1316: 145 Ind Cas 416(1). (DB).

——S. 526 (8) — Several accused — Several applications for transfer one after another on same ground, maintainability of.

Where there are several accused, all the accused are not one by one entitled to have an adjournment to apply for transfer in the absence of fresh grounds or incidents.

The words "or the accused" in S. 526(8), Criminal P. C., apply to the accused as a whole and although any further incident might give rise to a fresh application it would equally give rise to a fresh application on the part of the same applicant provided always that there is something to justify or form foundation of the application. AIR (Vol 18) 1931 Lah 274: 32 Cr LJ 1229: 12 Lah 668: 32 PLR 941: 134 Ind Cas 770(2).

——S. 526 — Interpretation — "Any person" meaning.

The words "any person" in S. 526 (6-a) are comprehensive enough to include (1) the Crown or the Local Government, (2) any private individual who has an interest in the subject-matters of the complaint, as also (3) all or any one of the accused persons. 123 Ind Cas 330: 52 All 263: 1930 ALJ 209: 1930 Cr C 319: 31 Cr LJ 485: AIR (Vol 17) 1930 All 206 (FB).

——S. 526 — Atmosphere engendering suspicion.

The trial of a case should be in an atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with the course of justice. It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly be seen to be done. 29 PLR 667: 111 Ind Cas 451: 29 Cr LJ 867: 11 A I Cr R 200: AIR (Vol 15) 1928 Lah 757.

——S. 526 — "Inquiry or trial" do not apply to transfer proceedings before District Judge.

The reference in Cl. (8) to "inquiry or trial" is intended to apply to those inquiries or trials which are specially referred to in the earlier portion of the Code and the words do not apply to transfer proceedings pending before the District Judge. 5 Pat 229: 97 Ind Cas 974: 8 PLT 66: 27 Cr LJ 1214: AIR (Vol 14) 1927 Pat 59 (DB).

——S. 526 — S. 526 of the Cr P. Code, which clothes the High Court with power to transfer any case from any file to any other file, controls S. 195(3) and Ss. 476-A and 476-B of the Code. The Court to which an appeal against an order refusing or granting a sanction for prosecution is transferred is invested with all the powers of the ordinary Court of Appeal or revision for hearing the particular appeal or revision against the order under S. 195, of the Code and can grant or refuse sanction or proceed under S. 476. 86 Ind Cas 428: 26 Cr LJ 796: AIR (Vol 12) 1925 Nag 358.

——S. 526 — Applies to enquiries under Workmen's Breach of Contract Act (XIII of 1859).

An enquiry under the Act, XIII of 1859 is an enquiry by a Magistrate or a Criminal Code within S. 6 Cr. P. Code and although the object of the enquiry is merely to issue coercive orders and if necessary to enforce the same by a sentence of imprisonment, there is nothing to show that such an enquiry is excluded from the operation of S. 526, Cr. P. Code. The definition of "enquiry" given in S. 4, cl. (k) which includes every enquiry other than a trial conducted under the Code of Cr. P. by a Magistrate or a Court, is not exhaustive so as to exclude an enquiry under the Workman's Breach of Contract Act of the nature above referred to. 75 Ind Cas 984: 43 All 700: 21 ALJ 619: 4 LR A Cr 140: 25 Cr LJ 72: AIR (Vol 11) 1924 All 76.

——S. 526 — A case in a Court without jurisdiction cannot be transferred. 72 Ind Cas 351: 24 Cr LJ 351: 17 MLW 69: AIR (Vol 10) 1923 Mad 326. (DB).

——S. 526 (8) — Commencement of hearing — Adjournment.

For the purposes of S. 526(8) the hearing or trial must be taken to include all the proceedings taken to determine a case and the first step in the hearing at the sessions trial is the reading and explaining of the charge to the accused and the Court is not bound to grant an adjournment after the charge is read over and explained under S. 526 Cr. P. C. (1912) 35 M 701: (1911) 2 MWN 311: 12 Cr LJ 271: 10 Ind Cas 380. (DB).

——S. 526 — Applicability to proceedings before Village Magistrate.

The provisions of the Cr. P. C. relating to transfer of criminal cases and the right of the accused to obtain an adjournment of the case pending application to a superior court for transfer have no application to proceedings before Village Magistrate. (1911) 21 MLJ 755: 12 Cr LJ 407: 11 Ind Cas 591.

——S. 526 (8) — Commencement of hearing — Meaning of.

S. 526 (8) has no application where a transfer is sought after the case for prosecution is closed, the words "Commencement of hearing" mean commencement in the Court objected to. (1911) 4 Bur LT 213: 12 Cr LJ 474: 12 Ind Cas 82.

——S. 526 — Applicability of Ss. 107 and 110—Magistrate taking keen interest.

A District Magistrate who was convinced of the guilt of the accused and who was taking keen personal interest in the matter, should not be allowed to try the case but it should be transferred to another district. The powers given to High Court by S. 526 are not limited by provisions of Ss. 107 and 110 of Cr. P. C. 16 A. 9 not followed. (1910) 32 All 642: 7 ALJ 813: 11 Cr LJ 412: 6 Ind Cas 874.

——S. 526 — Supplementary trial — No disqualification of Judge.

Supplementary trials are very common and it would cause much public inconvenience, if Magistrates and Judges who had tried one batch of persons should be thereby debarred from trying a subsequent batch on the same facts. (1904) 31 C 715 (719): 8 CWN 910: 1 Cr LJ 408 (DB).

(b) Proceedings under S. 145

——S. 516 (8) — Applicability — Proceedings under S. 145.

S. 526(8), Cr. P. Code, does not apply to proceedings under S. 145, Cr. P. Code. AIR (V 34) 1947,

Nag 187: ILR (1947) Nag 422: 230 Ind Cas 407: 48 Cr LJ 627: 1947 NLJ 257.

——S. 526 — Quaere—Whether an application for transfer of a case pending under S. 145, Criminal P. C., lies under S. 526, Criminal P. C. AIR (V 21) 1934 Lah 73: 35 Cr LJ 624: 148 Ind Cas 201.

——S. 526 — S. 526 (8) does not apply to proceedings under S. 145. AIR (V 16) 1929 Cal 778: 57 Cal 869: 124 Ind Cas 522: 31 Cr LJ 689: 1929 Cr C 522: 50 CLJ 331: 34 CWN 59 (DB).

——S. 526 — Although a "case" in Cl. 8, S. 526, includes a proceeding under S. 145, a party in a proceeding under S. 145 cannot apply for adjournment under Cl. (8), S. 526. AIR (V 14) 1927 Pat 351: 6 Pat 553: 8 PLT 716: 28 Cr LJ 1035: 106 Ind Cas 219 (DB).

**——S. 526 — Proceedings under S. 145 cannot be transferred.**

S. 526 does not empower a High Court to transfer proceedings under S. 145 of the Code as such proceedings cannot be described as a criminal case which means a case in which a person is accused of an offence. AIR (V 12) 1925 Lah 48: 76 Ind Cas 868: 25 Cr LJ 276.

**——S. 526 — Applicability — Chap. XII of the Code.**

S. 526 does not apply to proceedings under Chap. XII of the Cr. P. C. so that a party at a proceeding under S. 145 is not entitled to an adjournment under S. 526(8). AIR (V 1) 1914 Cal 557(1): 18 CWN 393: 15 Cr LJ 359: 23 Ind Cas 727 (DB).

**——Ss. 526, 145 — 'Inquiry' — Proceedings under S. 145.**

Proceedings under S. 145, Cr. P. C., is an inquiry within Ss. 526(a) and 4 (k). (1901) 5 CWN 749: 28 C 709 (713) (DB).

### 4. Apprehension.

(a) General.
(a-1) Criterion for transfer.
(b) Requisites.
(c) Other illustrations.

### (a) General.

**——S. 526 — Apprehension in mind of accused.**

The accused filed a written statement in which he made serious complaints against the Magistrate as well as disclosed prima facie, a good defence. The Magistrate filed the written statement without even reading it:

Held, that there was sufficient ground for apprehension in the mind of the accused. AIR (V 29) 1942 Lah 122: 44 PLR 104: 43 Cr LJ 632: 200 Ind Cas 446.

——S. 526 — Where the complainant made an application in which he intimated his intention to move the High Court, the refusal to accept such an application and to obey the terms of the Code justifies the apprehension in the mind of the applicant that he would not receive a fair trial and the fact that the application was not made in the proper form does not justify the ignoring of the facts mentioned therein. 1938 Nag L Jour 36

**——S. 526 — Application for stay for applying for transfer — Bail cancelled — Apprehension, if created.**

It is true that under Sch. II, Criminal P. C., an offence under S. 30, Frontier Crimes Regulation, is not bailable, but where the accused had been allowed bail at a previous stage in the proceedings, the cancellation of it, merely because the accused intended to apply for transfer, is an action which might well create an impression upon his mind that he will not receive a fair trial. AIR (V 24) 1937 Pesh 20: 38 Cr LJ 337: 167 Ind Cas 175.

**——S. 526 — Effect of words or action of trying Magistrate on mind of accused should be considered.**

Where transfer of a case is applied for on the ground that on a certain date the complainant was seen going to the Chamber of the Magistrate and remaining there for some time and this is not denied by the Magistrate what effect the words or the action of a trying Magistrate will have on the mind of an accused person should always be considered and if the words or action of the Magistrate would raise an apprehension in the mind of the accused person that he would not have a fair and impartial trial, then the case must be transferred. AIR (V 24) 1937 Rang 272: 38 Cr LJ 882: 170 Ind Cas 270.

**——S. 526 — Refusing securities on insufficient grounds.**

Held, that the action of the Magistrate in persistently refusing to accept the securities and refusing to give bail to the accused, was such as could reasonably create an apprehension in the mind of the applicant that he will not get a fair trial in the district and that in matters like this, considerations of justice must prevail over those of convenience. AIR (V 24) 1937 Oudh 79: 1936 OWN 1232: 38 Cr LJ 105: 165 Ind Cas 873.

**——S. 526 — Transfer of case at Magistrate's whim.**

For a Magistrate to transfer a case from one Court to another at his whim and caprice would be seriously to interfere with the working of the Courts and would shake the confidence of the public in those Courts. AIR (V 23) 1936 Sind 237: 38 Cr LJ 133(2): 30 SLR 327: 166 Ind Cas 83(2) (DB).

**——S. 526 — Proceedings before Sessions Division of Judicial Commissioner's Court.**

The accused were tried before the Additional Judicial Commissioner of Sind, and a special jury of nine jurors. After a trial, six of the accused were convicted. The convicted men then appealed to the Court of the Judicial Commissioner and the appeal was accepted by the Court as being brought under S. 410, Criminal P. C. Under the powers of S. 9(c) of the Sind Courts Act, (Bombay Act XII of 1866), the matter was referred by the Judicial Commissioner, as the Judges differed, to a third Judge.

The Additional Judicial Commissioner, to whom the case was referred, came to the conclusion that the trial had been unsatisfactory, that there was a point of law upon which the appellants were entitled to rely as to certain evidence and he, thereupon, came to the conclusion, that the conviction must be set aside, and passed the following order: "I set aside the convictions and order a re-trial of all the appellants, and I further order under the provisions of S. 526(e), Criminal P.C., that the case be transferred for trial to the Sessions Court of Hyderabad, there to be tried by the Sessions Judge or one of the Additional Sessions Judges".

Held, (i) that S. 526 had very little to do with this case, because it was not necessarily exclusively

confined to, but dealt with cases which are not in the High Court where it may appear to the High Court that there ought to be a transfer. This section did not apply, because this case had first of all to be got back to some Court for trial. Consequently, it must be taken that he had really ordered the transfer of the case, under S. 423(b). AIR (V 22) 1935 PC 122: 1 BR 633: 1935 OWN 744: 39 CWN 929: 1935 MWN 689: 16 PLT 513: 37 PLR 542: 69 MLJ 128: 42 LW 162: 37 Bom LR 634: 1935 AWR 808: 62 CLJ 1: 59 Bom 496: 92 IA 174: 36 Cr LJ 978: 1935 ALJ 1154: 156 Ind Cas 3.

——S. 526 — **In cases of doubt of personal impartiality of the Judge or where his acts and orders create reasonable apprehension in accused, transfer should be granted but not otherwise.**

Where any doubt can be shown as regards the personal impartiality of the presiding Judge of the Court, a transfer should immediately be granted; but where no such personal grounds can be shown a transfer should only be granted when the Magistrate has shown by his acts or orders that there is a possibility that he may be prejudiced against the accused or, at any rate, that the accused might have a reasonable apprehension that he is so prejudiced.

Such an apprehension should not arise from the ordinary acts of a Magistrate performed in the course of a case. During the conduct of a protracted trial it necessarily happens that many points arise upon which the Magistrate to give a decision, and the fact that he makes a decision against the accused is not sufficient to warrant any apprehension of impartiality if the order is passed in good faith and the reasons for the order are duly stated. AIR (V 16) 1929 Nag 172: 117 Ind Cas 213: 30 Cr LJ 728: 1929 Cr C 47.

——S. 526 — It is not sufficient to found an application for transfer that the applicant is apprehensive that he will not get a fair trial. No Court ought to interfere by an order for transfer unless it is satisfied by clear and unimpeachable evidence that the Court, or the individual, from whom it is proposed to transfer the case, has by some personal conduct rendered himself unfit, or unlikely to give the accused a fair trial. Subject to that salutary provision local people must take the local Courts as they find them. AIR (V 14) 1927 All 184: 99 Ind Cas 105: 8 LRA Cr 17: 28 Cr LJ 73: 7 A I Cr R 49.

——S. 526 — **Allegation must be examined and found true.**

If an accused person does in fact believe that he will not have a fair and impartial trial in a certain tribunal, it is in the last degree inexpedient that he should be tried by it and the case must be transferred, unless that is impossible, however high the certainty of the impartiality of that tribunal may be in the minds of all right-thinking men, and however discreditable to him the existence of that belief in his mind may be.

But the allegation of the accused, like any other, must be examined and found true before it can be accepted. The question is not whether the belief is reasonable or unreasonable but whether it exists or not though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standards of intelligence and honesty common in the class to which the accused belongs. 10 NLR 15, Not. Appr. AIR (V 13) 1926 Nag 448: 22 NLR 99: 27 Cr LJ 835: 95 Ind Cas 755.

——S. 526 — **Accused's degree of intelligence important factor.**

It is of the utmost importance that persons arraigned before the Court should have confidence in the impartiality of the Court and if a person has a reasonable cause to apprehend that the Court before whom he is being tried is not completely free from bias, a transfer should be directed. In deciding what is reasonable cause, regard must be had not so much to the motives which might be supposed to bias the judge as to susceptibility of the parties.

Hence the degree of intelligence possessed by an accused who applies for transfer must be taken into consideration while deciding his application. If the actions of the Judge though capable of being explained and though traceable to a superior sense of duty are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial the case should be transferred to some other Judge for trial. AIR (V 12) 1925 Lah 101: 25 Cr LJ 638: 81 Ind Cas 126.

——S. 526 — An erroneous view of the law is not a reasonable ground for apprehension that the case will not be properly tried. AIR (V 11) 1924 Pat 695: 77 Ind Cas 810: 5 PLT 487: 1924 PHCC 196: 25 Cr LJ 458.

——S. 526 — It is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts. Where there is anything in the case likely to create in the mind of the accused a reasonable apprehension that he may not have an impartial trial, the case would be transferred. What is "reasonable" must of course depend on the degree of intelligence of the accused. Regard must be had to the susceptibilities of the accused and his apprehensions must be given due weight to. AIR (V 10) 1923 Lah 264: 71 Ind Cas 1006: 3 Lah 443: 24 Cr LJ 286.

——S. 526 — **Accused suspecting partiality — It is better that case is transferred.**

A Magistrate in the discharge of the multifarious duties of his office has to perform a very large number of extra judicial functions and it may so happen that in the discharge of his executive duties he may be compelled to act in a way which would raise a suspicion in the mind of an accused person that he was not likely to get justice when the Magistrate came to inquire into a particular matter judicially. Therefore when an occasion has arisen to give an accused person grounds for suspicion it is advisable that the judicial trial should be held by another Magistrate, specially where such a Magistrate is easily available. AIR (V 10) 1923 Oudh 172: 74 Ind Cas 715: 24 Cr LJ 811.

**(a-1) Criterion for transfer.**

——S. 526 — In deciding if an application for transfer of a case is to be granted, what is to be considered is whether the accused has ground for reasonable apprehension that he may not have an impartial trial. (1933) 145 Ind Cas 521: 34 Cr LJ 1024 (Pat).

——S. 526 — Transfer of case from one Court to another should be freely granted where it is felt that there are reasonable grounds for a party to distrust the tribunal before whom his case is pending. AIR (V 20) 1933 Sind 361: 35 Cr LJ 147: 146 Ind Cas 586.

——S. 526 — Tests.

Section 526 does not say that a transfer may be ordered in any case where it is made to appear to the accused that a fair and impartial enquiry or trial cannot be had but says so where this is made to appear to the High Court. What is contemplated is that the Court itself should be satisfied on that point and the real test is not what the accused may reasonably or unreasonably have been led to think about it. Every case must be decided on its own facts. AIR (V 20) 1933 Sind 17: 26 SLR 255: 33 Cr LJ 908: 139 Ind Cas 791 (DB).

——S. 526 — Ground for transfer is not to be decided in abstract — What is to be determined is whether the Magistrate behaved so as to give legitimate ground for fear of impartial trial. AIR (V 17) 1930 All 737: 1930 ALJ 606: 123 Ind Cas 685: 31 Cr LJ 555: 1930 Cr C 993.

——S. 526 — The state of mind of the accused with whom the Magistrate had grown angry in a case will be taken into consideration while deciding upon an application for transfer made by him in another case if he is an ignorant villager who would be frightened by the Magistrate being angry with him in one case would believe that in another case the Magistrate would be for that reason prejudiced against him and not where he is well experienced in the art of litigation. AIR (V 17) 1930 All 495: 125 Ind Cas 32: 31 Cr LJ 764: 1930 Cr C 739.

——S. 526 — Where cross-examination by Magistrate on question suggested by Public Prosecutor after defence cross-examination arouses suspicion in mind of accused — Case should be transferred. AIR (V 17) 1930 Lah 173: 124 Ind Cas 688: 31 Cr LJ 736: 1930 Cr C 181.

**——S. 526 — Cumulative effect to be considered.**

It is not necessary, when supporting an application for transfer, to establish that there is any actual bias in the mind of the Magistrate concerned. It is the cumulative effect likely to be produced on the mind of an ordinary reasonable accused person that has to be seen. The question whether sufficient grounds are made out for a transfer is often a matter of opinion and depends on inferences to be drawn from facts that have happened. AIR (V 15) 1928 All 396: 26 ALJ 1250: 110 Ind Cas 686: 29 Cr LJ 750 (FB).

**——S. 526 — Act forms a ground for transfer.**

Where a Magistrate before disposing of a bail application consulted the District Magistrate and refused the application as advised by the latter:

Held, that though both the Subordinate Magistrate in consulting the District Magistrate and the latter in advising him in connexion with the orders to be passed on the bail application, may have acted with the best of intentions, it cannot be denied that such action on their part was wholly unjustified and was certainly calculated to raise a reasonable apprehension in the mind of the petitioner that he will not have a fair trial. AIR (V 15) 1928 Lah 1: 9 Lah 537: 29 Cr LJ 815: 111 Ind Cas 319.

——S. 526 — It is not necessary for a petitioner to establish that the Magistrate is actually prejudiced against him. All that he need prove is that the conduct of the trial by the Magistrate has been such as to cause a reasonable apprehension in the mind of the accused that he will not receive a fair trial. (1928) 109 Ind Cas 812(1): 10 A I Cr R 351: 29 Cr LJ 620 (1) (Lah).

**——S. 526 — Criterion for transfer.**

The criterion for a transfer under Cl. (1) (a), S. 526, is that the High Court must be of opinion that the applicant will not receive a fair and impartial trial in the Court below. The mere fact that the applicant entertains an absolutely unreasonable belief that he will not have a fair trial would not be sufficient to order a transfer under Cl. (e), S. 526(1), Cr. P. Code. AIR (V 15) 1928 Nag 21: 105 Ind Cas 226: 10 NLJ 184: 28 Cr LJ 898: 9 A I Cr R 49.

——S. 526 — In order to decide the advisability of transfer, the question is not whether the belief that the applicant would not get justice is reasonable or unreasonable but whether it exists or not, though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standard of intelligence and honesty common in the class to which the accused belongs. AIR (V 14) 1927 Nag 384: 28 Cr LJ 188: 99 Ind Cas 860.

——S. 526 — In an application for transfer what has to be established is a belief in the mind of the accused person that his case will not be fairly tried. AIR (V 14) 1927 Nag 48: 27 Cr LJ 1062: 97 Ind Cas 38.

**——S. 526 — Principle explained.**

It is not sufficient for the applicant for transfer merely to allege that he would not get an impartial trial, but he must place before the Court the facts which gave rise to this belief in his mind. The Court should not make an order for transfer unless it is satisfied that on the facts disclosed in the application and affidavit there arises a reasonable apprehension that the applicant may not have a fair and impartial trial.

But at the same time what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial.

The law has regard not so much to the motive which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object is to clear away every thing which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is essential to social order and security. AIR (V 12) 1925 Lah 361: 6 Lah 396: 7 LLJ 241: 26 PLR 273: 26 Cr LJ 853: 86 Ind Cas 709.

**——S. 526 — Fear of outside influence.**

Where the accused had reason for apprehending that influences outside the Court might bear upon the course of their trial, and where the Trying Magistrate recording the evidence of the identification witness slurred over the uncertainty and hesitation of the witness.

Held, that the case should be transferred. AIR (V 12) 1925 Pat 339: 84 Ind Cas 441: 26 Cr LJ 297.

——S. 526 — General rule can't be laid down.

It is difficult to lay down any hard and fast rule under which transfer is made, for the circumstances of one case might differ from those of the other but the principles under the decisions of the various cases go to establish that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he would not receive fair dealings at his trial the case should be transferred to a calmer atmosphere. AIR (V 12) 1925 Pat 115: 81 Ind Cas 78: 5 PLT 63: 2 Pat LR Cr 69: 25 Cr LJ 590.

——S. 526 — Grounds — Apprehension, reasonable.

For transfer the apprehension of the accused of not receiving a fair and impartial trial must be a reasonable one in the opinion of the Court. 1 S.L.R. 8 Diss. AIR (V 4) 1917 Sind 45: 10 SLR 183: 18 Cr LJ 644: 40 Ind Cas 292 (DB).

——S. 526 — Transfer of case — Apprehension that fair and impartial trial cannot be held — Local inquiry accompanied by partisan of complainant.

Where during the pendency of a case against the accused for the alleged cutting of a bund, the Magistrate went to the scene of occurrence accompanied by a partisan of the complainant & held local inquiry into a matter which, though not the subject of complaint against the accused, could, nevertheless, be imagined by the accused, to be such.

Held— That though there were no reasons to suppose, on the materials before the court, that the Magistrate would not bring to the trial of the case against the accused a fair and impartial mind, still under the circumstances of the case it was desirable that the trial should be held by some other Magistrate. (1908) 12 CWN 748 (750): 7 Cr LJ 510 (DB).

——S. 526, Sub-s. (8) — Transfer — Reasonable apprehension — Tests for determining — Magistrate's anxiety that the accused, if guilty should not escape punishment — Application for — Refusal — Effect on subsequent proceedings.

Where the accused in a case arising in connection with the agitation for the partition of Bengal made an application to the trying Magistrate for the postponement of the trial with a view to moving the High Court for transfer under S. 556, but the Magistrate refused the application for postponement stating it as his opinion that he could go on with the trial until the accused were called on for their defence, though, as a matter of fact, he postponed the hearing shortly afterwards on the same day after the examination of three witnesses for the prosecution, and, further in his explanation to the High Court stated that his reason for examining three witnesses before allowing the application for postponement was that he was apprehensive that the case might be settled amicably out of court and the witnesses might not afterwards be available, and, if available, might not speak the truth against the accused.

Held: Per Mitra J. (Holmwood, J., contra) that inasmuch as the order of the Magistrate on the petition for postponement and his explanation to the High Court displayed an anxiety on his part that the accused, if really guilty, should not escape punishment, they were calculated to raise, not unnaturally, in the minds of the accused, an apprehension that might not have a fair and impartial trial before him, and as such an apprehension was not, in the peculiar circumstances of the case, foolish or unfounded, case should be transferred to some other Magistrate for trial.

Although under Sub-s. (8) of S. 526, Cr. P. C., the Magistrate has authority to proceed with the case for the prosecution until the accused is called on for the defence after an application for postponement had been made to him with a view to moving the High Court for transfer, yet it is not desirable that the Magistrate should ordinarily exercise that authority, but he should unless the case is exceptional in character, grant the prayer for postponement or adjournment at once.

What is a reasonable apprehension must be decided in each case with reference to the incidents of case and surrounding circumstances, and in determining whether an apprehension is reasonable it is the duty of the court by placing itself in the position of the accused to consider the facts and circumstances attending his position. Abstract reasonableness ought not to be the standard.

Per HOLMWOOD J. — The case should be transferred in view of the technical objection that may be taken to the Magistrate's final decision owing to his having refused postponement. (1906) 10 CWN 793: 33 C 1183 (1190, 1192): 3 CLJ 637: 3 Cri LJ 477 (DB).

——S. 526 — Transfer of criminal case — Reasonable apprehension of unfair trial.

Where in a case of an alleged petty theft, the Magistrate issued warrants in the first instance and then exacted heavy bail from the accused.

Held, that the accused were justified in apprehending that they would not have a fair trial before the Magistrate. The case was accordingly transferred. (1904) 8 CWN 589 (590): 1 Cr LJ 528 (DB).

(b) Requisites.

——S. 526 — Justifiable apprehension that no fair trial will be got.

The susceptibilities of the petitioner have to be looked to and if he has a justifiable apprehension that he will not get a fair trial, the case should be transferred even if the High Court is satisfied that in fact, there is no sufficient reason to think that the trial Court will be biassed in any way against him.

Where the accused has threatened a witness and tampered with him, it is a relevant fact in the trial of the case by the Magistrate who is seized of it and will have to decide it. The District Magistrate, however, is not entitled to come to a finding on this point himself particularly as ex parte finding and take any action on it to the prejudice of the trial.

The trial having been legally entrusted to another Magistrate, there is no justification for the District Magistrate's interference by inducing the superior officer of the accused to transfer him from the place of the trial and thus interfering with the rights of the accused to defend himself. Such interference would justify the transfer of the case to another district. AIR (Vol 31) 1944 Lah 95: 46 PLR 31: 45 Cr LJ 548: 212 Ind Cas 135.

——S. 526 — Accused applying for transfer on ground that there were rumours that he had bribed Magistrate — Magistrate ordering payment of subsistence allowance to witnesses on application for adjournment — Whether sufficient grounds for transfer.

In an application for transfer, the accused stated that there were rumours that the Magistrate had received bribes from him, and that he

apprehended he would not get a fair and impartial trial as when he applied for adjournment, the Magistrate ordered him to pay subsistence allowance for the witnesses:

Held, that the Magistrate had no power to order subsistence allowance and this, in itself, was sufficient to raise an apprehension in the mind of the applicant that he will not get a fair and impartial trial and on this ground alone, the case should be transferred.

Further, because of the rumours, anybody placed in the position of the accused will apprehend that the civil officers, knowing that some allegation has been made against them, will try to clear their character by convicting him and this is an apprehension which, it is reasonable to hold, will be raised in the mind of this petitioner. On that ground also, the case should be transferred. AIR (Vol 24) 1937 Rang 311: 38 Cr LJ 963: 170 Ind Cas 841.

**——S. 526 — Apprehension real — Transfer not causing prejudice to complainant.**

In a criminal case, it is not enough that justice is done but what is more important is that the parties must feel that justice has been done. Where the accused's apprehensions, however foolish, appear to be real and no prejudice is likely to be caused to the complainant, the case should be transferred to another Magistrate for trial especially when the accused has moved for transfer at the earliest opportunity. (1936) 163 Ind Cas 677 (1): 18 NLJ 293: 37 Cr LJ 855 (1).

**——S. 526 — Apprehension should not be a fanciful one.**

Before the High Court takes into consideration an apprehension in the mind of the accused that he will not get a fair trial, the Court must be satisfied that the apprehension is not a fanciful one. AIR (Vol 23) 1936 Rang 114: 37 Cr LJ 436: 161 Ind Cas 240.

**——S. 526 — Mere apprehension if sufficient.**

Section 526 does not say that a transfer may be ordered in any case where it is made to appear to the accused that a fair and impartial enquiry or trial cannot be had, but says so where this is made to appear to the High Court. Therefore, what is contemplated is that the Court itself should be satisfied on that point and the real test is not what the accused may reasonably or unreasonably have been led to think about it. AIR (Vol 23) 1936 Sind 237: 30 SLR 327: 38 Cr LJ 133 (2): 166 Ind Cas 83 (2) (DB).

**——S. 526 — Reasonable apprehension of partiality.**

It is necessary to avoid, not only any partiality on the part of a Magistrate, but any circumstances that might lead to a reasonable apprehension of partiality in the mind of an accused person; that is to say, it is desirable not only that justice should be done but that it should be manifest to all the world that justice is being done. (1935) 157 Ind Cas 758 (1): 1 BR 811: 36 Cr LJ 1266: 16 PLT 587.

**——S. 526 — Accused reasonably apprehending unfair trial.**

Where it was alleged on behalf of the accused that there existed an atmosphere prejudicial to the accused in the District and that, on that account, he could not expect a fair and impartial trial, and it appeared that those allegations were not unfounded:

Held, that it was a proper case for transfer and that it was not necessary for the accused to show that the Magistrate was biassed against him. AIR (Vol 18) 1931 Lah 540: 32 PLR 471: 32 Cr LJ 1188: 134 Ind Cas 519.

**——S. 526 — "Reasonable apprehension of not having a fair trial" — Meaning explained.**

All that is necessary for the accused under S. 526 (1) (a) to establish is the circumstances have arisen which have afforded a reasonable apprehension in his mind that he would not receive justice in the Court of the Magistrate, it is not necessary to establish that the Magistrate is actually prejudiced. In other words, it is to be established that Magistrate has conducted himself in such a manner that there is a reasonable apprehension in his mind that he would not approach the case with an impartial mind. The apprehension, of course, must be such as a reasonable person would entertain. 127 Ind Cas 150: 31 Cr LJ 1172: 1930 Cr C 921: AIR (Vol 17) 1930 Lah 877.

**——S. 526 — Where susceptibilities of accused are moved by fact that Magistrate has outside knowledge of proceedings, case should be transferred.**

A Judge or Magistrate having outside knowledge in respect of matters which form the subject-matter of the proceedings before him and having such knowledge from outside the Court before the actual hearing of these proceedings commences is in a position of embarrassment in dealing with the case.

The question is not in these cases as to whether the Magistrate having such outside knowledge will utilise that knowledge for the purpose of decision in the case but the question is whether there can be any reasonable apprehension in the minds of the accused persons that the Magistrate having the outside knowledge before him may not be betrayed by it into taking a view which the evidence might not support.

Where the susceptibiiities of the accused persons are reasonably moved by the reason of the fact that the Magistrate has outside knowledge not based on evidence on record, the case should be transferred from him: 125 Ind Cas 275: 31 Cr LJ 805: 1929 Cr C 597: AIR (Vol 16) 1929 Cal 809 (DB).

**——S. 526 — Question to be considered is whether accused reasonably thinks that he would not have a fair trial.**

In a dealing with applications for transfer, the High Court has to consider not whether any real bias exists in the mind of the presiding Judge against the accused, but the question is whether circumstances do not exist which though they may be susceptible of explanation, are nevertheless calculated to create in the minds of the accused a reasonable apprehension that they would not have a fair and impartial trial.

In determining whether the apprehension is reasonable or not the Court has not to come to a conclusion on abstract principles but has to bear in mind the degree of intelligence of the accused.

Where the accused had a reasonable belief that they had by various acts of theirs incurred the displeasure of the District Magistrate and other local authorities, and that they would not have a fair and impartial trial in that district and the belief was strengthened by the fact that the Superintendent of Police conferred with the District Magistrate with regard to their cases before the prosecutions were actually launched and there was the further circumstance that legal practitioners at the place evaded taking up the cases of accused,

Held, that the cases of accused ought to be transferred. 28 Cr LJ 787: 104 Ind Cas 227: AIR (Vol 14) 1927 Lah 709.

**——Ss. 526, 107 — Reasonable apprehension of failure of justice — Appointment of petitioners as special constables.**

Where some of the party against whom proceeding under S. 107, Cr. P. C., was instituted were further appointed special constables, although the latter order was in abeyance at the time, they moved the High Court.

Held that in consequence of the order the petitioners might have a reasonable apprehension that they would not have a fair and impartial trial. The High Court therefore transferred the case from the Magistrate's file. (1907) 11 CWN 121 (124): 4 Cr LJ 456 (DB).

**(c) Other illustrations.**

**——S. 526 — Magistrate asking accused to subscribe to funds — Accused apprehending their refusal to be cause of cancellation of bail.**

It is extremely improper for a Magistrate who is trying a case to ask the accused to subscribe to funds for public, charitable or any other purpose as such action is liable to be misunderstood by persons who are standing their trial.

Where subsequent to the refusal of the accused to purchase war fund flags, the Magistrate cancelled their bail bonds, the accused must be deemed to have had grounds for apprehension that it was their refusal to purchase these flags which led the Magistrate to cancel their bail. The case ought, therefore, be transferred to another Magistrate. AIR (Vol 30) 1943 Pat 143: 23 PLT 715: 9 BR 247: 44 Cr LJ 420: 205 Ind Cas 576.

**——S. 526 — Issue of warrant of arrest against witness without complying with S. 70, when accused had applied for transfer.**

The power to issue a warrant of arrest under S. 90, Criminal P. C., depends on due service of the summons, and where there is nothing before the Magistrate to show that the requirements of S. 70 of the Criminal P. C., had been complied with, he has no power to order issue of a warrant of arrest.

Issue of such a warrant against the witness without complying with the requirements of S. 70, at a time when the accused had applied for the transfer to the High Court of the case from the Magistrate's Court, is very ill-advised and calculated, not merely to cause an apprehension in the mind of the accused that the Magistrate was prejudiced against him, but to go far to suggest that the Magistrate was in fact in that condition. AIR (Vol 28) 1941 Pat 206: 7 BR 166: 42 Cr LJ 103: 191 Ind Cas 193.

——S. 526 — Request to have access to papers seized by police disallowed unreasonably — Trying Magistrate demanding heavy bails — Sufficient reasons to create apprehension. 123 Ind Cas 534: 31 Cr LJ 532: 1929 Cr C 636: AIR (Vol 16) 1929 Lah 860.

——S. 526 — Copies of statements recorded under S. 164 not given to accused's counsel — Copies of statements recorded under S. 162 applied at beginning of cross-examination but not immediately supplied — Magistrate ordering accused's counsel to start cross-examination at 4-15 p. m. of witness whose chief examination lasted for whole day — These incidents gave reasonable apprehension in accused's mind that they may not have fair trial and justified transfer of case. 117 Ind Cas 377: 30 Cr LJ 760: AIR (Vol 16) 1929 Lah 429.

——S. 526 — Where the Magistrate deliberately refused to give accused facilities to prosecute his civil suit connected with the same facts; and while examining him under S. 342 put questions by way of cross-examination and did not allow accused to add to his statement when shown to him under S. 364, it was likely that the circumstances would give rise in accused's mind to reasonable apprehension that he would not get fair trial, so as to justify transfer of the case. 110 Ind Cas 801: 10 Lah 223: 30 PLR 385: 11 AI Cr R 1: 29 Cr LJ 769: AIR (Vol 16) 1929 Lah 382.

——S. 526 — Complainant exempted from personal appearance on certain dates, while accused ordered to furnish bail on his coming late on account of the missing of the train — This does not amount to a sufficient ground for transfer. 29 PLR 667: 29 Cr LJ 867: 11 AI Cr R 200: 111 Ind Cas 451: AIR (Vol 15) 1928 Lah 757.

——S. 526 — When the entire evidence in the case has been recorded and the case has been argued by the respective parties, and the only thing that remains to be done is for the Magistrate to pronounce his judgment the expression of opinion by him at this stage that the petitioner had taken a prominent part in the affair is not a reason to apprehend that the Magistrate has prejudged the case against the petitioner. (1923) 108 Ind Cas 608: 29 Cr LJ 429: 10 AI Cr R 144 (Lah).

**——S. 526 — Hospitality of complainant's son.**

Although Magistrate receives hospitality in ignorance of the fact that his host is the son of the complainant, it would naturally raise a reasonable apprehension in the mind of the accused that they would not have a fair trial in the Magistrate's Court, and a transfer should be ordered. 27 Cr LJ 565: 94 Ind Cas 133: AIR (Vol 13) 1926 Lah 347.

——S. 526 — Use of strong language by Court is never calculated to satisfy the litigant public before it. An officer is sometimes bound to feel strongly on particular occasions, but as soon as he expresses himself strongly, he gives himself away and if he raises by his language, an apprehension in the mind of a party that the Officer is prejudiced the officer has only himself to thank. Besides a calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal. 47 All 288: 23 ALJ 133: 26 Cr LJ 538: 6 LRA Cr 57: 85 Ind Cas 378: AIR (Vol 12) 1925 All 283.

**——S. 526 — Fear of superior officer's influence.**

The fear in the accused's mind that a Deputy Magistrate making an enquiry prior to commitment would be influenced by the opinion, as to the guilt of the accused, of the District Magistrate formed in the extra-judicial inquiry as to the collection of evidence and to the proper conduct of the prosecution and that he would not get justice in the Court of the Deputy Magistrate is not a sufficient ground to transfer the inquiry to another Magistrate. 93 Ind Cas 1047: 2 OWN 847: 27 Cr LJ 551: AIR (Vol 12) 1925 Oudh 731.

——S. 526 — If the Magistrate makes observations which go to show that he is not favourable to the prosecution, complainant has cause for reasonable apprehension in his mind that the case is not being tried in a fair way, and there is sufficient ground to order transfer of the case. 88 Ind Cas 993: 7 PLT 49: 26 Cr LJ 1249: AIR (Vol 12) 1925 Pat 818.

——S. 526 — Where the accused suspected that the whole atmosphere in the place of trial was against him and was afraid that the local authorities would influence the Magistrate in prejudicing his mind against the accused,

Held, that a good ground for transfer was made out. 83 Ind Cas 723: 7 NLJ 155: 26 Cr LJ 163: AIR (Vol 11) 1924 Nag 243.

——S. 526 — Where an accused was told by his vakil that the Magistrate had tried to dissuade him from defending, the accused can have no confidence in the impartiality of the Magistrate and the case should be transferred. 3 LLJ 428: AIR (Vol 8) 1921 Lah 331 (1).

——S. 526 — Where any question arises, which relates to an alleged apprehension on the part of persons who are accused of a crime to the effect that they feel even although they may have no real justification for such feeling, that they are likely to be brought before some one who has already expressed some view (possibly of a premature character or even possibly justified by an immediate impression of their case) not altogether favourable to them, it is desirable that the trial should be removed to a sphere where they will be satisfied that they had a trial and hearing entirely satisfactory to their own conscience. 63 Ind Cas 868: 2 PLT 297: 22 Cr LJ 708: AIR (Vol 8) 1921 Pat 322.

### 5. Costs.

——Ss. 526 (8), 344 — **Case adjourned — Accused, if can be asked to pay costs of the day.**

When, upon an intimation by a party under S. 526 (8), Criminal P. C., about his intention to move the High Court for transfer, the Court grants an adjournment, the adjournment is not under S. 344 which permits the imposing of terms, but under S. 526 (8) which leaves no option to the Court to adjourn when once it has been intimated to the Court that the applicant intends to move the High Court for transfer. The Magistrate has, therefore, no power to order the accused to pay the costs of the day, to the prosecution. AIR (Vol 29) 1942 Mad 178: (1941) 2 MLJ 854: 54 LW 632: 43 Cr LJ 454: 1942 MWN 384: ILR (1942) Mad 661: 199 Ind Cas 54.

——S. 526 — **Costs under S. 344.**

A Court can pass an order for costs under S. 344, Criminal P. C., and this power is not restricted by S. 526 (8) and (9). But it cannot pass a conditional order of adjournment. AIR (Vol 25) 1938 All 112: 1937 ALJ 1356 (1): 1937 AWR 1226: 39 Cr LJ 352: ILR (1938) All 233: 173 Ind Cas 385.

——Ss. 526 (8), (a), 344 — **Adjournment on condition of payment of costs.**

Accused asked for an adjournment in order to enable him to apply to the High Court for transfer. The Magistrate adjourned the case on condition that a sum of Rs. 20 was paid by way of costs:

Held, that under S. 344, Criminal P. C., a Magistrate may adjourn a case on such terms as he thinks fit but this particular adjournment was one which was covered by the provisions of S. 526, sub-s. (8), and the Court had to grant it. It is true that the explanation to sub-s. (9) says that nothing contained in sub-s. (8) or sub-s. (9) restricts the powers of a Court under S. 344, but at the same time, it is difficult to see how a Court can impose terms for granting an adjournment when it is bound to grant that adjournment whether the terms are accepted or not.

(Order for costs was set aside). AIR (Vol 23) 1936 All 851: 1936 ALJ 1123: 1936 AWR 985: 38 Cr LJ 142: ILR (1937) All 161: 166 Ind Cas 198 (1).

——S. 526 — Where it was the hasty action of the Magistrate that had resulted in the transfer of the case, the costs of the complainant in the future trial should be borne by the Crown. AIR (Vol 23) 1936 Nag 233: 37 Cr LJ 1054: ILR (1936) Nag 219: 164 Ind Cas 1065.

——S. 526 — **Affidavit containing allegations against Magistrate — Denial by Magistrate — Accused's Pleader informing Court of his inability to support application — Assessment of compensation.**

One of the accused in a criminal case swore an affidavit for an application for transfer containing allegations attributing to the trying Magistrate remarks which, if true, would undoubtedly render him unfit to be a person to continue to exercise judicial functions.

There were also statements regarding the Magistrate's conduct of the proceedings which, if believed, would cast serious reflections on the Magistrate's ability to preside over a criminal trial. At the hearing, the Advocate for the accused informed the Court that in view of the categorical denials contained in the explanation given by the Magistrate, he was not in a position to support the rule:

Held, that it was open to the Court to proceed under sub-s. (6-A) of S. 526, Criminal P. C., and when the accused did not require further opportunity to show cause, the Court might assess the compensation at the maximum fixed by the statute, viz., Rs. 250. AIR (Vol 22) 1935 Pat 120: 35 Cr LJ 1056 (2): 16 PLT 293: 150 Ind Cas 79.

——S. 526 — **Costs under S. 526 (6-A).**

Costs under S. 526 (6-A) cannot be granted when the application is not frivolous or vexatious. AIR (Vol 21) 1934 Lah 516: 36 PLR 240: 150 Ind Cas 1095.

——S. 526 — Where an application for transfer has been made without any justification and is found to be vexatious and made with the view of causing delay or otherwise hindering the course of justice, it is proper that an order under S. 526 (6-A) is passed. AIR (Vol 20) 1933 Nag 201: 34 Cr LJ 1035: 29 NLR 338: 145 Ind Cas 445 (DB).

——S. 526 — An order for costs of adjournment should not be passed in the case of an application for transfer. AIR (Vol 19) 1932 Bom 470: 56 Bom 536: 34 Bom LR 1106: 33 Cr LJ 802 (2): 139 Ind Cas 577.

——S. 526 — **Vexatious applications — Penalty.**

The High Court will exercise the powers given to it under S. 526 (6-A), Criminal P. C., in all frivolous or vexatious applications for transfer. AIR (Vol 18) 1931 Bom 206 (1): 33 Bom LR 311: 32 Cr LJ 805: 131 Ind Cas 981 (DB).

——S. 526 — Where an application for the transfer of a case has been made to the High Court and has been thrown out on the ground that it is frivolous or vexatious, the Local Government opposing the application is entitled to recover its costs from the applicants. 123 Ind Cas 330: 1930 ALJ 209: 52 All 263: 1930 Cr C 319: 31 Cr LJ 485: AIR (Vol 17) 1930 All 206 (FB).

——S. 526 — There is not and there cannot be a cast iron rule that the Crown neither pays nor receives costs. Exceptions may be grafted upon this rule by local statute. The peculiar circumstances of a case may also necessitate a departure from the said rule. 123 Ind Cas 330: 1930 ALJ 209: 52 All 263: 1930 Cr C 319: 31 Cr LJ 485: AIR (Vol 17) 1930 All 206 (FB).

### 6. Duty of counsel.

——S. 526 — **Allegations by Advocate on instructions of client.**

Though an Advocate cannot pledge himself for the truth of his client's allegations, being an officer of the Court, it is his bounden duty to take some steps to verify the truth of the allegations he is instructed to make. It is his duty to assist the Court in the administration of justice and is not mere mouthpiece of his client. If an Advocate makes reckless and false allegations against a Magistrate in the application for transfer on the instructions of his client without taking any steps to verify the truth of those allegations, he is unfit to enjoy the privileges conferred upon him by law and must be visited with punishment. AIR (Vol 31) 1944 Sind 155: ILR (1944) Kar 133: 217 Ind Cas 182: 46 Cr LJ 223.

——S. 526 — **Statements of clients should be tested by pleader.**

Although it is perfectly true in one sense that a legal adviser must accept statements of fact from his client yet in applications for transfer statements imputing prejudice or unfairness or corruption to Magistrates should not be made unless the statements of the client as tested by the adviser are found sustainable, unless they are found to be corroborated and unless adviser has taken some steps not necessarily to pledge himself for his client's veracity but such as to give him, as a reasonable man, ground for belief that the statements at any rate are such as should be properly investigated.

The duty of the legal profession is a very serious one both with regard to applications of this kind and also in respect of pleadings. An application for transfer drafted by mukhtar contained a statement which would have been considered as a statement that there was such a relationship between the Magistrate and the person who was mentioned as having visited him, as to make it undesirable that Magistrate should sit and try a case in which the interests of that person were adversely affected. The statement was found to be totally unfounded and untrue.

Held, that the mukhtar was guilty of professional misconduct. 116 Ind Cas 762: 8 Pat 575: 10 PLT 711: AIR (Vol 16) 1929 Pat 151 (FB).

——S. 526 — Although every application for adjournment for the purpose of a transfer indirectly implies that there is a belief in the mind of the accused person that he would not have a fair trial, an application for adjournment under S. 526 does not always amount to an allegation of partiality made by the accused's vakil against the trying Magistrate. If an application is made in good faith, the mere fact that it turns out subsequently that there are not sufficient grounds for transfer would not lead to a necessary inference that there was misconduct on the part of the practitioners who were responsible for such an application. 26 ALJ 1250: 110 Ind Cas 686: 29 Cr LJ 750: AIR (Vol 15) 1928 All 396 (SB).

### 7. Duty of court.

See also N. 1.

(a) General.
(b) Considerations for transfer.
(c) Magistrate, duties of.

### (a) General.

——S. 526 — **Explanation of judicial officers in regard to allegations in transfer applications — Duty to use dignified language.**

The High Court expects judicial officers in answering allegations made in the affidavits filed in support of applications for transfer to use dignified language. It is not desirable for any learned judicial officer in his answers to show peevishness.

Where the allegations refer to denial of opportunity to counsel to argue, it is undesirable for the judicial officer to make caustic general remarks about the Bar. There should be complete co-operation between the Bench and the Bar. In answering such affidavits, Courts ought not to display loss of temper. A bare statement in a co-herent manner of the truth or otherwise of the allegations against them is what is expected of Courts in answering affidavits. 1950 ALJ 524: AIR (Vol 37) 1950 All 735: 1950 AWR 534.

——S. 526 — **Grounds for transfer of case — Duty of Court in regard to reception of evidence.**

In order to justify a transfer the Court must be satisfied that there is reasonable ground for apprehension in the mind of the accused. A mere feeling which is not justified by the action of the Court trying the case, cannot be sufficient.

While it should not be the object of a Court necessarily to secure conviction and to fill up the gaps in the evidence of the prosecution, it cannot equally be the business of the Court to bring about a failure of justice by not exercising its powers in clearing up what is not evident from the record merely from a fear that an accused person might possibly take it as an indication of the working of the Court's mind against him. 1947 OA (CC) 124: 1947 AWR (CC) 124: 1947 OWN 483: 1947 A Cr C 160: AIR (Vol 35) 1948 Oudh 103: 49 Cr LJ 126.

——S. 526 — **District Magistrate's order dismissing application for transfer — Refusal to supply copy of order and statement of prosecution witnesses.**

An order of a District Magistrate dismissing an application for transfer is a judicial order and a copy of which ought to be given on requisition. It is absurd for the Court to refuse to supply the copy on the ground that the District Magistrate's sanction was necessary. Where the copy is refused on such a ground together with refusal to supply copy of statement of prosecution witnesses, the party has a reasonable apprehension that he may not receive a fair trial in the Magistrate's Court and in such a case, the case should be transferred under S. 526 (1) (a). AIR (Vol 27) 1940 Lah 283: 42 PLR 192: 41 Cr LJ 756: 189 Ind Cas 605.

——S. 526 — **Tactics to delay disposal of case.**

Where the applicant suppresses that certain prior applications were dismissed as being baseless and it appears that he had resorted to tactics of delaying the disposal of the case by devious means, the application should be dismissed. AIR (Vol 20) 1933 Sind 361: 35 Cr LJ 147: 146 Ind Cas 586.

——S. 526 — **Proper application for transfer should be insisted upon when allegations are made against trial Magistrate.**

It is no doubt true that a District Judge can transfer a case suo motu, but when action is taken at the instance of a party, a proper application should as a rule be insisted upon, specially when allegations are made against the trial Magistrate.

The functions of the District Magistrate under S. 528 which empowers him to transfer cases from the Courts of the Magistrate subordinate to him are judicial functions and must be exercised with due observance of the procedure and formalities which have to be followed in all other judicial matters.

He must be moved by a proper application openly presented in the Court by the aggrieved party personally or through a person duly authorized by him for that purpose. Sufficient ground for transfer must be shown and notice to the other side must be issued before order for transfer is passed. The Magistrate has also to record his reasons for transferring the case. AIR (Vol 17) 1930 Lah 168: 1930 Cr C 176: 121 Ind Cas 374: 31 Cr LJ 257.

——S. 526 — **Power to pass emergent orders.**

When an accused person presents an application under S. 526, Cl. (8), Cr. P. Code, it is the duty of the Court to stay all judicial proceedings, that is, that the Court should not go on hearing the case which was before it; but it is not right to say that as an effect of the application the jurisdiction of the Court ceases and that the Court cannot pass any emergent order which the law authorizes it to pass. AIR (Vol 15) 1928 All 268: 26 ALJ 398: 9 AI Cr. R 269: 9 LRA Cr. 37: 108 Ind Cas 569: 29 Cr LJ 448; 9 LRA Cr 102: 10 AL Cr R 142.

——S. 526 — **Transfer even at advanced stage of trial — When ordered.**

If good grounds for a transfer of a criminal case are made out, the Court ought not to refuse it merely because the case has reached an advanced stage or that the transfer may entail expense and trouble to all concerned. A Magistrate made certain premature and ill-advised remarks regarding the testimony of certain defence witnesses and held out threats to the accused regarding the sentence and the effect of his application for transfer of a case.

From all this it appeared that the attitude of the Magistrate towards the accused was hostile to them: and a reasonable apprehension was created in the mind of the accused that he would not get justice from him. The trial of the case however, was so far advanced that the entire evidence for the prosecution and the defence had been recorded and a date was fixed for the hearing of arguments.

Held, the case was a fit one for ordering a transfer. 113 Ind Cas 321: 10 Lah 778: 12 AI Cr R 96: 30 Cr LJ 129: AIR (Vol 15) 1928 Lah 975.

——S. 526 — Whether apprehensions of the accused are true or not, it is not for the appellate Court to decide; it is enough for the transfer of the case if he has reasonable ground for such an apprehension. (1928) 107 Ind Cas 160: 9 AI Cr R 486: 29 Cr LJ 299 (DB) (Pat).

**——S. 526 — Re-trial — Order after quashing conviction — Re-trial by another Magistrate is advisable.**

Where accused have once been convicted and the conviction is upset by superior Court and re-trial ordered, unless it is impossible to get a Magistrate other than the one who has already convicted the accused or unless there be circumstances which would necessitate the trial of the same case before the same Magistrate over again, it is desirable that the trial should not be held before the same Magistrate. 30 CWN 1002: 27 Cr LJ 1188: 97 Ind Cas 948: AIR (Vol 13) 1926 Cal 1173 (DB).

——S. 526 — S. 526 is imperative and at any stage an accused notifying to the Court his intention to apply for transfer the Court must postpone the case for giving reasonable time for making the application. AIR (Vol 11) 1924 All 533: 83 Ind Cas 699: 22 ALJ 430: 5 LRA Cr 57: 26 Cr LJ 139.

——S. 526 — A case having once been dismissed on the report of the police by a Magistrate was resurrected in the form of a complaint at the suggestion of the Revenue Assistant. The Magistrate subsequently noted that as he had expressed an opinion on the case, he thought it better he should not try it.

Held, that this was a good ground for transfer. Applications for transfer giving good reasons, if the allegations be correct, why a case should be transferred, require to be seriously dealt with and should not be casually brushed aside as fazul. AIR (Vol 11) 1924 Lah 257 (1): 5 LLJ 520.

**——S. 526 — Violation of S. 138, Evidence Act.**

Generally it is not the province of the Court to examine witnesses and as a rule of the Court the Court should leave the witnesses to the pleaders to be dealt with as is provided for in S. 138 of the Indian Evidence Act; where therefore the Court took the witnesses into its own hands and proceeded with their examination and they were not permitted to be examined by the complainant or his pleader. Held, that a ground for transfer of the case was made out. 82 Ind Cas 154: 11 OLJ 333: 25 Cr LJ 1226: 27 OC 246: AIR (Vol 11) 1924 Oudh 371.

**(b) Considerations for transfer**

**——S. 526 — Application under — Consideration.**

In deciding an application under S. 526, Cr. P. Code, for transfer, what the Court has to see is whether on the facts established a reasonable apprehension is likely to arise in the mind of the applicant that he is not likely to have a fair and impartial trial. ILR (1948) All 280: 1948 ALJ 63: 1948 OA (HC) 66: 1948 AWR (HC) 66: AIR (Vol 35) 1948 All 242: 49 Cr LJ 315: 1948 ALW 181.

**——S. 526 — Transfer — Guiding principle.**

The ruling principle to be followed in the transfer of cases under S. 526, Cr. P. Code, is that not only justice should be done, but it should also appear to have been done. AIR (Vol 34) 1947 Pat 166: 12 Cut LT 60: 27 PLT 257.

——S. 526 — Transfer — Considerations — Question as to admissibility or cogency of evidence to be led —Relevancy. See 222 Ind Cas 431: 47 Cr LJ 455: AIR (Vol 33) 1946 Sind 1.

——S. 526 — It is necessary not only that justice should be done but that it should appear that justice is being done. AIR (Vol 25) 1938 Pat 238: 4 BR 533: 39 Cr LJ 527: 175 Ind Cas 110.

**——S. 526 — In considering transfer application, the Court should put itself in position of petitioner.**

The standard which the High Court has to place before itself in order to decide the propriety or otherwise of transfer is the standard of the petitioner.

What the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge are nevertheless such as are calculated to create in the mind of the applicant, a justifiable apprehension that he would not have an impartial trial. AIR (Vol 24) 1937 Cal 64: 41 CWN 188: 38 Cr LJ 344: 64 CLJ 532: 167 Ind Cas 251 (DB).

——S. 526 — In dealing with an application for transfer, the Court has to consider not merely whether there has been any real bias in the mind of the presiding Judge against the applicant, but whether incidents may not have happened which, though they may be susceptible of explanation, are nevertheless such as are calculated to create in the mind of the applicant, a justifiable apprehension that he would not have an impartial trial.

Where the accused honestly entertain such an apprehension, the case should be transferred, specially where the trial has not yet commenced, as no administrative inconvenience will be caused by such transfer, but the accused cannot be permitted to choose their own Court. AIR (Vol 21) 1934 Oudh 452. 11 OWN 1193: 35 Cr LJ 1483: 151 Ind Cas 1003.

**——S. 526 — Consideration before the Court.**

The important point to be considered in an application under S. 526 is the fact as to the impression created in the mind of the accused. When the lower Court has not committed a gross error in exercising its discretion, the High Court should not set aside its order. AIR (Vol 20) 1933 Rang 89: 34 Cr LJ 832: 144 Ind Cas 677.

**——S. 526 — Principles to be considered — Re-transfer to same Court merely on ground of convenience.**

In considering the question of transferring a case from one Court to another, the principle to be followed is that it is not so much a matter of convenience nor of possible injustice, which has to be considered, but it is the apprehension in the minds of the accused persons and incidentally the public which ought to be taken into account, although it is most undesirable that there should be any feeling on the part of the accused persons or of the general body of citizens, that any trial which may

lead to conviction should have been tainted with the slightest suspicion of unfairness.

Where a case has been transferred from the Court of one Magistrate on the ground of an apprehension in the mind of the accused that he would not have a fair trial, it should not be re-transferred to the same Magistrate merely on the ground of convenience. AIR (Vol 20) 1933 Rang 9: 35 Cr LJ 272: 147 Ind Cas 126 (DB).

——S. 526 — In dealing with an application for transfer what the Court has to consider is not so much the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but it is the question whether by the remarks of the Judge a reasonable apprehension is created in the mind of the applicant that he would not have an impartial trial. AIR (Vol 15) 1928 Lah 975: 113 Ind Cas 321: 10 Lah 778: 12 AI Cr R 96: 30 Cr LJ 129.

**——S. 526 — Bona fide apprehension by reasonable man that accused will not receive fair trial is sufficient ground — Magistrate convicting other persons on similar evidence is no ground.**

The policy of law is to inspire confidence in the minds of the accused persons in the administration of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilities of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds which a reasonable person placed in the position of an accused person considers to be sufficient for entertaining apprehension that the accused will not have a fair trial in the Court of the Magistrate then an order for transfer should be made.

The mere fact that the Magistrate has on a previous occasion tried other cases against other accused on similar evidence and convicted them is no ground for transfer. AIR (V 15) 1928 Lah 460: 29 Cr LJ 295: 107 Ind Cas 783.

**——S. 526 — Criminal trial — The real question.**

In regard to a petition to transfer a case from one Magistrate to another the question to be considered is whether it is possible from the accused's point of view to say that his apprehension is not reasonable. Where it was alleged that the complainant was closely associated with the Magistrate's brother in electioneering work and the Magistrate himself was assisting his brother in electioneering.

Held, that under the circumstances the accused's apprehension of unconscious injustice was not unreasonable, held further that no slur was thereby cast on the Magistrate. AIR (Vol 11) 1924 Cal 981: 81 Ind Cas 560: 39 CLJ 330: 25 Cr LJ 944.

**——S. 526 — Grounds.**

A criminal case ought not to be ordinarily transferred; but it should be transferred when it is found that either of the party has a financial hold or other association with the trying Magistrate. AIR (Vol 7) 1920 All 195(2): 58 Ind Cas 923: 21 Cr LJ 843.

**——S. 526 — Grounds — Transfer of Criminal case.**

The transfer of a criminal case should be ordered only where on the application a reasonable inference arises as to the Magistrate's partiality against the accused. The fact that the accused thinks he cannot have an impartial trial is immaterial. AIR (Vol 1) 1914 All 241: 12 ALJ 33: 14 Cr LJ 666: 21 Ind Cas 906.

**——Ss. 526 and 528 — Grounds — Principles guiding.**

In effecting transfers of Criminal cases considerations should be had to the susceptibilities of the litigant parties and due regard should be paid to any reasonable apprehension which an accused might entertain as to the impartial trial, he might have at the hands of a tribunal. AIR (Vol 1) 1914 Nag 6: 10 NLR 15: 15 Cr LJ 196: 22 Ind Cas 980.

——S. 526 — Per Aston J.— Ordinarily, before a transfer is granted, it is well that the judge should be satisfied, if want of confidence is alleged, there should be foundation for such want of confidence. (1904) 6 Bom LR 856 (860, 861) (DB).

**——S. 526 — Transfer of case — Consideration for.**

In transferring a case from one Magistrate to another, the court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate, but must look to the effect likely to be produced in the minds of the parties and their witnesses, by the selection of a Magistrate. (1901) 25 B 179 (183): 2 Bom LR 755 (DB).

**(c) Magistrate, duties of.**

——S. 526 — Where rule of law is absolute in terms, the said rule has got to be observed and duly given effect to, and it is no province of a Magistrate to deviate from the said rule. 1930 ALJ 547: 124 Ind Cas 17: 31 Cr LJ 590: 1930 Cr C. 375: AIR (Vol 17) 1930 All 263.

——S. 526 — It is not proper for a Magistrate to frequently cross-examine prosecution witnesses or disallow questions which the complainant may desire to put to the defence witnesses for the purpose of showing their partiality but if the Magistrate acts in such a manner the complainant cannot thereby be held to have reason to apprehend that the Magistrate will not give a fair trial to his case. AIR (V 12) 1925 Oudh 52 : 25 Cr LJ 1185 : 82 Ind Cas 49.

**——S. 526 sub-section (8) — Duty of Magistrate — Application for transfer—Examination of witnesses thereafter.**

Under S. 526 (8) it is not incumbent on the Court to stay all proceedings in the case as soon as an application for adjournment was made but the Court is only bound to give such an adjournment as would afford a reasonable time for the application for transfer being made and an order passed thereon, before the accused is called on for defence. AIR (Vol 7) 1920 All 277 : 18 ALJ 1145 : 59 Ind Cas 376.

**——S. 526 — Duty of Magistrate — Stay of proceedings — Telegram by Vakil.**

A Magistrate acts injudiciously in proceeding with a case ignoring a private telegram from the vakil who has obtained a Rule in the High Court staying further proceedings. (1912) 16 CWN 1031: 13 Cr LJ 766: 17 Ind Cas 78 (DB).

**——S. 526 (8) — Duty of Magistrate — Sufficiency or insufficiency of reasons by whom to be decided.**

After an application for transfer under S. 526 (8) has ben made, a Magistrate can hear and record all evidence for the prosecution, if he considers that the grounds for transfer are insufficient and unlikely to be acceded to by a Superior Court.

But when the evidence for the prosecution is completed, he must irrespective of the sufficiency or insufficiency of the grounds set forth for transfer, allow a fair and reasonable opportunity to the accused, to apply for a transfer before calling upon him for his defence.

The High Court, and not a Magistrate is to decide, whether the grounds set forth for a transfer are good or not. Unless full opportunity is given to an accused applying for a postponement of the case to enable him to apply for transfer before he is called upon for his defence, the proceedings are void. (1912) 254 PLR 1912: 42 PWR 1912 Cr: 1 PR Cr 1913: 13 Cr LJ 746: 17 Ind Cas 58.

——S. 526 — Duty of Magistrate.

The refusal by a Magistrate to grant a reasonable opportunity for the accused to apply for a transfer before putting him on his defence is illegal under S. 526 (8) of the Cr. P. C., and proceedings subsequent thereto are also illegal. (1910) 3 SLR 155: 10 Cr LJ 570: 4 Ind Cas 379.

——S. 526 — Trial Magistrate importing his own knowledge of the accused in the case.

A Magistrate trying an accused person ought not to import his own knowledge of, or as regards, the accused into the case. (1904) 6 Bom LR 480 (481) (DB).

——Ss. 526, 527 — Transfer — Plea that applicant wishes to summon the trying Magistrate as a witness.

In an application for the transfer to another court of a criminal case pending against them the applicants alleged that the evidence of the trying Magistrate would be required by the accused touching certain matters connected with the case.

Held, inasmuch as the Magistrate was bound under S. 257, Cr. P. C., to issue a summons unless he considered that the application for a summons was made for the purpose of vexation or delaying or defeating the hands of justice, it was not proper to leave the decision of the suit in question to the Magistrate whose evidence was required, and that the application for transfer ought to be granted. (1904) AWN 94: 26 A 536 (537).

——S. 526 — Transfer of proceedings for good behaviour — Grounds for — Magistrate instituting proceedings on his own knowledge.

If a Magistrate institutes proceedings under S. 110 of the Code of Criminal Procedure on materials based on his own knowledge. he should not himself proceed with the trial. (1902) 6 CWN 595 (595): 29 Cal 392 (DB).

8. Fair trial.

——S. 526 — The use of the expression that the counsel is "fishing out a case" is likely to create an apprehension in the mind of the accused persons that they will not have a fair and impartial trial. AIR (Vol 31) 1944 Nag 320: 1944 NLJ 396: 46 Cr LJ 601: ILR (1945) Nag 533: 219 Ind Cas 337.

——S. 526 — Challan placed before Prosecuting Inspector on February 22, 1941 — On same day, challan placed before Sub-Divisional Magistrate in Court when on tour together with prosecution witnesses all of whom were examined — Next day Magistrate directing release of accused on bail and fixing March 5, 1941 for defence evidence — Accused actually released on March 4, 1941 when security was furnished — Counsel on March 5, 1941 asking for adjournment to recall prosecution witnesses for cross-examination — Request refused on ground that accused had "legal opportunities of cross-examination":

Held, that the accused was entitled to adjournment — Case, held, should be transferred. AIR (Vol 28) 1941 Lah 414: 43 Cr LJ 179: 197 Ind Cas 446.

——S. 526 — Expense, even if considerable must be incurred for proper administration of justice.

Even if considerable expense is incurred by the State in the proper administration of justice, yet that expense must be incurred and injustice must not be perpetrated simply because justice is expensive. AIR (Vol 25) 1938 Rang 198: 39 Cr LJ 576: 175 Ind Cas 350.

——S. 526 — Justice should appear to have been done.

It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. One important object is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promise the feeling of confidence in the administration of justice which is so essential to social order and security. AIR (Vol 24) 1937 Cal 64: 41 CWN 188: 38 Cr LJ 344: 64 CLJ 532: 167 Ind Cas 251 (DB).

——S. 526 — Appeal after re-trial on remand before same Appellate Court.

Where an Appellate Court sets aside the conviction under S. 366, I. P. C., and remands the case for retrial holding that there is a prima facie case under S. 360 or S. 366-A, and on a conviction after the remand, the accused files an appeal before the same Appellate Court, his application for transfer of the appeal to another Court is justified and in the interest of justice it should be allowed. AIR (Vol 24) 1937 Lah 652: 39 PLR 78: 39 Cr LJ 28 (2): 171 Ind Cas 791.

——S. 526 — Court not to act so as to raise fear in accused that Court has made up its mind.

It is always desirable that in his anxiety to dispose of a case, the Magistrate should not act in a manner which may raise a fear in the mind of the accused that he has already made up his mind. AIR (Vol 24) 1937 Pat 131: 3 BR 379: 17 PLT 622: 38 Cr LJ 484· 167 Ind Cas 881.

——S. 526 — Magistrate's duty — Justice should be seen to be done.

It cannot be impressed too strongly on all judicial officers that they should deal at arm's length with persons engaged or interested in cases pending before them and should so conduct themselves as not to allow an impression to be created that they are on terms of undue familiarity with one of them. It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. AIR (Vol 21) 1934 Lah 541: 35 PLR 478: 36 Cr LJ 192: 152 Ind Cas 896.

——S. 526 — Impartiality — Attempt to interfere with Judicial Officer — Impropriety of — Litigants' right to fairness.

Every order passed by a Judicial Officer should be the outcome of his own impartial and unprejudiced opinion. Any attempt to interfere with a Judicial Officer in the exercise of his judicial functions is not to be permitted, and any person who seeks to approach a Judicial Officer in connection with a proceeding that is sub judice before him otherwise than in the manner permitted and prescribed by law will incur reprobation of all right thinking people, and will be subjected to such pains and penalties as the Court has at its disposal. It is highly improper for any Judicial Officer to direct or influence a Judicial Officer subordinate to him regarding an order which might be passed by the latter in exercise of the jurisdiction with which he has been entrusted. Judges and Magistrates should not only be fair and impartial but also should appear to reasonable persons to be fair and impartial, and that neither accused persons nor litigant's should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned is biassed either in their favour or against them. AIR (Vol 19) 1932 Rang 90: 137 Ind Cas 675: 10 R 180: 33 Cr LJ 550.

——S. 526 — Copy of statement of witnesses to police — Refusal to grant.

When a copy of a written statement made by a witness before the police is asked for, it is the bounden duty of the Magistrate, and it does not depend upon his volition or good-will that he should refer to the statement made before the police and furnish a copy or record a definite order that he did not think it expedient in the interests of justice to furnish the accused with the copy.

Nor can he insist upon a written application for the same an oral request being sufficient. Therefore insistence on a written application and refusal to grant copies on misapprehension of law laid down under S. 162, or on other flimsy pretext are enough circumstances to give the accused person reasonable belief that the Magistrate had no desire to be fair to him. AIR (V 17) 1930 All 737: 1930 ALJ 606: 123 Ind Cas 685: 31 Cr LJ 555: 1930 Cr. C 993.

——S. 526 — The observations alleged to be made by the Magistrate in another case, which are derogatory of the complainant cannot be held to indicate that the complainant will not have a perfectly fair trial in deciding, first, a matter of accounts only and secondly, a question as to the criminal liability not of the complainant but of the accused in the case. AIR (V 17) 1930 Bom 477: 54 Bom 553: 32 Bom LR 1123: 32 CrLJ394: 1930 Cr C 1065 (FB).

**——S. 526 — Duty of Magistrate — Magistrate should not allow his executive zeal to outrun judicial discretion.**

It is one of the most important duties of a Court of law to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them.

Where a Magistrate declined to summon all the witnesses cited on behalf of the accused and took upon himself the duty of arbitrarily selecting only a few witnesses who were to be summoned to give evidence for the defence, adjourned the case for hearing at an out of the way place and continued the hearing in spite of High Court's order directing the Magistrate to give every reasonable facility to the accused to produce his defence evidence, and to hold the trial of the case either at the headquarters of the district or at a place which is either a railway station or easily accessible from a railway station and on closure of the case, called the accused and his counsel in the middle of the night and pronounced judgment at 1 A.M. inflicting upon the convict the maximum term of imprisonment permissible

Held, that the proceedings taken by the Magistrate show that he did not hear the case with that judicial detachment which should characterize the trial of a criminal case, and that he allowed his executive zeal to outrun his judicial discretion. AIR (V 15) 1928 Lah 125: 107 Ind Cas 100: 29 PLR 14: 29 Cr LJ 212: 9 AI Cr R 505.

——S. 526 — The mere fact that a police officer, who was in Court, addressed the Magistrate during the proceeding is not a ground for suspecting that the Magistrate would be prejudiced in the trial and that the accused would not receive a fair trial. AIR (V 14) 1927 Oudh 294: 1 LC 186: 28 CLJ 902: 105 Ind Cas 230.

**——S. 526 — Grounds — Fair and impartial trial not expected.**

Where it is shown that a fair and impartial trial cannot be had or that the transfer is expedient in the interests of justice a case can be transferred.AIR (V 1) 1914 All 21: 15 Cr LJ 368: 23 Ind Cas 736.

**——S. 526 — Ground for transfer.**

When an accused honestly believes that he may not have an impartial trial, before a Magistrate, the case should be transferred from his Court to another Court. (1913) 4 PWR 1913 Cr: 14 Cr LJ 286: 154 PLR 1913: 19 Ind Cas 718.

**——S. 526 — Fair trial — Possible apprehension of bias.**

Where the transfer was sought by the prosecution on the allegation that the Bettian Raj which was under the Court of Wards had an interest in the case and the District Magistrate who was one of the chief executive authorities connected with the Court of Wards ought not to try it.

Held that there were sufficient grounds for granting a transfer. Where it is impossible to prevent persons from having an apprehension that there might be some bias in the mind of the Magistrate inclining him to look with favour upon the interest of any party, a transfer should be granted. (1904) 8 CWN 77 (80) (DB).

——S. 526 — It is expedient for the ends of justice to direct the transfer of a criminal case from one court to another if circumstances have so transpired as to lead the accused to entertain a reasonable apprehension that he may not have a fair trial. In making such an order the High Court considered the convenience of the other side and directed the Crown to pay the expenses of his witnesses. (1904) 8 CWN 75 (76) (DB).

See also (1909) 36 C 904 (906): 10 Cr LJ 944: 3 Ind Cas 88 (DB).

**9. Grounds.**

See also N 4.

**(a) Absence of bias.**
**(b) Absence of legal advice.**
**(c) Apprehension.**
**(d) Bias.**
**(e) Communal feeling.**
**(f) Convenience.**
**(g) Cross complaints.**
**(h) Discussion outside.**
**(i) Delay.**
**(j) Friendship.**
**(k) Favour.**
**(l) Hostility.**
**(m) Harassment.**
**(n) Hurry.**
**(o) Intricate case.**
**(p) Improper procedure.**
**(q) Interest.**
**(r) Local influence.**
**(s) Magistrate's action in other capacity.**
**(t) Opinion formed.**
**(u) Relation.**
**(v) Reality of.**
**(w) Substantiation of.**
**(x) Subordination of Magistrate.**
**(y) Other grounds.**
**(z) What is not.**

**(b) Absence of bias.**

**——S. 526 — Absence of bias but reasonable apprehension.**

Where there is no reason to suppose that the Magistrate has any real bias against the accused, but, on the other hand, the circumstances of the case are such that the petitioner is bound to entertain a reasonable apprehension in his mind that he will not get a fair trial, he has the right to get his case transferred. (1934) 151 IC 669 (670): 35 PLR 702: 35 Cr LJ 1380.

——S. 526 — Where the Magistrate was clearly wrong in refusing to grant copies of statements previously recorded and made by prosecution witnesses but where his order was a bona fide one made under a genuine mistake of law.

Held, that the Magistrate did not act under any bias or prejudice and therefore an application for transfer on that ground could not be granted. AIR (Vol 16) 1929 Nag 172: 117 Ind Cas 213: 30 Cr LJ 728: 1929 Cr C 47.

**(b) Absence of legal advice.**

**——S. 526 — Magistrate showing haste in trial of case — No opportunity to accused to engage proper legal assistance.**

Where the Magistrate has displayed far too much haste in the trial of the case and has wrongly fail-

ed to give the accused opportunity to engage such legal assistance as he thought proper, the conduct of the Magistrate, though not inspired by any unfair motives, is such as to fill the mind of the accused, not unreasonably, with an apprehension that he will not secure a fair and impartial trial before him and the accused, therefore, can get his case transferred to another Magistrate. AIR (Vol 25) 1938 Rang 198: 39 Cr LJ 576: 175 Ind Cas 350.

——S. 526 — Where certain proceedings under S. 107, Cr. P. Code, assumed an importance of their own in the locality and it appeared that the accused could not get legal assistance because their lawyers were systematically worried by the authorities and an application was made on their behalf for transfer.

Held, that the cases should be transferred for trial to another place where a more calm and quiet atmosphere prevailed. AIR (Vol 17) 1930 Lah 954: 31 PLR 694: 1930 Cr C 1050.

——S. 526 — Where no practitioner in a district ordinarily employed in criminal cases is willing to act for the accused, it is a good ground for transfer of the case to another district. AIR (Vol 12) 1925 Oudh 672: 88 Ind Cas 1048: 2 OWN 682: 26 Cr LJ 1272.

**——S. 526 — Grounds — Executive order hampering defence — Allegation against the trying Magistrate — Absence.**

A member of the Police Force was prosecuted on a charge of extortion. He moved the High Court for transfer alleging that by reason of the order of his superior officers he was practically detained in the police lines and not allowed to go out to see legal practitioners. There was no allegation against the trying Magistrate. The High Court condemned the action of the authorities in detaining the petitioner in the manner above stated and directed that full opportunity must be given to the petitioner to consult legal advisers. AIR (Vol 6) 1919 Cal 156: 23 CWN 479: 20 Cr LJ 230: 49 Ind Cas 854 (DB).

(c) Apprehension.

**——S. 526 — Ground for transfer — Apprehension of accused — Excise case — Magistrate and Superintendent of Excise coming to place of trial in same car.**

It cannot be reasonably said that where an excise case is pending against an accused person and the Superintendent of Excise, a relation of the trying Magistrate, comes with the trying Magistrate to the place of trial in the same car, the accused person would have no apprehension at all that he would not get a fair and impartial trial. It is not desirable that an accused person should be perturbed by circumstances such as these which may be quite innocent when explained.

A Magistrate ought to refrain from giving cause to an accused person likely to be so misunderstood as to engender a belief that he would not get a fair trial. On the principle that justice should not only be done but must appear to be done, the case ought to be transferred from the file of the trying Magistrate. AIR (Vol 36) 1949 Assam 49: 50 Cr LJ 100 (DB).

**——S. 526 — Grounds for transfer — Reasonable apprehension in the mind of accused that he will not have a fair trial and justice — Test — Refusal of Magistrate to grant exemption from personal appearance to pardanashin — If grounds for transfer.**

Where on the facts it is found that there may be a reasonable apprehension in the minds of the accused that they shall not have justice at the hands of the Magistrate the case must be transferred to another Magistrate. Where the Magistrate refuses to give effect to the provisions of S. 205 of the Cr. P. Code exempting a pardanashin from personal appearance, the reluctance of the Magistrate to give the exemption might have raised a reasonable apprehension in the minds of the accused that they will not have a fair deal.

Though the Magistrate has a discretion under S. 205 as the attitude was responsible for generating a genuine feeling of apprehension in the mind of the accused the case must be transferred to some other Magistrate. It is a matter of public policy that justice should not merely be done but appear to be done. AIR (Vol 34) 1947 All 13: 225 Ind Cas 242: 47 Cr LJ 704: 1946 ALJ 303: 1946 ALW 339 (2): 1946 AWR (HC) 435.

**——S. 526 — Grounds for transfer — "Reasonable apprehension" — Principles.**

The principle is quite clear that apart from the susceptibilities of the accused, if circumstances do exist or events have happened, which are calculated to create in the mind of the accused the reasonable apprehension that he will not be fairly treated at his trial, the transfer should be made. AIR (Vol 34) 1947 Bom 409: 231 Ind Cas 254: 48 Cr LJ 721: 49 Bom LR 346 (DB).

**——S. 526 — Ground for transfer — Apprehension of accused that Magistrate might use outside knowledge against him.**

Where before the actual hearing of the proceedings commenced in his Court the Magistrate got some information about the case which induced him to order an enquiry by the police.

Held, that the apprehension in the mind of the accused that the outside knowledge obtained by the Magistrate might be utilised against him was not only real but reasonable and the transfer of the case from his Court was fully justified. AIR (Vol 34) 1947 Pesh 18: 231 Ind Cas 38: 48 Cr LJ 661.

**——S. 526 — Transfer application — Grounds — Magistrate starting a separate case on charges mentioned in challan but not proceeded with by Public Prosecutor.**

Police challan for offences of hoarding and also of profiteering — Public Prosecutor proceeding only on charges of profiteering — Trying Magistrate asking Public Prosecutor either to lead evidence in the charge of hoarding or to withdraw that charge — The latter stating that he would withdraw the charge later on if he finds necessary — The Magistrate starting a separate case against accused, on his own responsibility and asking Public Prosecutor to give the list of prosecution witnesses — Public Prosecutor refusing to give the list

Held, that the Magistrate in not accepting the ipse dixit of the Public Prosecutor, acted quite properly in the exercise of S. 494 and his action cannot be a justifiable and a reasonable ground for the accused to consider that he could not get a fair and impartial trial before that Magistrate. AIR (Vol 32) 1945 Cal 488 (DB).

——S. 526 — The fact that the District Judge who heard the appeal from the order directing the filing of a complaint under S. 476 is to try the case itself, as a Sessions Judge might cause a reasonable appre-

hension in the mind of the accused that he might not secure a fair trial and, therefore is a good ground for transfer of the case under S. 526. AIR (Vol 29) 1942 Mad 753: 1942 MWN 484: 55 LW 536: 44 Cr LJ 404: (1943) 1 MLJ 482: 205 Ind Cas 384.

——S. 526 — During the fast of Ramzan, the Magistrate fixed time from 11-30 A. M., to 5 P. M. and again from 5-30 to 10 P. M. for the hearing of the case, though the defence lawyers were Muhammadans. By an earlier order, he had refused adjournment to give reasonable opportunity to the accused of engaging and instructing another lawyer when the first lawyer fell ill:

Held, that the attitude and orders of the Magistrate created a reasonable apprehension in the minds of the accused that they would not get a fair and impartial trial at his hands and that the case should be transferred. AIR (Vol 25) 1938 Pat 238: 4 BR 533: 39 Cr LJ 527: 175 Ind Cas 110.

**——S. 526 — Reasonable grounds for existence of.**

It is very necessary that no person on trial before a Court should have any fear that he may not receive absolutely fair treatment.

Where several adjournments had to be asked for in a case but the accused were not necessarily to be blamed for them and the Magistrate threatened that he would cancel the bail or proceed with the case and when he cancelled the bail, the accused had to get the order reversed by the Sessions Judge:

Held, that under the circumstances, there were grounds for the accused to entertain a reasonable apprehension that they would not get a fair trial and that the proceedings might be transferred to another Court. AIR (Vol 20) 1933 Oudh 480: 10 OWN 906: 35 Cr LJ 292: 147 Ind Cas 96.

**——S. 526 — Trial not yet commenced — Apprehension honestly entertained.**

Where the petitioner honestly entertains an apprehension that he will not have a fair and impartial trial before a Magistrate and no administrative inconvenience will be caused by the trial of the case which has not yet commenced, an application for transfer must be granted. But the petitioner must not be permitted to choose his own Court. AIR (Vol 20) 1933 Pat 597: 34 Cr LJ 1025 (1): 145 Ind Cas 524 (2).

**——S. 526 — Grounds — Apprehension.**

Where a Magistrate had instituted proceedings against the accused under S. 228, I. P. C. and in his anxiety to secure imprisonment of the accused does not take these proceedings himself, the solicitude in doing so may be commendable, but the fact is not likely to inspire into the mind of the accused the feeling that he shall have a fair and impartial trial in the Court of that Magistrate for any other offence, specially so where it is proposed to call the Magistrate as witness by him in the contempt proceedings. AIR (Vol 18) 1931 Lah 30: 1931 Cr C 94.

——S. 526 — Cases which assume an importance of their own should be tried in a clam and quiet atmosphere where all proper and legitimate facilities can be provided both to the prosecution and the defence. Where certain incidents take place in a district, which raise a reasonable apprehension in the minds of the accused that they cannot have a fair and impartial trial there, then the accused are entitled to have their case transferred to another district. AIR (Vol 17) 1930 Lah 954: 31 PLR 694: 1930 Cr C 1050.

——S. 526 — Where adjournments are repeatedly made by a trying Court to bring pressure on the accused person to produce his absconding co-accused persons, the accused must have had reasonable apprehensions in their mind that their case would not be tried in that calm and judicial atmosphere and with that detachment which every accused person is entitled to in a Court of justice. Therefore this is a sufficient ground for transfer of the case. AIR (Vol 17) 1930 Lah 953: 1930 Cr C 1049.

——S. 526 — It appeared that a person who had lately been the peishkar of the Magistrate was an enemy of the accused and a friend of the complainant. The Magistrate had summarily rejected an application by the accused for adjournment under S. 526 clause (8) had refused him copies of that application and the order thereon, and had hurried to take the statement of the accused before all the evidence for the prosecution had been finished.

Held, these circumstances were enough to create a justifiable apprehension in the mind of the accused that he would not have a fair trial in that Magistrate's Court and the case was transferred to another Court. AIR (Vol 7) 1920 All 277: 18 ALJ 1145: 59 Ind Cas 376.

**——S. 526 — Grounds — Reasonable apprehension — Arrest without complaint.**

Where C made a verbal statement before the District Magistrate in his chamber charging D, a Sub-Inspector of Police, of bribery and the Magistrate forthwith arrested D and ordered further enquiry under S. 202, Cr. P. C. by the Deputy Supdt. of Police.

Held, that the Magistrate had no jurisdiction to arrest a person on a verbal statement before deciding whether process should issue after the result of the inquiry to be made under S. 202, Cr. P. C. Ss. 34 and 65 not being applicable and a case under S. 161 I. P. C. being one in which a summons should only issue in the first instance.

All that is necessary for transfer of a case is that there must be a reasonable ground for suspicions. Immediate action of the Magistrate in arresting the accused before enquiry, the likelihood of the Magistrates of the district, figuring as witnesses and the accused having lost faith in the head of the district and in the subordinate Magistrates are grounds for a transfer. AIR (Vol 7) 1920 Pat 516: 1 Pat LT 522: 58 Ind Cas 523.

**——S. 526 — Grounds — Transfer of case — Fair and impartial — Apprehension — Delay in examining complainant.**

Any kind of apprehension cannot entitle an accused to a transfer of the case against him: there must be upon the record some reasonable grounds for apprehending that the trial would not be fair and impartial. Unusual delay in examining the complainant or a disregard of the preliminaries prescribed by the Cr. P. C. for dealing with complaints and awaiting the consideration of the evidence in another case with which the accused has no concern in order to decide whether any action should be taken upon the complaint are matters which reasonably lead the accused to apprehend that he will not have a fair and impartial trial, and such a case is a proper one for a transfer. AIR (Vol 7) 1920 Pat 188: 1 Pat LT 494: 21 Cr LJ 504: 56 Ind Cas 664.

**——S. 526 — Grounds — Accused's movements restricted by Police Superintendent.**

The High Court transferred a case having regard to the fact that by the order of the Superintendent of Police the petitioner was allowed facilities for instructing legal advisers only on application to him and that there might be a reasonable apprehension in the mind of the petitioner that his movements were unduly restricted. AIR (Vol 6) 1919 Cal 383: 23 CWN 481: 29 CLJ 383: 20 Cr LJ 675: 52 Ind Cas 595 (DB).

**——S. 526 — Grounds — Altercation between Judge and Counsel.**

The High Court must satisfy itself that on the facts disclosed, there is a reasonable apprehension that the accused may be prejudiced and may not have a fair trial, before transferring a case. 25 C. 727 at 733; 33 C. 1183; disapproved. A quarrel or unpleasantness between the Judge and Counsel is no ground for transfer under S. 526. AIR (Vol 4) 1917 Pat 437: 1917 PHCC 230: 2 PLW 83: 18 Cr LJ 670: 40 Ind Cas 318 (DB).

**——S. 526 Cls. 1 (a) and (8)—Grounds — Fair and impartial enquiry — Apprehension.**

Where a Magistrate rejected the application of an accused for an adjournment to enable him to move the High Court under S. 526 Cr. P. C. for a transfer and passed remarks condemnatory of the accused in a superfluous order.

Held, that the Magistrate was bound to grant the adjournment and this irregularity coupled with the condemnation created a reasonable apprehension in the mind of the accused that he will not have a fair and impartial enquiry and the case ought to be transferred. AIR (Vol 1) 1914 Sind 83: 8 SLR 341: 16 Cr LJ 476: 29 Ind Cas 108.

**——S. 526 — Grounds — Criminal case — Transfer of — Reasonable apprehension.**

Regard must be had to the circumstances of each case in an application for transfer though a reasonable apprehension in the mind of the accused person that he will not have a fair trial is a sufficient ground for a transfer. (1909) 36 C 904: 10 Cr LJ 244: 3 Ind Cas 88 (DB).

**(d) Bias.**

**——S. 526 — Grounds for transfer — Partiality — Prejudice — Inference — What may not lead to.**

Any irregularity committed by a Magistrate during the course of the trial of a case need not lead to the inference that he would not try the case with impartiality.

Similarly a refusal to adjourn a case on an interpretation of S. 526 (8), Cr. P. Code, cannot lead to the inference that he was prejudiced against the applicant for transfer or that he had the intention of not affording him sufficient opportunity for making an application to the High Court for transfer of the case.

Mere conversation with an advocate associated with the advocate appearing for one of the parties cannot be said to be sufficient to lead to an inference that the Magistrate would not try the case impartially. AIR (Vol 37) 1950 A 312: 1950 AWR 391: 51: Cr LJ 886: 1950 ALJ 166.

**——S. 526 — Ground for transfer — Bias of Magistrate — Reasonable apprehension.**

On an application for transfer of a case from the file of a Magistrate, the question for the High Court to determine is not whether the Magistrate was, in fact, biassed, but whether or not there might appear to be a reasonable likelihood of his being biassed and whether or not a reasonable man might suppose that there had been an interference with the course of justice. AIR (Vol 37) 1950 EP 257: 51 Cr LJ 1313: 52 PLR 139.

**——S. 526 — Statement of another accused in another case referred to against accused — Impropriety of — Transfer of case though S. 190 does not apply — Advisability.**

Making reference to a statement made by another accused in another case is improper and it indicates bias of the Magistrate against the accused from the start. In such a case, it is advisable that the case is transferred to some other Magistrate even if the case does not come under the provisions of S. 190 (c), Criminal P. C. AIR (V 22) 1935 Cal 621: 36 Cr LJ 1366: 40 CWN 29: 63 C 419: 158 Ind Cas 385 (DB).

**——S. 526 — Finding that accused is in fact prejudiced — Whether necessary — Reasonable apprehension — Circumstances.**

Where, in an application for transfer in a criminal case, it is clear to the High Court that there have been many irregularities in the trial, which are calculated to prejudice the accused, it is unnecessary that the High Court should find that the accused is in fact prejudiced.

Where it is found that when the application for transfer was made, the Magistrate continued the hearing of the case and pending the hearing of the application, he cancelled the bail of the accused, involving them in an application to the Sessions Judge in a further application for bail which was granted and the granting of which indicated that there was no good reason for the cancellation, the accused may be said to have a reasonable apprehension of bias on the part of the trying Magistrate. AIR (Vol 20) 1933 Lah 914 : 34 Cr LJ 900(1): 145 Ind Cas 173.

**——S. 526 — The exercise by the Magistrate of the discretion vested in him by law in granting bail is no proof of bias on his part. AIR (Vol 13) 1926 Sind 257: 20 SLR 136: 27 Cr LJ 859: 95 Ind Cas 939.**

**——S. 526 — Magistrate's attempt to compromise case can reasonably cause suspicion of partiality.**

A natural suspicion can arise in the mind of parties and the case should be transferred on the application of one of the parties where the Magistrate has made an attempt to have the case compromised because what the Court has to consider in a question of transfer is not alone the question whether the Presiding Magistrate has really any bias in his mind against the applicant for transfer but also whether the applicant for transfer may reasonbly have entertained an apprehension of partiality on the part of the Magistrate in view of any incidents which may have happened, though such incidents are capable of explanation and may be altogether independent in their origin of any actual bias in the Magistrate's mind. AIR (Vol 12) 1925 Oudh 179: 25 Cr LJ 570: 81 Ind Cas 58.

**——S. 526 — Refusal to grant an application for a gun license put in after the expiration of the usual season for the granting of gun licenses is no evidence of bias. AIR (Vol 12) 1925 Pat 339: 26 Cr LJ 297: 84 Ind Cas 441.**

**——S. 526 — The law has regard not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. AIR (Vol 8) 1921 Pat 413: 2 PLT 198: 22 Cr LJ 726: 64 Ind Cas 38.**

——S. 526 — Grounds — Joint trial — Prejudice to accused — Transfer of case.

Where during the trial of the accused the petitioner as a prosecution witness made certain statements showing his complicity in the offences and the Magistrate ordered him to be tried jointly with the accused. Held, that the petitioner was entitled to be tried by another Magistrate for the trying Magistrate had examined him on oath. AIR (Vol 6) 1919 Cal 201: 20 Cr LJ 385: 50 Ind Cas 993 (DB).

——S. 526 — Grounds — Magistrate disallowing questions — Bad opinion of accused.

It is expedient for the ends of justice to transfer a case from the file of one Magistrate to that of another competent to try it, if, by reason of the words or conduct of the Magistrate before whom the case is pending, any party reasonably apprehends that there is bias against him in the mind of the Magistrate though there may not in fact be actual bias. Having regard to the fact that the Magistrate disallowed certain relevant questions in the cross-examination of the witnesses for the prosecution and recorded an opinion unfavourable to the accused, the High Court transferred the case. AIR (Vol 6) 1919 Pat 515: 20 Cr LJ 566: 52 Ind Cas 54.

——S. 526 — Grounds for transfer.

The sole question to be considered is whether the facts disclosed in the application give rise to a reasonable inference that the Magistrate who is seized of the case may be willingly or unwillingly prejudiced against the accused and where there is a reasonable apprehension that he will not be fairly treated, his case should be transferred. AIR (Vol 4) 1917 Lah 356: 13 PWR 1917 Cr: 18 Cr LJ 719: 40 Ind Cas 719.

——S. 526 — Grounds for transfer.

A District Magistrate cancelled a license for arms and refused to grant an interview to the licensee. These circumstances were sufficient grounds for transfer. To justify transfer, it is not necessary that there should be real bias in the mind of the Magistrate. It is sufficient if the circumstances create in the mind of the accused a reasonable apprehension, that a fair and impartial trial cannot be had. (1913) 35 All 5: 10 ALJ 357: 13 Cr LJ 823: 17 Ind Cas 567.

——S. 526 — Transfer, grounds for — Bias — Cumulative effect of acts not justifying a transfer by themselves.

Although each of the circumstances alleged may not by itself be sufficient to show that there was bias on the part of the Magistrate, a transfer would nevertheless be justified when, having regard to all the circumstances taken together, the accused might not unreasonably apprehend that he would not have a fair trial. (1905) 9 CWN 619 (621) (DB)

——S. 526 — Transfer of case — Bias — Impressions based upon evidence — No grounds. (1904) 6 Bom LR 1092 (1093) (DB).

——S. 526 — Transfer — Bias of Magistrate — Stay, refusal to, pending motion to H. C. — Proceeding with inquiry after rule issued brought to notice — Ex parte examination of witness — Cancelment of bail.

An accused who was on bail asked the Magistrate to stay inquiry pending his motion to the High Court for transfer. The Magistrate refused the application and cancelled the bail and remanded him to custody. On the day of trial a telegram was shown to him in proof of the fact that the High Court had granted a rule for transfer. The Magistrate, notwithstanding it, proceeded with the case, examined a witness and committed the accused for trial by the Sessions Court. A second petition was put in to quash the commitment. Held, that the conduct of the Magistrate showed bias and that the case should be transferred to another Magistrate. Held also, that the commitment should be quashed. (1900) 5 CWN 110 (113) (DB).

(c) Communal feeling.

——S. 526 — Case between two communities — Communal question becoming very prominent issue.

Ordinarily the Court would not accept the proposition that merely because the case is between Hindus and Muhammadans, either a Hindu or a Muhammadan Judge or Magistrate is ipso facto debarred from hearing it. But where a case has reached a stage in which the unfortunate question of communalism has become a very prominent issue owing to the transfer petitions, it would be desirable in the interests of everybody concerned, that the case should be transferred. AIR (Vol 25) 1938 Lah 706 : 40 Cr LJ 79 : 178 Ind Cas 507.

——S. 526 — Communal motive — Magistrate committing errors in procedure.

A Magistrate is not barred by reason of belonging to one community or the other from trying cases between members of those two communities. But when a Magistrate finds himself placed in such a position, it is incumbent upon him to exercise the greatest tact and discretion in handling the case. But where he commits errors of procedure so as to give rise to an apprehension in the minds of the petitioners that they would not get an impartial trial, the case should be transferred. AIR (Vol 25) 1938 Lah 576 : 40 PLR 505 : 39 Cr LJ 888 : 177 Ind Cas 507.

——S. 526 — Dispute of a communal nature — Transfer of.

In is no ground for the transfer of a case from the Court of a Hindu or Muhammadan Magistrate to that of a European Magistrate merely because the parties belong to different religions or the dispute is of a communal or quasi-communal nature. In order to obtain a transfer, it must be shown that there is a reasonable apprehension in the mind of the person applying for it that he will not get a fair trial. This is a question to be determined in each case and is not one to be decided by any general rule. AIR (Vol 21) 1934 Lah 73 : 35 Cr LJ 624 : 148 Ind Cas 201.

——S. 526 — Principle explained.

In cases of transfer where communal interests are involved a transfer should be granted with considerable hesitation. In such cases the matter is not to be decided in the abstract whether a certain Magistrate would deal with a matter impartially or not. The question always would be whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other. Where certain Mahomedans were prosecuted by the police out of several against whom a complaint was made by Hindus and the Magistrate who was a Hindu ordered the prosecution without waiting for the report of the police inquiry and the Magistrate delayed and ultimately refused the application of the accused for copies of statements made before the police and also conducted a local inquiry :

Held, that it was proper case for transfer. AIR (Vol 17) 1930 All 737 : 1930 ALJ 606 : 31 Cr LJ 555 : 1930 Cr C 993 : 123 Ind Cas 685.

——S. 526 — Where the complaint was by Mussalmans, accusing a Hindu of doing acts in a Mussalman graveyard, with intent to injure their feelings,

Held, that the complaint should, if possible, be tried by a European Magistrate. AIR (Vol 14) 1927 Lah 520 : 28 Cr LJ 588 : 8 AI Cr R 260 : 102 Ind Cas 556.

——S. 526 — Where there is a certain amount of communal feeling over a case to such an extent that one of the parties is unable to persuade the defence witnesses to appear before the Court and give evidence, as they are afraid that if they do so, there will be danger as regards their safety at the hands of the other party.

Held, that it is proper that the case should be transferred to some other Court. AIR (Vol 14) 1927 Pat 86 : 8 PLT 153 : 27 Cr LJ 1391 : 98 Ind Cas 607.

——S. 526 — Where a Hindu-Muhammadan question is involved in the case it is desirable that European Magistrate should enquire into and determine it. AIR (Vol 12) 1925 Lah 62 : 26 Cr LJ 1056 : 26 PLR 267 : 87 Ind Cas 976.

**——S. 526 — Grounds — Religious disputes — Judge a Mahomedan.**

A Mahommedan Magistrate whose order for the closing of a Jhatka shop by a person was set at defiance should not try the complaint on behalf of other Mahommedans especially when the dispute had become one of religious nature and the religious feelings of Mahomedans were supposed to have been outraged. (1912) 26 PWR 1912 Cr : 13 Cr LJ 601 : 16 Ind Cas 169.

### (f) Convenience.

——S. 526 — While it is true that convenience and expedition are factors to be considered in the trial of a case, it must be remembered that beyond even these considerations, is the even more important consideration that justice should be done, and the necessity for expedition should not be allowed to deprive the accused of a reasonable opportunity to call evidence in defence on a charge of an offence of which, at the outset of the proceedings, he had no knowledge he would be called upon to meet. AIR (Vol 26) 1939 Sind 222 : 40 Cr LJ 818 (2) : ILR (1940) Kar 95 : 183 Ind Cas 619 (DB).

**——S. 526 — Accused and his witnesses residing at considerable distance, whether a ground for transfer.**

The fact that an accused person and his defence witnesses reside at a considerable distance from where they are being tried is, ordinarily, no ground for transfer; but where it is highly inconvenient and risky for the applicant to appear either as an accused or as a witness in certain place, the case should be transferred from that place. AIR (Vol 22) 1935 Sind 68 : 36 Cr LJ 869 (1) : 155 Ind Cas 1010.

——S. 526 — The fact that it would be inconvenient for the person against whom proceedings have been started under S. 110 to summon witnesses from the place of his residence is no ground for transferring the case to the Court within whose jurisdiction such a person resides. AIR (Vol 14) 1927 Sind 59: 27 Cr LJ 1261: 20 SLR 310: 98 Ind Cas 109.

——S. 526 — The convenience of the accused has to be considered rather than that of the complainant for transferring a case. AIR (Vol 13) 1926 Lah 493 : 27 Cr LJ 563 : 94 Ind Cas 131.

——S. 526 (8) — Where the application is made after the hearing of the case had commenced, a refusal to grant postponement is no ground for transfer of the case; convenience is no ground for a transfer of the case. (1910) 4 SLR 42 : 11 Cr LJ 500 : 7 Ind Cas 603

**——S. 526 — Considerations for transfer.**

In transferring a case, no consideration should be had to the fact that by a transfer to a particular district, the accused will have the benefit of a trial by jury where previously he had none and the real question is that of the convenience of parties. (1903) 8 CLJ 59 (65).

### (g) Cross complaints.

**——S. 526 — Transfer — Cross-cases — Magistrate dismissing one while retaining other.**

In cross-cases, the Magistrate should make simultaneous order. When he dismisses one case while retains the other, the case is liable to be transferred. AIR (Vol 25) 1938 Mad 129 : 1937 MWN 998.

**——S. 526 — Case against applicant instituted by Police — Cross-complaint by applicant — Arguments heard in Police case — Procedure.**

A case was instituted by the Police under S. 307, I. P. C., against the applicant. After recording of evidence commenced, he filed a cross-complaint under Ss. 326, 324 and 452. This case was adjourned from time to time along with the challan. After arguments had been heard in the challan, the applicant applied for a transfer of the case :

Held, that it was reasonable that the pronouncement of orders in the challan case should be deferred until the Magistrate has heard the evidence in the case brought by the applicant and it was desirable that both cases should be heard by one and the same Magistrate and thus the danger of conflicting decisions being given on the same facts would be avoided. AIR (Vol 23) 1936 Lah 356 : 37 PLR 80 : 37 Cr LJ 510 (1) : 161 Ind Cas 921.

**——S. 526 — Complaint of accused dismissed — Whether ground for transfer of complaint against him.**

Interest or bias is not to be inferred from the opinions formed on evidence judicially recorded, and a Magistrate is not, therefore, disqualified to try the second case, merely because he has expressed his opinion on the first case tried by him.

Where two complaints were filed before the same Magistrate, one by the accused and the other against him, in both of which the parties were the same and the complaint filed by the accused was dismissed :

Held, that it was no ground for transfer of the case against him. AIR (Vol 22) 1935 Sind 72 : 36 Cr LJ 866 : 155 Ind Cas 994.

**——S. 526 — Discharge in one case — Reasonable apprehension of accused in the other case.**

Two cross-cases should be disposed of together. By discharging the accused in one case, the Magistrate, in a way, expresses his opinion that the prosecution story in the other case is probably true and the accused in that case can have a reasonable apprehension that their case has been prejudged. Consequently, the case should be transferred to another Magistrate. AIR (Vol 21) 1934 Lah 458 : 35 PLR 427 : 36 Cr LJ 238 : 152 Ind Cas 1060 (1).

**——S. 526 — Judge not in a position to approach counter-case with open mind.**

Where a Judge who has tried a riot case feels that it will not be possible for him to give a find-

ing in a counter-case different from that which he has given in the former and consequently is not in a position to approach the latter case with an open mind, the apprehension of the accused in the latter case that they cannot have a fair and impartial trial in his Court is just and it is proper under such circumstances that the case is transferred from his Court to some other Court of competent jurisdiction. AIR (Vol 20) 1933 Oudh 21 : 9 OWN 963 : 34 Cr LJ 46 : 140 Ind Cas 685.

——S. 526 — It is desirable that cross-complaints should ordinarily be disposed of by the same Magistrate. The mere fact that the complaint of one party is dismissed and that he is apprehensive of a conviction is by itself no good ground for a transfer. AIR (Vol 16) 1929 Lah 48 : 29 Cr LJ 934 : 111 Ind Cas 854.

**——S. 526 — Grounds — Opinion formed.**

The mere fact that the Magistrate has in a cross case expressed an opinion adverse to the accused is not necessarily a sufficient ground to transfer the case. AIR (Vol 15) 1928 Nag 217 : 29 Cr LJ 589 : 10 AI Cr R 282 : 109 Ind Cas 605.

——S. 526 (1) (a) — The expression of opinion by a Magistrate in one of two cross cases of a riot that the other party are the aggressors is not sufficient to transfer the case to another Magistrate. (1911) 33 All 583 : 12 Cr LJ 564 : 12 Ind Cas 652.

**——S. 526 (1) (a) — Grounds — Cross case — Discharge.**

The fact that a Magistrate has discharged a cross case between the same parties is not per se a sufficient ground for transferring a case from his Court. When the Magistrate has heard evidence in both cases, which he is not keeping distinct in his own mind and has discharged the one case on the evidence that he has heard in both cases, that is not a sufficient reason for transferring the other case from his Court. (1911) 5 SLR 264 : 13 Cr LJ 532 : 15 Ind Cas 804 (DB).

**(h) Discussion outside.**

**——S. 526 — Magistrate having private interview with one party out of Court and hearing his version of case.**

The fact that the Magistrate trying a case has had an interview with one of the parties to the case, privately and out of Court and had heard from such party his version of the facts, is sufficient to disqualify him from subsequently trying the case in his magisterial capacity even if there are no reasons for ascribing any prejudice or undue interest in the case to the Magistrate. AIR (Vol 25) 1938 Lah 346 (347) : 40 PLR 157 : 39 Cr LJ 606 (1) : 175 Ind Cas 520.

**——S. 526 — Duty of Magistrate — Magistrate calling two witnesses to his chamber — Transfer application on the ground that he induced them to give evidence against applicant.**

Although there may be a certain informality about proceedings due to local conditions, Magistrates must be careful that this informality is not such as to lead or reasonably to appear to lead to favour partiality or injustice or to affect or to appear to affect the substance of justice. And when the conduct of the Magistrate becomes so friendly and informal that he interviews witnesses in his room when there is no necessity, when there are no Pleaders and when the complainant who was present is not called.

It would appear that informality and friendliness have exceeded proper bounds and that he has abandoned that attitude of detachment which a trying Magistrate in the case where he is to do or seem to do justice to both parties should ordinarily maintain. And even if a complainant, or an accused or witnesses are friends of the Magistrate, the Magistrate must put the claims of public duty before the private claims of friendship, and during the pendency of the case, keep his friends at arms length.

Consequently, where the Magistrate calls two of the complainant's witnesses for interview in his chamber and the complainant thereupon files a transfer application on the ground that the Magistrate induced them not to give evidence against the accused, the application must be allowed as the circumstances are such as to give rise to reasonable apprehension in the mind of the complainant that his case will be prejudiced if it is heard further by that Magistrate. AIR (V 24) 1937 Sind 65 : 29 SLR 329 : 38 Cr LJ 500 : 168 Ind Cas 44.

**——S. 526 — Associating with Police.**

The suggestion that the Police Superintendent and the Magistrate cannot meet and break bread together without exposing themselves to the imputation that they we e engaged in some nefarious machination, is a suggestion which a Court should decline to entertain as a ground for transfer of the case. AIR (Vol 20) 1933 Sind 17 : 26 SLR 255 : 33 Cr LJ 908 : 139 Ind Cas 791 (DB).

**——S. 526 — Private inquiries.**

The practice of holding private consultations by Magistrate with the prosecuting agency before commencing the hearing of the case is highly improper. AIR (Vol 15) 1928 Lah 125 : 107 Ind Cas 100 : 29 PLR 14 : 29 Cr LJ 212 : 9 AI Cr R 505.

——S. 526 — Discussion of a case at the club by the officers who are likely to be concerned in the disposal of it is an extremely improper proceeding and is by itself sufficient ground to justify an order for transfer. AIR (Vol 8) 1921 All 55 (3) : 19 All LJ 946 : 65 Ind Cas 558.

**(i) Delay.**

**——S. 526 — Bail unlawfully refused — Trial postponed deliberately.**

Where the application for bail by the accused is unlawfully refused and the trial of the case is deliberately postponed by granting unnecessarily lengthy adjournments, there is sufficient cause for the transfer of the case to some other Magistrate competent to try it. AIR (Vol 27) 1940 Rang 26 : 41 Cr LJ 252 : 186 Ind Cas 147.

**——S. 526 — Complaint under S. 406, Penal Code, — Case sent for inquiry to another Magistrate and report received — Magistrate starting fresh inquiry on his own account under S. 202, Criminal P. C. — Considerable delay already caused — Ground for apprehension.**

Where a Magistrate starts a fresh inquiry on his own account under S. 202, Criminal P. C., after having sent the complaint under S. 406, Penal Code, for inquiry to another Magistrate and receiving his report, the procedure is irregular. And where, apart from the irregularity of conducting a second inquiry, there is also the inordinate delay, the complainant may well feel some apprehension that the fate of his case, so far as the admission of the complaint under S. 406, Penal Code, is concerned, will not rest entirely on the consideration of the report and the Magistrate's conclusion thereon and his application for transfer, therefore, will be justified. AIR (Vol 24) 1937 Nag 389 : 39 Cr LJ 80 : 172 Ind Cas 203.

——S. 526 — Where the proceedings of the Magistrate were dilatory and he issued a warrant

against the accused's wife who was a pardanshin lady.

Held, that a transfer was desirable. AIR (Vol 14) 1927 Lah 16 : 99 Ind Cas 1025 : 27 PLR 604 : 28 Cr LJ 225.

——S. 526 — Where the trying Magistrate ordered that he would examine only one witness a day during the trial and thus prolonged the trial of the case.

Held, that this is a sufficient ground for transfer of the case from that Magistrate to another. AIR (Vol 13) 1926 Lah 78 : 89 Ind Cas 451 : 26 Cr LJ 1363.

——S. 526 — **Delay in applying.**

Under S. 526 an application for transfer should be made, at the earliest possible opportunity after the occurrence of facts or circumstances which afford reasonable basis for such application. AIR (Vol 1) 1914 All 379 : 15 Cr LJ 536 : 24 Ind Cas 848.

**(j) Friendship.**

——S. 526 — **Magistrate already being in house of accused as tenant long before case started.**

The mere fact that the Magistrate lives in the house of the accused which he had taken on rent long before the case was instituted, is not a ground for transfer of the case at the instance of the complainant in a cognizable case, especially if the Crown opposes the transfer. AIR (Vol 25) 1938 Lah 569 : 40 PLR 468 : 39 Cr LJ 853 (2) : 177 Ind Cas 187.

——S. 526 — **Complainant purchasing car through trying Magistrate's son, subsequent to complaint.**

The complainant purchased a car through the trying Magistrate's son who was a salesman, on favourable terms. This purchase was made subsequent to the filing of the complaint. The accused applied for transfer :

Held, though the transaction was a bona fide one, and though the Magistrate was renowned for his impartiality, the apprehension in the mind of the accused being justifiable, the case should be transferred. AIR (Vol 24) 1937 Cal 64 (66) : 41 CWN 188 : 38 Cr LJ 344 : 64 CLJ 532 : 167 Ind Cas 251 (DB).

——S. 526 — **Magistrate personal friend of one party.**

The fact that the Magistrate is a personal friend of the complainant is no ground for transferring the case. AIR (Vol 18) 1931 Bom 206 (1) : 33 Bom LR 311 : 32 Cr LJ 805 : 131 Ind Cas 891 (DB).

——S. 526 — The fact that a Magistrate, fifteen years before had been a class-fellow of somebody who was either a complainant, a respondent or an advocate in the case is not a fit ground for transfer. AIR (Vol 17) 1930 All 262 : 115 Ind Cas 641 : 30 Cr LJ 522 : 1929 ALJ 616 : 10 LRA Cr 95 : 1930 Cr C 374.

——S. 526 — Where one of the prosecution witnesses is alleged to be a great friend of complainant and the Magistrate also is on friendly terms with the witness, the case should be transferred to another Magistrate. AIR (Vol 13) 1926 Lah 410 : 95 Ind Cas 318 : 8 LLJ 257 : 27 Cr LJ 782 : 27 PLR 843.

——S. 526 — Where the accused was an election agent of a rival candidate with the Magistrate before whom he was to be tried at the Council election and where the chief witness in the case was a friend of the Magistrate,

Held, that there were sufficient grounds to justify a transfer of the case to another Magistrate. AIR (Vol 12) 1925 Lah 615 : 89 Ind Cas 912 : 26 Cr LJ 1440.

——S. 526 (e) — The fact that the accused was a friend of one of the Magistrates forming a Bench is not a sufficient ground for ordering a transfer of the case from the Bench. AIR (Vol 5) 1918 All 391 : 19 Cr LJ 702 : 16 ALJ 490 : 46 Ind Cas 158.

——S. 526 (1) (a) — **Grounds — Complainant related to a friend of Magistrate — Increasing of bail.**

The fact that a Magistrate is a friend of a remote relative of the complainant is not per se a ground for transferring a case to another Court. A Magistrate is justified in increasing the amount of bail if by further proceedings the case turns out to be more serious than he first imagined. (1912) 66 PLR 1912 : 4 PWR Cr 1912 : 13 Cr LJ 474 : 15 Ind Cas 314.

**(k) Favour.**

——S. 526 — **Magistrate putting up with person on whose endorsement the complaint started.**

It is undesirable that the Magistrate should be putting up with the person, who had endorsed the complaint while trying a case which started on that complaint. In such a case, the question is not one of legality of the trial but is one whether the accused has reasonable apprehension of prejudice. The case, in these circumstances, should be transferred to another Magistrate. AIR (Vol 25) 1938 Pat 376 : 4 BR 519 (1) : 39 Cr LJ 517 : 175 Ind Cas 49.

——S. 526 — **Failure of Magistrate to discharge functions under S. 342, Cr. P. Code, judicially.**

The Court alone is authorized to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination. Under S. 342 the questions should not be put so as to cross-examine the accused or with a view to elicit from him statements which would lead to his conviction.

Further it is of the utmost importance in a criminal case that the trying Magistrate should keep himself at arm's length from both sides and should try to hold the scales even between them. He should not conduct the proceedings in such a manner as to give an impression that he is being guided by one side or the other. Where a Magistrate does not discharge these statutory functions under S. 342 in a judicial manner and acts as the mouthpiece of the Public Prosecutor in conducting the examination of the accused that is a valid ground for the transfer of the case from his Court. AIR (Vol 17) 1930 Lah 166 : 123 Ind Cas 570 : 1930 Cr C 174 : 31 Cr LJ 560.

——S. 526 — Court has power to summon any person as witness if his evidence appears essential for the just decision of the case. And no question of bias against the accused can arise unless it is shown that the Court was guiding or assisting the prosecution. AIR (Vol 16) 1929 Nag 172 : 117 Ind Cas 213 : 30 Cr LJ 728 : 1929 Cr C 47.

——S. 526 — That the case has unnecessarily been adjourned on several occasions in order to enable the complainant to appear is not sufficient ground for transfer. AIR (Vol 13) 1926 Lah 628 : 96 Ind Cas 878 : 27 Cr LJ 1022.

——S. 526 — An accused is entitled to transfer of the case which is sent to a particular Magistrate at the request of the complainant. AIR (Vol 12) 1925 Lah 121 : 81 Ind Cas 637 : 25 Cr LJ 989.

**(l) Hostility.**

——S. 526 — **Complainant receiving wound at time of Assembly election — Complainant and Magistrate taking opposite sides in election.**

A complainant received at the time of Assembly election, an incised wound on the shoulder and the

accused were prosecuted by the Crown under S. 326 and other sections of the Penal Code. The complainant applied for transfer of the case after only two witnesses had been examined. The Honorary Magistrate who was trying the case owned land in the village of which the complainant was a lambardar and they took opposite sides in the election. The Crown opposed the application:

Held, that in the circumstances of the case, it was not desirable that the case should be tried by the Honorary Magistrate concerned and must be transferred. AIR (V 28) 1941 Lah 299: 43 PLR 354: 42 Cr. LJ 880: 196 Ind Cas 467.

——S. 526 — Complaint under S. 107 made on Sunday— Magistrate taking complainant's statement on Sunday and issuing warrant against accused, for amount far beyond accused's means, with two sureties — When two persons offered security, enquiry held in their absence and on finding that they had not immovable property worth security amount, their security rejected — Other persons offering security and their bond attested by Honorary Magistrate — Honorary Magistrate called to appear and after his examination that security also rejected —Magistrate's conduct was characterised by vindictiveness and desire to harass accused and so transfer of case to another Magistrate held justified. AIR (V 17) 1930 Lah 668: 125 Ind Cas 615: 31 Cr LJ 980: 1930 Cr C 812.

**——S. 526 — Magistrate's attitude hostile to complainant — Transfer was allowed.**

Where further proceedings having been stayed by the High Court's order one of the two complainants appeared before the Magistrate on the date fixed for a hearing and apprised him of that order but the Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared,

Held, that there was no justification for this action of the Magistrate. That the Magistrate's attitude was clearly hostile to the complainants and the case must be transferred. AIR (V 13) 1926 Lah 151: 91 Ind Cas 536: 26 PLR 701: 27 Cr LJ 104: 7 LLJ 571.

——S. 526 — Merely the ground that the Sub-divisional Officer of the sub-division, where the accused is being tried, is on inimical terms with the accused is not sufficient to transfer the case to some other sub-division. AIR (V 13) 1926 Sind 295: 95 Ind Cas 466: 19 SLR 117: 27 Cr LJ 802.

——S. 526 — Where the Magistrate sent the record after inexplicable delay and had charged accused's father with an offence owing to enmity transfer is desirable. AIR (V 10) 1923 Lah 282.

### (m) Harassment.

**——S. 526 — Magistrate cannot threaten witness that he would be prosecuted for negligence.**

Magistrate has no power to threaten witness that he would be prosecuted for negligence. AIR (V 28) 1941 Pat 206: 7 BR 166: 42 Cr LJ 103: 191 Ind Cas 193.

——S. 526 — Where the accused were residents of one district and the complainant himself originally resided in that district and the incident which has led to the prosecution of the accused for defamation also took place in that district.

Held, that the case has been instituted in another district in order to harass the accused and should be transferred to the former. AIR (V 14) 1927 Lah 271: 28 PLR 211.

### (n) Hurry.

**——S. 526 — Anxiety of Magistrate to finish case within prescribed period.**

It is a salutary rule that Magistrate should ordinarily finish cases within six weeks and that they should submit explanations of delay if any case lasts longer than that period but the rule should not be allowed to interfere with the course of justice or with a fair decision of any case.

On the whole, less time is wasted if Magistrates act strictly according to the letter and the spirit of the law wihout making any special efforts to expedite cases by using extraordinary means and this anxiety on the part of the Magistrate is not sufficient to create a reasonable apprehension of not having a fair trial. AIR (V 23) 1936 All 695: 1936 ALJ 975: 37 Cr LJ 1100: 1936 AWR 838: 165 Ind Cas 20.

**——S. 526 — Quick trial — Trying case on Sunday.**

Undue procrastination is perhaps the most conspicuous of all the faults which disfigure the administration of justice in this country and zeal on the part of a Magistrate in trying to dispose of a case without delay affords no ground for transfer. Magistrate, who disregarded the rule that all Subordinate Courts should sit from day to day except Sunday and took up a case on Sunday, does not give a substantial cause for suspecting his impartiality. AIR (V 20) 1933 Sind 17: 26 SLR 255: 33 Cr LJ 908: 139 Ind Cas 791 (DB).

——S. 526—Where beyond the mere fact that the proceedings against the petitioners were hurried there is nothing to indicate that the inquiry had not been fair and impartial, and the petitioners remain unrepresented through no fault of the Magistrate, an application under S. 526 for transfer of cases cannot be granted. AIR (V 17) 1930 Lah 529: 125 Ind Cas 322: 31 Cr LJ 812: 1930 Cr C 677.

——S. 526 — The fact that the Magistrate refused to give copies and proceeded hurriedly in recording the accused's statement before the prosecution evidence is over is a sufficient ground for transfer. AIR (V 7) 1920 All 277: 18 ALJ 1145: 22 Cr LJ 88: LR 1 A (Cr) 179: 59 Ind Cas 376.

### (o) Intricate case.

**——S. 526 — Jurisdiction of High Court under S. 526 — Case triable both by First Class Magistrate and Sessions Court — Difficult questions of law likely to arise — Transfer of case to Court of Session.**

The jurisdiction of the High Court under S. 526, Criminal P.C., covers cases exclusively triable by a Court of Session and also cases not exclusively triable by such Court. It follows that the Legislature contemplated that, for the ends of justice, a case of the latter description may forthwith be ordered by the High Court to be committed to a Court of Session for trial.

Where the case against the accused, though ex facie, was one triable both by a First Class Magistrate and the Court of Session, it was likely to embrace within it charges for offences which are exclusively triable by a Court of Session and the accused were being tried under S. 120 B of the I.P.C. also, that is, for criminal conspiracy to commit the offence of criminal breach of trust, and on proof of that charge, they were liable to be punished in the same manner as if they had abetted the offence of criminal breach of trust, and this feature of the case made the trial complicated in its nature and was bound to attract difficult questions of law for decision by the Court seised of the case:

Held, it was proper and just that the accused should have a trial by a Court of Session with the aid of a jury and that the case should be transferred to a Court of Session.

Held, also, that the fact that a trial may suddenly at the discretion of the Magistrate, be converted into an inquiry and vice versa must have the effect of prejudicing the accused person in his defence. AIR (V 21) 1934 Oudh 349: 35 Cr LJ 928: 11 OWN 780: 149 Ind Cas 235.

——S. 526 — Cases, which are likely to be keenly contested and intricate in nature, are, on the whole, likely to be more efficiently disposed of by stipendiary Magistrates than by Honorary Magistrates. AIR (V 15) 1928 Nag 21: 10 NLJ 184: 28 Cr LJ 898: 105 Ind Cas 226: 9 AI Cr R 49.

(p) Improper procedure.

(i) General.
(ii) Creating apprehension.
(iii) Illegal acts of Magistrate.

(i) General.

——S. 526 — Grounds for transfer — Contravention of S. 539-B, Cr. P. Code — Local inspection without notice to accused and in his absence — Memorandum prepared by magistrate incorporating 'ex parte' statement of accused — Transfer of case. See AIR (Vol 36) 1949 Lah 201: 229 Ind Cas 606 (DB).

**——S. 526 — Grounds for transfer — Refusal of equal opportunities to both sides to produce evidence — Remarks of Court creating apprehension in the mind of the party — Conduct of Judge creating suspicion of partiality.**

Refusing one party an opportunity of producing witnesses one day and granting a similar request to the opponent the next day when he was not in law entitled to it, is quite sufficient to give rise to the apprehension in the mind of the litigant that he was not being treated with equal fairness with his opponent.

Where a Judge makes a remark that "the case will have to be argued in other Court," the implication being that he was going to convict, it is calculated to give rise to serious apprehension in the mind of the accused. Added to all this when the Judge permits the prosecuting inspector to sit with him at the dais and look into the Court files, there is a clear case of good grounds for transfer under S. 526, Cr. P. Code. AIR (Vol 34) 1947 Oudh 145: 1947 OWN (CC)24: 1947 AWR (CC) 20: 1947 OA (CC) 20: 1947 A Cr. C 14: 48 Cr LJ 166: 228 Ind Cas 245.

——S. 526 — Grounds for transfer — Magistrate trying case subordinate to sub-Divisional Magistrate taking cognizance — Expression of opinion in order taking cognizance — Effect. See 226 Ind Cas 31: 12 BR 652: 47 Cri LJ 812: AIR (Vol 33) 1946 Pat 162.

——S. 526 — Grounds for transfer — Magistrate appreciating witness in former trial in particular manner in prior trial and convicting—If grounds for transfer of subsequent case against other accused in which witness is same. See 222 Ind Cas 431: AIR (Vol 33) 1946 Sind 1: 47 Cri L Jour 455.

**——S. 526 — Production of additional witnesses refused.**

Where the request of the accused for producing certain witnesses was refused by the trying Magistrate and his subsequent application to have them examined by the Court under S. 540, Criminal P. C., was also refused, but later on, at the instance of the prosecutor, one of the witnesses named by the accused was examined by the trying Magistrate and when the accused applied for stay of the proceedings under S. 526 (8), to enable him to file an application for transfer in the case, the Magistrate first refused to stay the proceedings but granted time subsequently when it was pointed out to him that the refusal would constitute a serious cause for complaint against him:

Held, that there were reasonable grounds for transfer under S. 526, Criminal P. C. AIR (Vol 30) 1943 Oudh 437: 1943 AWR 96: 1943 OWN 359: 45 Cr LJ 89: 209 Ind Cas 535.

**——S. 526 — Dismissal of complaint under S. 203, when it cannot be said to be unreasonable.**

Where the complaint which could not be said to be unreasonable was dismissed under S. 203, Criminal P. C. without examining the complainant:

Held, that the case should be transferred to some other Magistrate. AIR (Vol 29) 1942 Mad 69: 1941 MWN 844 (2): 43 Cr LJ 340: 198 Ind Cas 16 (2).

——S. 526 —In a prosecution for murder, the committing Magistrate permitted the Assistant Public Prosecutor who was also an Advocate privately engaged by the complainant, to conduct the prosecution on behalf of the Crown. An application made on behalf of the accused objecting to the conduct of the case by the Assistant Public Prosecutor on the ground that it would, under the circumstances, be prejudicial to the accused, was rejected by the Court. Upon an application of the accused for transfer of the case:

Held, that the granting of the permission to the Assistant Public Prosecutor showed that the committing Magistrate had completely failed to appreciate how important was the issue affecting the administration of justice raised by these proceedings in his Court and it was expedient in the interests of justice that the case should be transferred from the Court of the committing Magistrate. AIR (Vol 27) 1940 Sind 220: ILR (1940) Kar 482: 42 Cr LJ 158: 191 Ind Cas 378.

**——S. 526 — Magistrate who had convicted accused due to error in procedure.**

Any accused person who has once been convicted by a Magistrate to whom the case is sent back because of errors in procedure, has a reasonable apprehension that he is likely to be convicted again by that Magistrate. Prima facie, therefore the case ought to be sent for trial to another Magistrate. AIR (V 26) 1939 Lah 27: 41 PLR 213: 179 Ind Cas 819.

**——S. 526 — Excise Inspector, while raiding houses of accused taking Magistrates and Police Officers to act as search witnesses.**

Where an Excise Inspector, when he raided the houses of the accused, took with him, for the purpose of acting as search witnesses, three Magistrates, the Deputy Superintendent of Police, the Assistant Manager of the Estate, the Station Officer and the Circle Inspector:

Held, that the procedure was extraordinary and that these extraordinary measures and activities of a large number of executive officers of the district staff furnished the accused with reasonable grounds for apprehension that the district authorities in the district had practically made up their minds as to the guilt of the accused and there was sufficient ground for granting the petition for transfer. AIR (V 21) 1934 Oudh 452: 11 OWN 1193: 35 Cr LJ 1483: 151 Ind Cas 1003.

——S. 526 — Where the Magistrate refused to grant a copy under S. 162, Criminal P. C., on the

ground that no contradiction had been established and sent the papers to the Police again so as to deprive the accused of his right under S. 191, Criminal P. C.:

Held, that there was sufficient ground for transferring the case. AIR (V 18) 1931 All 273: 32 Cr LJ 370: 129 Ind Cas 267.

——S. 526 — An accused applied for transfer of his case to the High Court without informing the trying Magistrate. The Magistrate examined a number of witnesses for the prosecution and also the accused. The accused in answer to one of the questions disclosed that he had applied for transfer and the Magistrate thereupon made an order stating that he refrained from taking further proceedings until the order of the High Court, but at the same time cancelled the bail holding that there was prima facie evidence against the accused.

Held. that this was not either a correct or a consistent attitude for the learned Magistrate to adopt. Once having correctly expressed an opinion that he "refrained from further proceedings" in view of the application made to the High Court, he ought to have stayed his hands completely for the time and certainly he ought not to have taken the serious and drastic step of cancelling the bail bonds of the accused and that this proceeding was likely to produce a reasonable apprehension in the mind of the accused that he would not have a fair and impartial trial before the Court, and this was therefore a fit case for transfer. AIR (V 17) 1930 Lah 958: 1930 Cr C 1054.

**——S. 526 — Wrong order under S. 250 Cr. P. C.**

Where the Magistrate without discharging the accused passed an order under S. 250 calling upon the complainant to show cause why he should not give compensation to the accused persons which was clearly wrong, and it was clear that he did not intend to discharge the accused.

Held, that it was obvious that it would be a mere farce to allow the complaint to be tried by the Magistrate and a transfer should be granted. AIR (V 16) 1929 Lah 623: 117 Ind Cas 883: 30 Cr LJ 854: 1929 Cr C 181: 30 PLR 361.

**——S. 526 — Prosecution of witness for perjury at conclusion of his evidence.**

Where in a criminal case a certain witness was being examined and at the conclusion of the evidence of this witness the Magistrate ordered his prosecution under S. 193, I. P. C. and at the conclusion of the hearing of the case on that date that he did formally order his prosecution.

Held, that the action of the Magistrate however well intended it may be, was to say the least of it, precipitate. The proper time, if he was inclined to take action against any witness under S. 476, Criminal P. C. would have been at the time of delivering judgment in the main case. AIR (V 15) 1928 Lah 180: 106 Ind Cas 456: 29 Cr LJ 40: 9 A I Cr R 426.

**——S. 526 — Sessions case — Grounds for — Case to be heard do die in diem.**

Ordinarily a Sessions trial once begun should be continued do die in diem until it is finished. Consequently where a Sessions Judge fixed a date of a Sessions case which from the number of witnesses for the prosecution and for the accused could not have been finished in a single day but the Judge was willing to grant an adjournment to another date. Held, that this constituted a ground for the transfer of the case. AIR (Vol 6) 1919 All 200: 17 ALJ 48: 1 UPLR (HC) 36: 20 Cr LJ 127: 49 Ind Cas 111.

**——S. 526 — Grounds — Refusal to allow cross-examination of the complainant.**

Magistrate's refusal to allow the accused to properly cross-examine the complainant, though improper cannot be a ground for transfer especially if the case has reached an advanced stage. AIR (Vol 4) 1917 Lah 296: 18 Cr LJ 690: 29 PWR 1917 Cr: 40 Ind Cas 690.

**(ii) Creating apprehension.**

——S. 526 — Accused not allowed to inspect record of statements under S. 164, made by prosecution witnesses or to cross-examine witnesses thereon:

Held, that this created an apprehension in the mind of the accused that he would not get the fair trial and hence the case should be transferred. AIR (Vol 25) 1938 Rang 442 (446): 40 Cr LJ 265: 179 Ind Cas 783 (DB).

**——S. 526 — Magistrate handing over judicial record to person to be examined as witness.**

It is highly improper for a Magistrate or his officials to allow the judicial record of a pending case to be removed from the Court and handed over to a person who is to be examined as a witness in the case.

An incident like this is such as to raise a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial and is a sufficient ground for transfer. AIR (Vol 19) 1932 Lah 294: 33 Cr LJ 223: 33 PLR 438: 136 Ind Cas 9.

——S. 526 — Issuing a non-bailable warrant of arrest in a case of bailable offence and proceeding to frame a revised charge when the case was not posted for hearing on that date are sufficient grounds for apprehension and for the transfer of the case. (1933) 1933 MWN 1427 (1428).

**——S. 526 — Erroneous refusal of Court to accept bail.**

Where a Magistrate erroneously refuses to accept bail and unnecessarily prolongs proceedings, the procedure adopted by him is likely to raise apprehension in the mind of the accused, and transfer of the case is justifiable. AIR (Vol 19) 1932 Lah 440: 33 PLR 416 (1): 34 Cr LJ 89: 141 Ind Cas 43.

**——S. 526 — Conduct creating reasonable apprehension — Ground for transfer.**

The mere fact that certain orders passed by the trying Magistrate are erroneous or illegal, is by itself, insufficient to justify transfer of the case from his Court. But where the procedure adopted is such as to justify a reasonable apprehension in the mind of the accused persons that they would not have a fair and impartial trial, there is sufficient ground for transferring the case. AIR (Vol 18) 1931 Lah 59: 32 Cr LJ 253: 129 Ind Cas 193.

**——S. 526 — Magistrate apprised of the transfer application at a late stage — Order stating that he refrained from further proceedings, but cancelling bail bonds — Case fit for transfer.**

Where an accused applied for transfer of his case to the High Court without informing the trying Magistrate and where the Magistrate examined a number of witnesses for the prosecution and examined the accused and the accused in answer to one of the questions disclosed that he had applied for transfer and the Magistrate made an order stating that he refrained from taking further proceedings until the order of the High Court, but at the same time cancelled the bail, holding that there was prima facie evidence against the accused.

Held, that this was not either a correct or a consistent attitude for the learned Magistrate to adopt. Once having correctly expressed an opinion that he "refrained from further proceedings" in view of the application made to the High Court, he ought to have stayed his hands completely for the time and certainly he ought not to have taken the serious and drastic step of cancelling the bail bonds of the accused and that this proceeding was likely to produce a reasonable apprehension in the mind of the accused that he would not have a fair and impartial trial before the Court, and this was therefore a fit case for transfer. AIR (Vol 17) 1930 Lah 958: 1930 Cr C 1054.

——S. 526 — Where adjournments are repeatedly made by a trying Court to bring pressure on the accused person to produce his absconding co-accused persons, the accused must have had reasonable apprehension in their minds that their case would not be tried in that calm and judicial atmosphere and with that detachment which every accused person is entitled to in a Court of justice. Therefore this is a sufficient ground for transfer of the case. AIR (Vol 17) 1930 Lah 953: 1930 Cr C 1049.

**——S. 526 — Circumstances causing apprehension in accused's mind that he will not have fair trial described.**

A case was started against the accused under S. 377, on an incomplete chalan. The accused applied, as soon as the case was called, under S. 344, Cr. P. Code, for adjournment on the ground that he had been served only three hours before, that he wanted time to get copies of the statements made by witnesses to the police or before Magistrate under S. 164, and that this leading counsel was out of station on account of the Muharram holidays. This application was rejected by the Court on the ground that another advocate was present in Court on behalf of the petitioner. The accused then presented another application under S. 526 (8) stating that he intended to apply for the transfer of the case from the Magistrate's Court and praying that the case be adjourned to enable him to do so.

The Magistrate rejected the application assuming that the accused wanted to apply under S. 528. In the course of the trial which then commenced, the first and important witness in respect of whom the offence was alleged to be committed stated that he made the allegations against the accused at the instance of a person, who was alleged to be a bitter enemy of the accused, that his previous statement before a Magistrate was made under pressure. A complaint was made against this witness by the Magistrate under S. 476, Cr. P. Code.

The next witness was then called, but he did not give any direct evidence against the accused. Though at least one other witness for the prosecution was present in Court, the Magistrate did not examine him but passed an order adjourning the case on the ground that he had "lot of treasury work to do". The accused then moved the High Court for transfer of the case and an ad interim order was passed staying further proceedings.

Held, that all the above incidents would necessitate the transfer of the case to another Court. AIR (Vol 15) 1928 Lah 1: 111 Ind Cas 319: 9 Lah 537: 29 Cr LJ 815.

(iii) Illegal acts of Magistrate.

**——S. 526 — Grounds for transfer — Enquiry in jail — Refusal of facilities to engage lawyer — Defence not supplied with relevant and necessary documents.**

Where a Magistrate holds an enquiry under Ch. XVIII of the Cr. P. Code in jail in a case where the accused are charged for an offence under S. 302, I. P. Code and reasonable facilities for the accused to engage a lawyer are denied and the relevant and necessary documents are not supplied to the accused, the circumstances are enough to create in the mind of the accused an apprehension that they would not get a fair trial before that magistrate and would be a valid ground for transferring the case to another Court. AIR (Vol 34) 1947 A 346: ILR (1947) All 657: 1947 ALJ 253: 1947 AWR (HC) 266: 48 Cr LJ 868.

**——S. 526 — Grounds for transfer — Magistrate suggesting compromise or arbitration and then intimidating and coercing accused to accept decision of partisan — Transfer justified — Ends of justice.**

It is grossly improper for a Magistrate trying a criminal complaint to suggest to the accused that the dispute should be settled by arbitration, and after the complainant backs out, to attempt to intimidate and coerce the accused into accepting a decision by a person interested in the complainant, under a threat that otherwise a more serious charge would be framed.

Such conduct is calculated to cause apprehension in the mind of the accused that he would not have a fair and impartial trial. In such a case it is clearly expedient in the interests of justice that the case should be transferred from the Court of that magistrate to another Court. (1947) 230 Ind Cas 44: 48 Cr LJ 488.

**——S. 526 — Enquiring Magistrate holding identification parade.**

Where the Magistrate who is making preliminary enquiry holds an identification parade, there is a sufficient ground for transfer of the case from his Court. (1937) 1937 MWN 1200.

**——S. 526 — Administration of criminal law — Held, on facts, case was fit for transfer.**

The officers who administer the law are not above the law.

Where no notice was served as required by S. 539 (b), but the Magistrate went to the spot and asked the accused to execute bond under S. 91, Criminal P. C., and on his failure to do so, and in the absence of witnesses, proceeded to try the case on the spot:

Held, that the procedure followed was altogether illegal and void.

Held, further that in view of the extremely unsatisfactory behaviour of the Magistrate, the apprehension entertained by the applicant that he will not have a fair trial was perfectly reasonable and the case must, therefore, be withdrawn from his Court and transferred to another. (1936) 163 Ind Cas 413: 18 NLJ 320: 37 Cr LJ 837.

**——S. 526 — Magistrate examining witnesses after 9 p.m. — Lahore High Court Circular Letter No. 2167-G dated April 2, 1924.**

Where a Magistrate was found to have examined, on his own admission, certain witnesses after 9 p.m. in contravention of the directions of the High Court as contained in its Circular Letter No. 2167-G, dated April 2, 1924:

Held, that the directions contained in the above letter were quite clear that no new case should be taken up by the Subordinate Courts after 4 p.m. and that the case might be transferred to some other Court. AIR (Vol 20) 1933 Lah 96: 33 PLR 1032: 34 Cr LJ 383: 14 Lah 201: 142 Ind Cas 696 (1).

**——S. 526 — Magistrate examining accused on detailed instructions of Counsel for prosecution.**

Where, during examination of the accused, the Magistrate made use of a document which he stated he had obtained from Counsel for the prose-

cution, and he put a number of matters to the accused under examination in one question.

Held, that it was improper for the Magistrate to base his examination of an accused on detailed instructions given by Counsel for prosecution; and that as failure to take a firm and impartial line might result in failure to write an impartial judgment, it was expedient for the ends of justice to direct a transfer of the case. AIR (Vol 20) 1933 Nag 269: 16 NLJ 158: 34 Cr LJ 1172: 146 Ind Cas 149 (1).

——**S. 526 — Apprehension — Grounds for — Magistrate sending for party to his house and pressing him to make compromise — Case should be transferred.**

It is highly improper on the part of the trying Magistrate to send for party to a case pending in his Court to his house and then to press upon him the desirability of a compromise. Such a course is likely to raise a reasonable apprehension in the mind of the party that the Magistrate is showing favour to the other side and the case should be transferred to some other Magistrate. AIR (Vol 18) 1931 Lah 32: 1931 Cr C 96.

——S. 526 — Directions of appellate Court with regard to trial disregarded — Application under S. 526 by accused ignored and proceedings continued — Matter not irrelevant expunged from written statement of accused by Magistrate — Held these incidents were sufficient to justify transfer of the case to another Magistrate. AIR (Vol 17) 1930 Lah 882: 1930 Cr C 978.

——S. 526 — Where it appeared (i) that during the course of trial the Magistrate, in contravention of the rule that the Magistrates are not expected to receive private communications either from the parties or their counsel received a letter from the witness for defence calculated to create a reasonable apprehension in the mind of the petitioner that he was a friend of the Magistrate; (ii) that the witnesses of the petitioner were treated in a manner different from that in which witnesses of the opposite party were treated; (iii) that Magistrate while complying with the prayer for postponement as the petitioner wanted to move for transfer to another Court passed an illegal order imposing condition when he had no discretion but to postpone.

Held, that a strong ground was made out for transfer. AIR (Vol 16) 1929 Lah 702: 119 Ind Cas 327: 30 PLR 657: 30 Cr LJ 1048: 1929 Cr C 216.

——S. 526 — Magistrate conducting a trial on a gazetted public holiday in compliance with the request of a police officer constitutes sufficient ground for the case being transferred. AIR (Vol 15) 1928 Lah 334: 107 Ind Cas 779: 29 Cr LJ 294: 10 AI Cr R 22.

——**S. 526 — Local inspection and collection of evidence behind back of parties.**

In a case under S. 486, Penal Code, the Magistrate, after some witnesses were examined for the defence, himself visited the markets in order to make personal enquiries regarding the case without giving any notice to the parties. After this enquiry he summoned some witness on his own initiative.

Held, that the course adopted was illegal. By making personal enquiries the Magistrate made himself an important witness in the case and incapacitated himself to proceed with trial. AIR (Vol 13) 1926 Rang 180: 97 Ind Cas 60: 4 Rang 106: 27 Cr LJ 1084.

——S. 526 — The refusal to afford a suspect such reasonable opportunity on the part of a Magistrate amounts to a failure on his part to exercise his discretion in a wise and proper manner and though such refusal may not form by itself a ground for transfer, it is a factor which the higher Court would seriously take into consideration. AIR (Vol 13) 1926 Sind 288: 96 Ind Cas 391: 20 SLR 122: 27 Cr LJ 935.

——S. 526 — The refusal of a Magistrate to give a reasonable opportunity to an accused person to apply for a transfer of the case is an illegality which vitiates the whole proceeding. A District Magistrate, who as Inspector of Factories, directs the District Engineer to visit a factory and to see whether certain directions have been carried out, is precluded by S. 556 of the Cr. P. Code from trying a prosecution based upon the report of the District Engineer. (1921) 63 Ind Cas 877: 22 Cr LJ 717 (Lah).

——**S. 526 — Grounds — Stopping cross-examination — Apprehension.**

Where a trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined, the Magistrate was guilty of an act of indiscretion which would reasonably lead the accused to believe that they would not get a fair trial at his hands. The case should be transferred to some other Magistrate. AIR (Vol 6) 1919 Pat 565: 20 Cr LJ 559: 51 Ind Cas 847.

——**S. 526 — Grounds — Local inspection by Magistrate — Record of impressions formed not made — Transfer.**

A Magistrate is not entitled to make a local inspection of a place of occurrence as he thereby constitutes himself a witness except for the purpose of explaining evidence that has been given before him. But when he does make an inspection, the law casts on him an obligation to make accurate note on the record of what he has seen. Where a Magistrate made local inspection but omitted to make a note of his impressions on the record.

Held, that although it was an error due more or less to the accident, the case ought to be transferred to the Court of another Magistrate, as the essence of justice is that it must be free from all taint or suspicion. AIR (Vol 4) 1917 Pat 1: 3 PLW 261: 19 Cr LJ 92: 42 Ind Cas 252.

——**S. 526 — Grounds — Magistrate putting questions to witness prejudicial to accused — Whether sufficient ground for transfer.**

Where a Magistrate on information furnished by a police peshi clerk, put improper questions to a defence witness so as to prejudice the accused, there is sufficient cause for granting a transfer of the case. AIR (Vol 1) 1914 All 49: 12 ALJ 50: 15 Cr LJ 234: 23 Ind Cas 186.

**(q) Interest.**

——**S. 526 — Magistrate issuing warrant under S. 5, Public Gambling Act — Desirability of his not trying the case.**

It is ordinarily undesirable that a Magistrate who believes that the information that a house has been used as a public gaming house is credible should not try the case, but he cannot be said to be personally interested in the case, and S. 526, Criminal P. C., would not apply. He merely comes to the conclusion that the information given to him was credible, and he has subsequently to decide the case on the evidence given in it. Even if the case is being tried by another Magistrate, there would be the same presumption and the result would be the same. AIR (Vol 25) 1938 Nag 63: 39 Cr LJ 55: ILR (1939) Nag 556: 171 Ind Cas 1007.

——S. 526 — The reference of the President to Joint Magistrate to make the Bench properly seized of the case is sufficient to warrant a transfer. (1935) 1935 MWN 1227.

——S. 526 — Where the act of the Magistrate in attempting to arrange an interview with a person is calculated not only to lower his own prestige and dignity in the eyes of the litigants, but also to create an apprehension in the minds of the accused that his relations with the person, whom they rightly or wrongly believe to be at the bottom of the prosecution is such that they would not have a fair and impartial trial in the Court, it is proper that the case should be transferred from his Court. AIR (Vol 21) 1934 Lah 541: 36 Cr LJ 192: 35 PLR 478: 152 Ind Cas 896.

**——S. 526 — Magistrate calling party to his house and pressing him to compromise.**

It is highly improper on the part of the trying Magistrate to send for a party to a case pending in his Court to his house and then to press upon him the desirability of a compromise. Such a course is likely to raise a reasonable apprehension in the mind of the complainant that the Magistrate is showing favour to the other side and is a sufficient ground for transferring the case from his file. AIR (Vol 18) 1931 Lah 32: 32 Cr LJ 537: 32 PLR 358: 130 Ind Cas 430.

**——S. 526 — When a sufficient ground.**

Section 556 is based on the maxim nemo debet esse judex in propria cause. The expression "a party or personally interested" implies that a direct personal pecuniary interest, however small in the result of the case, disqualifies a Judge, Magistrate or Justice from trying a case, but where such interest is not pecuniary the disqualifying interest should have substantially the same effect so as to create a reasonable suspicion of bias. The mere possibility of a bias is, however, not enough.

Where the only interest in the result of a case tried by a Magistrate is that he is concerned in it in his public capacity it may fairly be presumed that his interest is not so substantial as to warrant the inference that he is likely to have a real bias in the matter. If in addition to his being so interested there are other circumstances to suggest the real likelihood of a bias, it is another matter. English Case-law referred to. AIR (Vol 14) 1927 Sind 98: 98 Ind Cas 405: 27 Cr LJ 1333: 20 SLR 171.

——S. 526 — Court issuing warrant for arrest is not interested in prosecuting persons who rescue judgment-debtor from lawful arrest under the warrant. AIR (Vol 13) 1926 Cal 605: 43 CLJ 234: 27 Cr LJ 555: 93 Ind Cas 1049 (DB).

**——S. 526 — Acts indicating interest are grounds for transfer.**

Where a seat on the dias was given to a gentleman, not necessarily having any connection with the case while the Magistrate was hearing it; where he received visits from the complainant and the accused during the conduct of the proceedings thereby laying himself open to an imputation, and where the Magistrate accepted a lift in the complainant's car and sat in it with the complainant's brother.

Held, it was advisable to transfer the hearing of the case. (1926) 93 Ind Cas 962: 3 OWN 245: 27 Cr LJ 498: 13 OLJ 644.

——S. 526 — Where a Magistrate has interested himself in a case pending before him in the way of obtaining a settlement by the parties, it is to the interest of both the parties and it is but fair to the Magistrate himself that he should not hear the case. AIR (Vol 12) 1925 All 289: 47 All 411: 23 ALJ 191: 26 Cr LJ 869: 86 Ind Cas 805.

——S. 526 — Taking more than a formal part in the police investigation would serve as a ground for transfer. AIR (Vol 12) 1925 Rang 219: 89 Ind Cas 261: 26 Cr LJ 1317: 4 Bur LJ 65.

**——S. 526 — Magistrate being Vice-President of Municipal Committee starting proceedings is a ground for transfer.**

The Magistrate was a member as well as the Vice-President of the Municipal Committee, Rawalpindi, and was present at the meeting in which the Resolution was passed, for the disobedience of which proceedings against the petitioners had been started.

Held, under such circumstances, as a member or an office-bearer of a Municipality, the Magistrate is debarred from trying a case arising out of the proceedings of the Municipality. The fact that he is one of the members of a Bench before which the cases against the petitioners are pending will not make any difference. AIR (Vol 9) 1922 Lah 72: 69 Ind Cas 384: 23 Cr LJ 704.

**——S. 526 — Dt. Magistrate taking special interest in the case — Good ground.**

Where before the filing of the complaint the District Magistrate made a local enquiry in an unsuccessful attempt to bring about a settlement between the parties and subsequently directed the complainant to file a complaint before him which was then transferred for disposal to the Sub-Divisional Magistrate by an order discussing the merits of the complaint and expressing an opinion adverse to the accused, the case was transferred under S. 526 of the Code for trial to the Court of the District Magistrate of another district. AIR (Vol 9) 1922 Oudh 124.

**——S. 526 — Transfer of case — District Magistrate's powers.**

Where in a dispute regarding possession which gave rise to several criminal cases, the Magistrate of the district showed himself to be an eager partisan of one of the disputing parties, and it was found that he had repeatedly endeavoured to dispose of, by unauthorised executive action, matters which the law reserves for judicial determination, and had been betrayed into many illegal and irregular acts, some of which were of a highly oppressive character.

Held, that he had disqualified himself for the discharge of any judicial function, great or small, in any matter arising out of the dispute. The cases were transferred to another district, as the High Court did not consider it advisable to leave them to be dealt with by any Magistrate of his selection. (1886) 10 CWN 82: 2 CLJ 555 (565).

**(r) Local influence.**

**——S. 526 — Case arousing public interest and excitement.**

A mere fact that the case has aroused public interest and some excitement, is no reason for the transfer of the case, when the challan does not show that the facts of the case are of any extraordinary complexity or involve any specially difficult questions of law. AIR (V 25) 1938 Nag 56: 20 NLJ 151: ILR (1938) Nag 248: 39 Cr LJ 660: 175 Ind Cas 935.

**——S. 526 — Transfer — Bias in mind of Judge — Apprehension in mind of accused.**

In dealing with an application for transfer, the Court has to consider whether there has been any real bias in the mind of the presiding Judge against the applicant and whether incidents may not have happened which are such as are calculated to create in the mind of the applicant, a justifiable apprehension that he would not have an impartial trial:

Held, after considering the facts that there was a fundamental conflict between the Police of the District and the attitude taken up by the District

Magistrate and that the atmosphere of the District was charged with opposing currents and cross-currents, and in this highly charged atmosphere, the applicants' apprehension that they would not get a fair and impartial trial were not purely illusory and that in the interests of justice, it was proper to grant their application for transfer. ('36) 160 Ind Cas 965: 1936 OWN 254: 37 Cr LJ 386.

——S. 526 — Cases which assume an importance of their own should be tried in a calm and quiet atmosphere where all proper and legitimate facilities can be provided both to the prosecution and the defence. Where certain incidents take place in a district which raise a reasonable apprehension in the minds of the accused that they cannot have a fair and impartial trial there, then the accused are entitled to have their case transferred to another district. AIR (V 17) 1930 Lah 954: 31 PLR 694: 1930 Cr C 1050.

——S. 526 — Where a number of officials in the district are personally concerned, whether as witnesses or otherwise, in the case, it is desirable that it should be tried elsewhere. AIR (V 14) 1927 All 708: 28 Cr LJ 1011: 106 Ind Cas 99.

**(s) Magistrate's action in another capacity.**

——S. 526 — Where the prosecution of the applicant was ordered by the Cantonment Magistrate after inspection of the building alleged to be constructed in contravention of the Cantonment Rules in his capacity as Secretary to the Cantonment Committee, it would be more advisable if the case were tried by another Court. AIR (Vol 9) 1922 All 528: 71 Ind Cas 256: 20 ALJ 911: 24 Cr LJ 128.

——S. 526 — The mere fact that the presiding Magistrate as the District Magistrate in charge of the District has taken precautions against intimidation and illegal picketting by the strikers so as to avoid a breach of the peace, is no ground for the transfer of a case in which the strikers are tried under Ss. 143 and 506, I. P. C. (1922) 65 Ind Cas 440: 23 Cr LJ 88 (Cal).

——S. 526 — Certain illegal parwanas were issued by the accused prior to his arrest for the offence for which he was being tried. The District Magistrate had written him to withdraw those parwanas but he refused to do so. Subsequently the case was started against him and he applied for a transfer of the case on the ground that the District Magistrate was prejudiced owing to his refusal to withdraw the parwanas.

Held, that there was nothing improper on the part of the District Magistrate in requesting the accused to withdraw the illegal parwanas and that it was not a ground for a transfer of the case. AIR (V 9) 1922 Pat 494: 81 Ind Cas 49: 25 Cr LJ 561 (DB).

**——S. 526 — Grounds — Magistrate himself a witness.**

The mere fact that the trying Magistrate has to be cited as a witness in the case for the defence is no ground for transferring the case from his file To constitute a good ground for transfer, it must be proved to the satisfaction of the Court that the Magistrate is a necessary and essential witness for the defence. AIR (V 5) 1918 Cal 175: 19 Cr LJ 632: 45 Ind Cas 680 (DB).

**——S. 526 (1) (a) — Grounds — Proceedings initiated by order of a District Magistrate — Deputy Magistrate of district appearing as prosecution witness.**

Proceedings against an accused were initiated under the orders of a District Magistrate and one of the important witnesses for the prosecution was a Deputy Magistrate of the District. Held, the case ought to be transferred to another district. AIR (V 1) 1914 Oudh 398: 24 Ind Cas 951: 1 OLJ 271: 15 Cr LJ 543.

**——Ss. 526 and 556 — Grounds — Magistrate discovering existence of crime — Institution of proceedings — Transfer.**

A Magistrate who while on tour discovers the existence of a crime, collects evidence and institutes criminal proceedings is precluded from trying the case himself and so such a case must be transferred so as to remove from the minds of the litigant parties any suspicion or distrust regarding the tribunal. (1912) 8 NLR 1: 13 Cr LJ 236: 14 Ind Cas 428.

**——S. 526 — Grounds — Magistrate as private arbitrator — Subsequently trying case as Magistrate — Transfer of case.**

Where a Magistrate dealt informally with the dispute as private arbitrator, he ought not subsequently to judge the same dispute between the same parties as Magistrate. (1911) 18 CLJ 150: 14 Cr LJ 602: 12 Ind Cas 474 (DB).

**——S. 526 — Interest — District Magistrate also Agent to Court of Wards and Manager of estate concerned in the case — Transfer from Magistrate subordinate to him.**

The mere fact that the Magistrate of the district is, in his capacity as Collector , concerned in the management of the estate who is interested in the prosecution is no ground for transferring the case from his district. No suggestion that he as Manager knew of the institution of the proceedings. He came to know of it only after some time. (1900) 28 C 297 (301) (DB).

**(t) Opinion formed.**

**——S. 526 — Ground for transfer — Trial Magistrate expressing opinion about case in local enquiry held behind back of accused.**

Where while a case was sub judice before him the trial Magistrate held a local inquiry upon a petition referred to him for enquiry and report in which he examined witnesses behind the back of the accused with regard to the same subject-matter, expressed his opinion about one of the witnesses examined in Court and further expressed his opinion about the very matter which was pending decision before him, an application for transfer of the case ought to be allowed. AIR (V 36) 1949 Pat 105: 29 PLT 464: 50 Cr LJ 176.

**——S. 526 — Magistrate expressing opinion before hearing evidence.**

A Magistrate who has formed an opinion about a case and has expressed his opinion before hearing the evidence in the case, ought not to be allowed to try it. AIR (V 18) 1931 Rang 87: 32 Cr LJ 938: 132 Ind Cas 556.

——S. 526 — Case remanded by appellate Court for re-trial need not necessarily be transferred to another Magistrate.

It is not a general rule that when a case is remanded by the appellate Court for re-trial, it should always be sent to a different Magistrate to the one who held the trial originally, merely on the ground that the former Magistrate having already expressed an opinion against the accused when convicting him the latter has a reasonable apprehension that he will not have a fair trial in the Court of that Magistrate. AIR (V 14) 1927 Lah 546: 28 Cr LJ 647: 103 Ind Cas 103.

——S. 526 — The mere fact that a District Magistrate has come to the conclusion that there is a prima facie case against the accused is no ground for transfer of the case from the district unless it can be shown that he is influencing its result directly or indirectly. AIR (V 14) 1927 Lah 164: 28 Cr LJ 180: 99 Ind Cas 862.

**——S. 526 — Expression of distinct opinion.**

Where the trying Magistrate had expressed a distinct opinion in his order in a previous case that the applicant was guilty of abetting the accused in that previous case who were servants, held there was ample ground for a reasonable apprehension that appellant would not receive impartial trial. AIR (V 13) 1926 Nag 98: 27 Cr LJ 210: 92 Ind Cas 162.

**——S. 526 — Pungent remarks on the conduct of witness.**

The Magistrate in recording the evidence of a witness made a note that the witness faltered and from his demeanour it appeared that he had not told the truth.

Held, that there were sufficient grounds for transfer of the case. AIR (V 12) 1925 Cal 480: 86 Ind Cas 708: 29 CWN 316: 26 Cr LJ 852 (DB).

——S. 526 — Superior officer expressing to the trial Magistrate his belief in innocence of the accused justifies the transfer of the case. AIR (V 12) 1925 Oudh 90: 82 Ind Cas 766: 11 OLJ 657: 25 Cr LJ 1374.

——S. 526 — Where the Court has already formed very strong opinion of the conduct of the accused whose prosecution was ordered by the Court under S. 166, I. P. C., transfer should be ordered. AIR (V 11) 1924 All 533: 83 Ind Cas 699: 22 ALJ 430: 5 LRA Cr 57: 26 Cr LJ 139.

**——Ss. 526 and 528 — Grounds — Transfer — Adverse opinion in previous case.**

The opinion expressed by the Magistrate in a previous case in which the accused was tried and convicted on a separate and distinct charge is in itself no ground for the transfer of the case. AIR (V 5) 1918 Pat 165: 4 PLW 21: 19 Cr LJ 121: 43 Ind Cas 409.

——S. 526 — That a Magistrate in a counter-case has clearly formed an opinion strongly against a party is a sufficient ground for transfer. (1910) MWN 735: 9 MLT 162: 11 Cr LJ 702: 8 Ind Cas 721 (DB).

——S. 526 — If a Magistrate who tried a case has formed some opinion on the evidence and has expressed it, it is fair and just that the accused should be tried by another Magistrate. (1910) 7 ALJ 19: 11 Cr LJ 51: 5 Ind Cas 178.

**——S. 526 — Transfer of case — Rioting — Magistrate forming his opinion on a material question in the case before trial.**

The High Court made an order transferring a case of rioting from the file of a Magistrate who before the trial commenced, had expressed a decisive opinion on the question of the possession of the property in relation to which the riot was said to have taken place, that being the most important question in the case. (1904) 8 CWN 641 (642)) (DB).

**(u) Relation.**

**——S. 526 — Grounds for transfer — Refusal of Magistrate to grant exemption from personal appearance to pardanashin — Reasonable apprehension of injustice — Lawyer friend of Magistrate.**

The mere fact that the lawyers representing the complainant happen to be the friends of the Magistrate trying the case cannot justify an inference against the integrity of the Magistrate or the lawyers; and from the mere fact that orders were passed in favour of the complainant it cannot be said that the Magistrate was influenced by those lawyers.

Even if the accused have not made out any case against the integrity and fair-mindedness of the Magistrate, there yet may be a reasonable apprehension in the minds of the accused that they shall not have justice at his hands, and under the circumstances the case should be transferred to some other Magistrate. Where in a trial under S. 323, Penal Code, the Magistrate refused to grant an exemption from personal appearance under S. 205 to pardanashin ladies belonging to Vishya class:

Held, that though the propriety of the order could not be questioned and though the matter was within the Magistrate's discretion the order might have raised a reasonable apprehension in the minds of the accused that they would not have a fair deal. It is a matter of public policy that justice should not merely be done but should appear to be so. (1946) 225 Ind Cas 242 (All).

——S. 526 — Where a Crown case is being conducted by the Court Inspector, the mere fact that the complainant has engaged to watch the case, a pleader who is a near relation of the Magistrate trying the case is no ground for the transfer of the case so long as the pleader is only watching the case. AIR 1925 Oudh 348, Diss. from. AIR (V 13) 1926 Pat 464: 95 Ind Cas 764: 7 PLT 770: 1926 PHCC 383: 27 Cr LJ 844.

——S. 526 — It is undesirable that a member of the legal profession should practice in a Court presided over by a near relation. Where the complainant's muktear was a near relation of the Magistrate and where the muktearnama was not filed until the day on which the case was transferred to that Magistrate.

Held, that transfer to some other Magistrate must be ordered. AIR (V 12) 1925 Cal 806: 88 Ind Cas 607: 29 CWN 648: 26 Cr LJ 1183. (DB).

——S. 526 — The mere fact that the Magistrate's son is a pleader and that he has been engaged by the other side is no ground for granting a transfer to another Court. AIR (V 12) 1925 Oudh 348: 85 Ind Cas 56: 26 Cr LJ 440.

**——S. 526 — Grounds of transfer — Magistrate a relative of the Police Sub-Inspector — Magistrate guardian of a person having a claim to the estate interested in the prosecution.**

The fact that the Magistrate is a relative of the Police Sub-Inspector of the place, or that he is in private life a guardian of a person who has a claim

to the estate whose manager or servant initiates the prosecution, is no ground for transfer from the said Magistrate. (1901) 28 C 297 (300) (DB).

**(v) Reality of.**

——S. 526 — An application for transfer cannot be granted simply because it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case, he would not give effect to a certain legal objection which might be taken at the trial. AIR (V 15) 1928 Lah 317: 107 Ind Cas 773: 29 Cr LJ 289: 10 AI Cr R 8.

—S. 526 — Application for transfer cannot be granted lightly on fanciful and sentimental grounds. AIR (V 15) 1928 Lah 276: 107 Ind Cas 108: 29 Cr LJ 220: 9 AI Cr R 514.

**(w) Substantiation of.**

**——S. 526 — Application by the State for transfer of case from one Sessions Judge to another Sessions Judge — Unusual nature of — Care to be taken before making application.**

An application by the State for transfer of a case from one Sessions Judge to another Sessions Judge is unusual as it is very rarely, if at all, made. The Sessions Judges occupy a position of distinct importance in our judicial hierarchy and hence before such a transfer application is presented on behalf of the State, it is not unreasonable to assume that care is taken, on the part of the department of Law and Order, that there is substance in the allegations on which the transfer application is based. AIR (V 37) 1950 A 727: 1950 AWR 521: 1950 ALJ 513 (DB).

**——S. 526 — Whether applicant had reasonable opportunity to apply under S. 526 — Determination of.**

The question whether a person notifying his intention of making an application under S. 526, has had a reasonable opportunity of making such an application must have reference to the ground on which it is sought to make the application. AIR (V 31) 1944 Mad 78: 56 LW 640: 1943 MWN 706 (2): (1943) 2 MLJ 524: 45 Cr LJ 368: 211 Ind Cas 350 (DB).

**——S. 526 — Prosecution by Police and in hands of Public Prosecutor — Application by private complainant.**

A complainant's application for transfer of a case should be scanned more narrowly than that of an accused person. In a charge which is instituted on a Police report and in which the prosecution is in the hands of the Public Prosecutor, exceptionally strong grounds would have to be shown before the High Court would exercise its power of transfer at the instance of a private complainant. AIR (V 28) 1941 Lah 299: 43 PLR 354: 42 Cr LJ 880: 196 Ind Cas 467.

**——S. 526 — Case already transferred once — Very strong grounds are required to transfer it.**

When a case has already been transferred, very strong grounds are required to transfer it a second time. If accused or his counsel are so unfortunate as to have a reasonable apprehension that the second Magistrate will not give them justice and want to get their case transferred to a third Magistrate, it may well be supposed that the accused or his counsel are to blame in part. AIR (V 27) 1940 Lah 354: 41 Cr LJ 948: 190 Ind Cas 561.

**——S. 526 — Charge under S. 304, I.P.C. — Conviction for lesser offence — Private complainant — Transfer when ordered.**

If a Magistrate convicts an accused on a minor charge when he should have committed him to Sessions on a graver charge, there is a remedy provided by the law, but it would be a very dangerous thing for the High Court to interfere in a pending case and transfer it from the Court which is seised of it because the Court during the hearing of the case takes a particular view of the law or the facts.

In a charge under S. 304, I.P.C., which is instituted on a police report and in which the prosecution is in the hands of the Public Prosecutor, exceptionally strong grounds would have to be shown before the High Court would exercise its power of transfer at the instance of a private complainant when the responsible authorities are satisfied that there is no ground for withdrawing the case from the Court which is hearing it. AIR (V 13) 1926 All 307: 93 Ind Cas 246: 7 LRA Cr 71: 27 Cr LJ 454.

——S. 526 — It is not desirable that a litigant should be able to get a transfer at his will and pleasure by making an application containing unfounded allegations against a judicial officer, and then representing that after making those allegations he could not expect to get justice from him. If this principle is accepted every application for transfer is bound to succeed. AIR (V 13) 1926 Lah 470: 96 Ind Cas 395: 8 LLJ 303: 27 PLR 491: 27 Cr LJ 939: 27 PR 570.

**——S. 526 — Grounds — Sessions Judge's order for trial on graver charges — Whether valid.**

Where a Sessions Judge in hearing an appeal in the ordinary course of his duties found that there were materials for a charge under a graver offence and sent the case down for trial thereon, it was held that the Sessions Judge was perfectly right and there was no ground for transfer. AIR (V 1) 1914 All 111: 15 Cr LJ 367: 23 Ind Cas 735.

**(x) Subordination of magistrate.**

**——S. 526 — Grounds for transfer — Superior revenue officer of trying Magistrate expressing himself in very strong terms with regard to guilt of accused is sufficient ground.**

The High Court wil not hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his revenue superior on whose inquiry and report the case has been started. AIR (V 33) 1946 Pat 162.

**——S. 526 — Magistrate subordinate as Revenue Officer to person on whose report case was instituted.**

The High Court will not hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his revenue superior on whose inquiry and report the case has been instituted. AIR (V 29) 1942 Bom 316: 44 Bom LR 763: 44 Cr LJ 71: 203 Ind Cas 257 (DB).

**——S. 526 — Magistrate subordinate to District Magistrate who sanctioned prosecution.**

It cannot be held as a general principle that no Magistrate subordinate to the District Magistrate can deal with a case in which the District Magistrate had sanctioned prosecution. But at the same time, if there are, at any time, reasons for thinking that in fact a particular Magistrate was likely to be influenced by the opinion of the District Magistrate, the High Court should not hesitate to transfer the case to the Sessions Court. AIR (V 28) 1941 Bom 336 : 43 Bom LR 518 : 43 Cr LJ 262 : 197 Ind Cas 733 (DB).

**——S. 526 — Fact that member of Legislature is figuring in case is no ground for transfer.**

The Magistrate, when he tries a case under S. 406, Penal Code, should be alert to see that his Court is not used for the purpose of oppression by introducing the evidence of any zemindar or any Member of the Legislative Assembly who, as

such, has no special position or privilege at all in any Court of law, and the Magistrate must deal with the case as it comes before him strictly upon its merits.

If, for instance, he believes the case is a false case inspired by some prominent person, he will, if he thinks that that prominent person has aided or abetted the making of a false complaint or has given false evidence in Court, not hesitate to take such action under S. 476, Criminal P. C., as the interest of justice requires. It must be made known that Magistrates will not be deterred from doing their duty merely because a person concerned is a zemindar, an M. L.A. or a prominent person.

It is a truism that wherever British concepts prevail, all men are equal before the law, and a zemindar, an M. L. A., or a prominent person has no special privilege under the Criminal Procedure Code, and should any such person make or aid in making a false complaint or give false evidence on oath then the law must be put in motion against him in the same way as against any other person. Hence the fact that such a person is figuring in a case is no ground for transferring it. AIR (V 28) 1941 Sind 39 : 42 Cr LJ 437 : 193 Ind Cas 557.

——S. 526 — **Deputy Commissioner of district taking prominent part in prosecution — Possibility of his being examined as witness for prosecution.**

It was evident that the Deputy Commissioner had been involved in the case to an unusual degree. He was perfectly within his rights as head of the district, and no doubt, thought it his duty to investigate alleged scandals and see that the wheels of justice were set in motion. The result, however, in this case, had been that it was he himself who lodged the first information report and that he would have to be examined as a witness for the prosecution. There was no personal feeling on the part of the Deputy Commissioner against the accused. There was no ground for attributing bias to him against the accused :

Held, that it would be somewhat embarrassing to the trial Magistrate to have his Deputy Commissioner as a witness before him, epecially when the accused was inclined to criticise the manner of the investigation made against him. The case, therefore, was fit one for being transferred to another district. AIR (V 27) 1940 Nag 275 : 1940 NLJ 335 : 190 Ind Cas 153.

——S. 526 — **Complaint filed by Deputy Commissioner.**

The mere fact alone that it is the Deputy Commissioner who has laid the complaint does not afford a reasonable ground for apprehension in the mind of any person that he will not receive a fair trial in the district of the Deputy Commissioner. To get the case transferred to another district, he must further show that the Subordinate Magistrates in that district are in awe of the Deputy Commissioner and look upon him as a person who must, on no account, be crossed. However, cases of this nature which have been instituted by the Deputy Commissioner or District Magistrate of a district, should not be tried by the Magistrate who is in such immediate touch with the Deputy Commissioner or District Magistrate as is the Headquarters Magistrate of the district.

Where there are Magistrates who are not executive officers, it is desirable that they should be chosen to try such cases. It cannot be denied that an accused person might feel some apprehension that a subordinate executive officer might be unduly influenced by the expressed opinion of the Deputy Commissioner, and might be ready to pay too much deference to that opinion and might even be inclined to follow it in preference to his own. Such an apprehension could scarcely exist in regard to a Magistrate who belongs to the judicial service, and is in no likelihood of being unduly impressed by the authority of the executive head of the district. AIR (V 26) 1939 Rang 88 : 40 Cr LJ 532 : 181 Ind Cas 315.

——S. 526 — **Advocate appearing in case being official superior of Magistrate's brother.**

Where an Advocate appearing in the case is the official superior of the Magistrate's brother, the matter as to whether he should or should not try the case himself, should better be left to the good sense of the Magistrate and if he feels that in the particular case, by reason of the relationship of his brother to the Advocate, he feels himself in any way embarrassed in dealing with the matter, he should send the papers to the superior Court which can, in the inquiry held by itself, make any necessary complaint. AIR (V 26) 1939 Sind 181 : 40 Cr LJ 750 : 183 Ind Cas 195.

——S. 526 — **Complaint against Financial Commissioner — Magistrate, also Collector and subordinate to accused.**

Where a complaint made against the Financial Commissioner was transferred for disposal to the Additional District Magistrate who was also a Collector and as such, subordinate to the accused, and the complainant applied for transfer of the case :

Held, that the applicant might quite reasonably, albeit quite wrongly, have the apprehension that the particular relationship that the Additional District Magistrate had to the accused might have some influence on him; and even if it merely embarrassed him, it would be sufficient to justify the applicant's apprehension that the trial might not be all that could be desired.

The case should be transferred to some other Court; for, the existence of such an apprehension in the mind of one of the parties must militate against a proper trial, if for no other reason than that it places the party concerned under a very serious handicap. AIR (V 25) 1938 Rang 68 : 39 Cr LJ 415 : 174 Ind Cas 400.

——S. 526 — **Investigation by District Magistrate who held offence prima facie made out.**

The accused was a clerk to the Bench of Honorary Magistrates. The District Magistrate, after conducting an investigation into the manner in which the accused had been performing his work came to the conclusion that he committed defalcations of money paid in as fines by persons convicted before the Honorary Magistrate. In his report to the Police to prosecute the accused, the District Magistrate stated that there was sufficient ground for believing that he was guilty of an offence under S. 409 I. P. C. The accused applied for transfer to a Magistrate outside the District :

Held, that though an apprehension that he would not receive an impartial trial might actually be groundless, but it was not unlikely that a fear might arise in the accused's mind and that for the ends of justice, the case should be transferred to Magistrate who was not under the immediate control of the District Magistrate. AIR (V 24) 1937 Rang 284 : 38 Cr LJ 923 : 170 Ind Cas 420.

——S. 526 — **Complaint against near relation of District Magistrate.**

A complaint against the District Superintendent of Police, filed before the District Magistrate, was transferred by him to the Sub-Divisional Magistrate for disposal. The accused was the relation

of the District Magistrate. The acts that gave rise to the complaint occurred 10 years ago and the case, had it come up for trial, would certainly have been a cause celebre. The complainant objected to the case being tried by the Magistrate on the ground that he himself would have to be called as witness in the trial and prayed for its transfer. Notwithstanding the objection, the Magistrate held that he could not take cognizance of the offence for want of sanction of the Local Government and discharged the accused :

Held, that the action of the Sub-Divisional Magistrate could not be said to be illegal; but, in view of all the circumstances of the case, the matter, if it had to be put an end to, should have been put an end to in a way correct in every possible detail, and the Sub-Divisional Magistrate, in his somewhat delicate position, would have shown a better sense of the fitness of things if he had, under the circumstances, asked that some other Magistrate should deal with the case finally. AIR (V 23) 1936 Rang 242 : 37 Cr LJ 723 : 162 Ind Cas 988.

——S. 526 — An officer of the rank of District Superintendent of Police, for certain things done by him while he was a Deputy Commissioner of Police, would be entitled to have a complaint aganst him tried by a Senior Magistrate, and not a Subordinate Magistrate. AIR (V 23) 1936 Rang 242 : 37 Cr LJ 723 : 162 Ind Cas 988.

——S. 526 — If a complaint is filed against a near relation of the District Magistrate, it should only be inquired into by a Magistrate who cannot, in any reasonable sense of the word, be described as a subordinate of the District Magistrate. As a rule, it should be transferred for disposal to a Magistrate who is entirely independent of the District Magistrate. AIR (V 23) 1936 Rang 242 : 37 Cr LJ 723 : 162 Ind Cas 988.

**——S. 526 — Complainant, Magistrate's superior officer.**

An application for transfer cannot be granted as a matter of course and to agree to transfer a case from a Magistrate's Court merely because his official superior is the complainant, would be to create a reflection upon the integrity and impartiality of the magistracy which, even an apprehension of an accused person would not justify. Before an application for transfer should succeed, there must be some reasonable basis for the apprehension of the accused person. It is not sufficient for an accused to say that he is apprehensive, for otherwise, an accused would in the first instance always be free to decide in which Court, at least, his case should not be tried.

The accused, a tapedar, was accused of having attempted to bribe his Collector and the Magistrate of the District and the Magistrate of the District was the complainant:

Held, that the case should be transferred to another District Magistrate. AIR (Vol 22) 1935 Sind 195: 36 Cr LJ 1480: 29 SLR 336: 158 Ind Cas 809.

——S. 526 — Accused charged with trespassing into outhouses of District Magistrate — Order to summon witnesses including District Magistrate — District Magistrate sending note to trial Court to suspend summons to himself and others — Trial Court ordering notice not to be issued — Interference by District Magistrate held illegal — Reasonable grounds for suspecting that applicant will not have fair trial held existed and application for transfer held must be allowed. AIR (Vol 21) 1934 Nag 39 : 35 Cr LJ 411 : 147 Ind Cas 289.

**——S. 526 — Magistrate acting under Police influence.**

Where, in an application for transfer, the allegations of the petitioner that the Magistrate was acting entirely on the Police reports and that the case had created a great commotion and alarm in the District, were not refuted :

Held, that these allegations taken in conjunction with the conduct of the Magistrate in cancelling the bail and thereafter in calling upon the applicants to furnish security while they were applying to the High Court for transfer would undoubtedly raise an apprehension in the minds of the applicants that they would not get a fair and impartial trial and there was sufficient ground for transferring the case.

Held, further, that the circumstances of the case were exceptional and the case should be transferred to another District altogether. AIR (Vol 20) 1933 Rang 165 : 34 Cr LJ 1195 : 146 Ind Cas 23.

——S. 526 — The fact that the Magistrate trying a case is subordinate to the officer making the complaint is not sufficient ground for transfer. AIR (Vol 12) 1925 Nag 433 : 89 Ind Cas 897 : 24 Cr LJ 1425.

**——S. 526 — Outside influence — Superior Magistrate holding strong view of the case is not sufficient.**

The fact that the Magistrate conducting the trial is subordinate to the District Magistrate and the latter has taken a strong view of the merits of the case is not a sufficient ground for transferring the case outside the district. AIR (Vol 7) 1920 Pat 792 : 60 Ind Cas 657 : 3 UPLR (Pat) 25 : 22 Cr LJ 257 (DB).

**(y) Other grounds.**

——S. 526 — Grounds for transfer — Accused preferring case to be tried by particular Judge or Court — If ground for transfer to that Judge or Court. See AIR (Vol 33) 1946 Sind 1 : 222 Ind Cas 431 : 47 Cr LJ 455.

——S. 526 — Application for transfer of case under S. 476 to the file of Magistrate before whom offence was committed on ground that he was proper Judge to appreciate whether complaint should be made or not although otherwise very reasonable, cannot be granted by reason of words of S. 476, Criminal P. C. AIR (Vol 26) 1939 Sind 181 : 40 Cr LJ 750 : 183 Ind Cas 195.

**——S. 526 — Exercise of power under S. 127 (1) by Magistrate trying case, in relation to disturbance out of which offence arose.**

As a general rule, the mere fact that a Magistrate has, in his capacity as a Magistrate, exercised the powers given to him under S. 127 (1), Criminal P. C., in relation to particular disturbance or series of disturbances, affords no ground for the transfer, from the cognizance of that Magistrate of a case arising out of that disturbance or series of disturbances.

If, on the other hand, a Magistrate, in the course of the performance of his duties in relation to any particular disturbance were to acquire any particular knowledge by his own observation or otherwise which might, in the hearing of any case, tend to embarrass him, it is possible that a transfer either at the instance of the Magistrate himself or at the instance of the accused person, might, in some cases, be desirable in the interests of justice.

In case of an application for transfer, it is necessary for a person who claims a transfer to prove by affidavit, fully and strictly, all the facts on which he rests his claim. AIR (Vol 25) 1938 Rang 454 : 40 Cr LJ 154 : 178 Ind Cas 942 (DB).

——S. 526 — **Magistrate expressing final opinion.**

A re-trial should not take place before the Magistrate who has already expressed his final opinion upon the matter. (1937) 38 Cr LJ 229 : 3 BR 170 (2) : 166 Ind Cas 466.

——S. 526 — **Advisability of sending case to some other Magistrate when case is remanded on appeal.**

The position of a Magistrate who had decided against the accused before remand is indeed difficult since howsoever fair he may be in fact, he cannot remove the vague fear in the mind of the accused as to his own attitude and impose confidence in him :

Held, that although there was no merit in the allegations regarding the adverse attitude of the trial Magistrate, it was advisable when the case was remanded on appeal, that it should have been sent to some other Magistrate. ('36) 37 Cr LJ 459 : 18 NLJ 199 : 161 Ind Cas 317 (1).

——S. 526 — **Magistrate using words in order passed suggesting that he believed in guilt of accused before having heard him in defence**

Where in an order passed during the course of the proceeding, the Magistrate has inadvertently used words which suggest that before the case was finished and before the accused had been heard in his defence, he believed the guilt of the accused to be established which may reasonably give just ground for apprehension in the mind of the accused, it is only proper in the circumstances that the case should be transferred. AIR (Vol 22) 1935 Sind 223 (223, 224) : 37 Cr LJ 152 : 29 SLR 339 : 159 Ind Cas 687.

——S. 526 — **Prejudging the case.**

Where the Magistrate has prejudged the case, a sufficient ground for transfer is made out. AIR (Vol 20) 1933 Rang 164 : 34 Cr LJ 950 (2) : 145 Ind Cas 344.

——S. 526 — **Magistrate taking active part as Executive Officer against picketing.**

Where a Magistrate has been taking steps as an Executive Officer to put down picketing of shops, it is desirable that such a Magistrate should not, as far as possible, hear cases arising out of picketing, in his judicial capacity.

Where a Magistrate who had taken steps as an Executive Officer to stop picketing in certain shops, took cognisance of a case arising out of such picketing and further instituted proceedings against the accused under S. 228, I. P. C., and in his anxiety to secure the imprisonment of the accused, did not take the proceedings for contempt himself :

Held, that the conduct of the Magistrate was not likely to inspire into the mind of the accused the feeling that he would have a fair and impartial trial and there was sufficient ground for transferring the case. AIR (Vol 18) 1931 Lah 30 : 32 Cr LJ 491 : 32 PLR 272 : 130 Ind Cas 330 (1).

——S. 526 — **Grounds for.**

The refusal by a Magistrate to permit the cross-examination of the prosecution witnesses after all of them have been examined-in-chief; (2) the cancellation of bail bonds of an accused made after an application for stay of proceedings pending an application for transfer of the case; and (3) refusal to furnish the accused with copies of depositions of witnesses for the prosecution, were held to be sufficient grounds for transfer of a case. AIR (V 7) 1920 Pat 492: 1920 PHCC 283 : 57 Ind Cas 454.

——S. 526 — Expression of opinion in miscellaneous proceedings does not justify transfer of the main case. AIR (Vol 11) 1924 Oudh 338 : 77 Ind Cas 721 : 11 OLJ 54 : 25 Cr LJ 433.

——S. 526 — The fact that the trying Magistrate believed to have made up his mind that there is no likelihood of a breach of peace is not a sufficient ground for transfer. If he forms any opinion on the question of possession which might hamper him in dealing with the evidence on that point, it might no doubt be proper ground for transferring the case. AIR (Vol 10) 1923 Oudh 161: 76 Ind Cas 562: 25 Cr LJ 194 (Lah).

——S. 526 — Where a Magistrate in framing the charges against the accused observed that the offence had been proved the case should be transferred to another magistrate for trial. (1922) 65 Ind Cas 632 : 23 Cr LJ 168.

——S. 526 — **Grounds — Magistrate not knowing English — Oral and documentary evidence in English — Transfer if advisable.**

Where the evidence both oral and documentary is in English and the Magistrate does not know English, a transfer is advisable. AIR (Vol 2) 1915 All 50 : 16 Cr LJ 73 : 26 Ind Cas 665.

——S. 526 — **Grounds — Necessity for evidence of trying Magistrate — Burden of proof.**

An application for transfer based on the ground that the evidence of the trying Magistrate is necessary for the defence cannot be entertained unless the applicant clearly shows that his evidence is really essential and there is a likelihood that he can give evidence which would aid the defence. The burden of proving this lies heavily on the accused. AIR (Vol 1) 1914 Sind 20 : 8 SLR 170 : 16 Cr LJ 222 : 27 Ind Cas 846.

——S. 526 — **Transfer expedient — Presence at search.**

Where a Magistrate was present at a search made by the Police during investigation and in all probability he came to know of some facts in connection with the case, it is expedient that the case should be tried by some other Magistrate. (1901) 5 CWN 864 (865) (DB).

**(z) What is not.**

(i) General.
(ii) Error of judgment.
(iii) Judge, actions of.
(iv) Magistrate, irregular actions of.
(v) Mistake of law.

**(i) General.**

——S. 526 — **Apprehension of being convicted is no reason for transfer.**

An accused is only entitled to transfer if he has a reasonable apprehension of an unfair trial. Every guilty criminal must have a reasonable apprehension of being convicted; and apprehension of being convicted is no reason for a transfer. AIR (V 28) 1941 Lah 367: 43 PLR 639: 43 Cr LJ 71: 196 Ind Cas 816.

——S. 526 — **Police Officers of district, witnesses in case.**

It is undesirable to transfer a case from one district to another because Police Officers of the district are witnesses in that case. AIR (V 27) 1940 Lah 527: 42 PLR 589: 42 Cr LJ 284: 192 Ind Cas 347.

——S. 526 — **Disallowing relevant question.**

A witness who had been examined by the Police can reasonably be asked whether a particular version which he was giving in Court was given by him to the Police. If he did give it, he is not contradicted. But if he did not, or if there is no mention of it in the diary, the value to be attached to the omission will depend upon the circumstances and may

even mean the rejection of the version. The question, in any case, would be perfectly relevant and legitimate. However, rejection of the question cannot be a ground for transfer. AIR (V 25) 1938 Pat 238: 4 BR 533: 39 Cr LJ 527: 175 Ind Cas 110.

**——S. 526 — Mere passing of illegal order — Whether justifies inference against impartiality.**

Courts may pass orders which may either be legal or illegal, but the mere passing of an illegal order will not justify an inference against their honesty or impartiality. AIR (V 24) 1937 Lah 411: ILR (1937) Lah 114: 39 PLR 643: 38 Cr LJ 955: 170 Ind Cas 586.

**——S. 526 — Accused placing sinister interpretation on Magistrate's innocent act.**

An accused is not entitled to have his case transferred from the Court of a Magistrate who is seised of it merely because he chooses to place a sinister interpretation on an innocent act of the Magistrate. Otherwise, an accused person endowed with a suspicious nature will make the administration of justice impossible. AIR (V 24) 1937 Lah 411: 39 PLR 643: ILR (1937) Lah 114: 38 Cr LJ 955: 170 Ind Cas 586.

**——S. 526 — Sensational nature of case.**

The fact that a case is a sensational one cannot, without qualification, be accepted as a ground for the transfer of a case at all. AIR (V 23) 1936 Sind 237: 38 Cr LJ 133(2): 30 SLR 327: 166 Ind Cas 83(2) (DB).

**——S. 526 — Magistrate hearing major part of case before his transfer.**

The general principle that it is desirable that a Magistrate who has heard the greater part of a case should conclude it, should not be allowed to outweigh the prejudice and loss likely to result to the accused by transfer of the case to the Mamagistrate who heard it before his transfer to another district. AIR (V 22) 1935 Sind 197 : 36 Cr LJ 1495: 158 Ind Cas 964.

**——S. 526 — Action of Police unjustifiable.**

The conduct of the Police even if it be unjustifiable is no ground for transferring the case from the District. AIR (V 21) 1934 Lah 516: 36 PLR 240: 150 Ind Cas 1095.

——S. 526 — The existence of a village feud may well be within the knowledge of a Sub-Divisional Officer as also statements of apprehension that a false case will be brought against a man. But these are not sufficient reasons to cite the officer as witness for defence in a case so as to necessitate a transfer of a case to another Magistrate where such officer is the trying Magistrate. AIR (V 14) 1927 Oudh 31: 3 OWN 944: 99 Ind Cas 97: 28 Cr LJ 65: 7 A I Cr R 179.

——S. 526 — Where one of the grounds for transfer was that an officer purely of Judicial Department may be authorised to deal with the case,

Held that the High Court will not under ordinary circumstances be justified in accepting a ground which insinuates condemnation of the whole body of Magistrates serving in the executive line. AIR (V 11) 1924 Nag 243: 83 Ind Cas 723: 7 NLJ 155: 26 Cr LJ 163.

——S. 526 — Where the supposed displeasure of a Magistrate towards an accused is inferred from his attitude, it is not sufficient ground to transfer a case. AIR (V 6) 1919 All 29: 2 UPLR (All) 55: 58 Ind Cas 681.

**——S. 526 — Grounds — Co-accused found guilty — No ground for.**

The fact that certain persons jointly tried with the accused, were subsequently, separately tried and found guilty does not point to any doubt on the Magistrate's impartiality and is therefore no ground for a transfer of the case. AIR (V 1) 1914 All 378: 15 Cr LJ 253: 23 Ind Cas 205.

**(ii) Error of judgment.**

**——S. 526 — Magistrate allowing inadmissible evidence to be brought on record.**

The fact that the Magistrate has allowed certain pieces of inadmissible evidence to be brought on the record would by itself may indicate an error of law, and not necessarily any bias in the mind of the Magistrate. AIR (Vol 29) 1942 Pat 77: 8 BR 47: 43 Cr LJ 48: 196 Ind Cas 582.

**——S. 526 — Grounds — Error of judgment — Refusal to give copies — Transfer.**

An error of judgment in admitting evidence, is no ground for transferring a case from such Court, nor is the fact that when addressed by that Court, the District Magistrate refuses to produce the papers called for the defence on the ground that some are missing and that the rest are confidential. AIR (Vol 6) 1919 Pat 493: 20 Cr LJ 609: 52 Ind Cas 273.

**——S. 526 — Refusal to grant bail.**

Refusal to grant bail is not a ground for transfer of a case from one Magistrate to another. An error in disallowing certain questions is not a ground for a transfer. The improper exclusion of evidence is not a good ground for a transfer during the pendency of the case. (1911) 4 Bur LT 113: 12 Cr LJ 277: 10 Ind Cas 917.

**(iii) Judge, actions of.**

**——S. 526 — Judge having previous official contract with accused, whether disqualification to try.**

The mere fact that the Judge or Magistrate had previously an official contract with the accused does not necessarily disqualify him from hearing the appeal or holding the trial. AIR (Vol 30) 1943 Cal 594: 45 Cr LJ 324: 210 Ind Cas 337 (SB).

**——S. 526 — Allowance or disallowance of questions by Judge in pursuance of judicial duty — Unfavourable comment made by accused on Magistrate previously whether can be ground for transfer.**

A Judge or Magistrate who conscientiously tries a case in a judicial proceeding has a legal duty to apply, to the best of his ability, the rules of evidence, as those rules are laid down in the Evidence Act. And his plain judicial duty is to exclude irrelevant evidence whether in examination-in-chief or in cross-examination.

The allowance or disallowance of questions by a Judge in pursuance of a judicial duty can never by itself afford a ground upon which to base an application for a transfer of a case, unless it is either shown affirmatively that there exists some improper motive or unless upon the face of the questions themselves, disallowed or allowed as the case may be, the only possible inference must be that they have been allowed or disallowed for some ulterior and improper reason.

An accused who was being tried by an Additional District Magistrate made an application for transfer of case on the ground that as the accused had made some unfavourable comment on the Magistrate while he was Deputy Commissioner, the Magistrate might harbour a resentment

against the accused which would prevent him doing justice in the case :

Held, that this could not be accepted as ground for transfer. AIR (Vol 25) 1938 Rang 456: 40 Cr LJ 162: 179 Ind Cas 72 (DB).

——**S. 526 — Evidence of Police Investigating Officer interpolated during cross-examination of prosecution witness.**

During the trial, the evidence of the Police Investigating Officer was interpolated during the cross-examination of the prosecution witness. Complaint was made of this in the affidavit supporting the transfer petition :

Held, that although the Sessions Judge might better have waited till the investigating officer came to be called, he was entirely within his rights in putting this witness in the box and this could not be said to have prejudiced the accused. AIR (Vol 25) 1938 Rang 442 : 40 Cr LJ 265 : 179 Ind Cas 783 (DB).

——**S. 526 — Judge taking proceedings for contempt — Whether ground for transfer.**

Where, after hearing of the day was finished, the accused was called back and convicted under S. 228, I. P. C., and apprehending that he might not get a fair trial, he applied for transfer :

Held, that it may be that the Judge erred in taking proceedings for contempt of Court and in convicting him for that offence, but the mere conviction of him by the Judge did not warrant the transfer of the Sessions case from his Court. To hold otherwise would be to concede the privilege to a party to a case to secure the transfer of a case from a particular Court by being unnecessarily offensive and insolent and thus courting proceedings for contempt of Court. AIR (Vol 24) 1937 All 171 : 38 Cr LJ 416 (2) : 1936 AWR 967 : 167 Ind Cas 515.

——**S. 526 — Mere fact that in another case Judge came to particular conclusion.**

Where it is sound doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer, yet in applying the doctrine regard must be had to the circumstances in each case, and the mere fact that in another case, on other evidence the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer. AIR (Vol 17) 1930 Pat 337 : 11 PLT 248 : 31 Cr LJ 732 : 1930 Cr C 709 : 124 Ind Cas 846.

——S. 526 — The mere fact that Sessions Judge has heard the appeals of some of several persons convicted of dacoity, is no bar to his hearing the appeals of other arrested and convicted subsequently, nor is it a ground for transfer of the appeal to another Sessions Judge. (1921) 22 Cr LJ 416 : 2 UPLR (All) 421 : 61 Ind Cas 656.

——**S. 526 — Grounds — Transfer of criminal case on insufficient grounds.**

The Judge's expression of opinion upon evidence in a former counter-case or proceeding is not a sufficient reason for the transfer of a criminal case from him. AIR (Vol 3) 1916 Pat 33 : 1 PLJ 399: 18 Cr LJ 95: (1917) PHCC 30: 3 PLW 70 : 37 Ind Cas 159 (DB).

**(iv) Magistrate, irregular actions of.**

——**S. 526 — Passing remarks during the conduct of the case.**

Court should be very cautious in making observations during the course of a trial, because in dealing with a petition for transfer, the superior Courts have to see whether or not particular observations made by the Court will raise a reasonable apprehension in the mind of the accused that he would not have a fair trial in the Court. Observations that the prosecution witnesses who did not support the story of the prosecution are won over and further that their evidence would not affect the merits of the case, must necessarily raise such an apprehension in the mind of the accused that he would not get a fair trial.

The fact that the Magistrate insisted on a petition on 12 annas stamp being filed for whatever objection raised by the accused, would certainly create an apprehension in the mind of the accused with regard to the impartiality of the Court, especially when the Magistrate had observed that the witnesses had been won over and that their statements would not affect the merits of the case against the accused. AIR (Vol 29) 1942 Pat 77 : 8 BR 47 : 43 Cr LJ 48 : 196 Ind Cas 582.

——**S. 526 — Examination of accused under S. 342, before close of prosecution case.**

The fact that the Magistrate has examined the accused under S. 342, Criminal P. C., exhaustively before the prosecution case was closed by itself would not show that there was any bias or prejudice in the mind of the Magistrate. Section 342 authorises a Magistrate in a criminal case to examine the accused at any stage of the trial in order to have the evidence before him clarified. The stage at which examination under S. 342 is imperative is after the prosecution has closed its case. This point is not such as would entitle the accused to claim a transfer. AIR (Vol 29) 1942 Pat 77 : 8 BR 47 : 43 Cr LJ 48 : 196 Ind Cas 582.

——**S. 526 Magistrate's disallowing questions in cross-examination without recording them.**

The fact that when the Magistrate disallowed questions in cross-examination, he made no note of this on the record is no ground for transferring a case under S. 526. AIR (Vol 27) 1940 Lah 527 : 42 PLR 589 : 42 Cr LJ 284 : 192 Ind Cas 347.

——**S. 526 — Refusal to call particular defence witness.**

Refusal of a Magistrate to call a particular person as a defence witness is no reason for transferring the case. AIR (Vol 27) 1940 Lah 354 : 41 Cr LJ 948 : 190 Ind Cas 561.

——**S. 526 — Magistrate wrongly admitting evidence.**

While it is easy for an Appellate Court to say that this or that evidence should not have been admitted on the record, it is not so easy for a Magistrate who is recording the evidence constantly to interrupt the Advocate and shut out questions or answers the true purport or purpose of which may not be clear until some time after the questions have been asked, answered and recorded.

It is true the duty lies upon the Court to exclude evidence which is inadmissible in law but the fact that the Magistrate wrongly admits evidence, an error in law, is not of itself necessarily good ground to transfer a case. AIR (Vol 26) 1939 Sind 238 : 40 Cr LJ 803 : ILR (1940) Kar 113 : 183 Ind Cas 460.

——**S. 526 — Irregularity in recording evidence — Accused not likely to benefit by transfer.**

Where the Court recorded evidence under S. 255-A, Criminal P. C., with irregularity creating apprehensions in the mind of the accused who applied for transfer of the case but it appeared that transfer would not be of any benefit to the accused, the best course would be to expunge the evidence irregularly recorded and not to transfer the case. AIR (Vol 24) 1937 Pat 131 : 17 PLT 627 : 3 BR 379 : 38 Cr LJ 484 : 167 Ind Cas 881.

——**S. 526 — Defence witnesses, list of — Irregularity, held, no ground for transfer.**

Strictly speaking, the accused cannot be called upon to enter into his defence until all the pro-

secution witnesses have been exhausted and till then, under the law, the Magistrate cannot ask the accused to file the list of his defence witnesses. But the mere fact that he is called upon to submit the list before the cross-examination of all prosecution witnesses is not an irregularity which will afford sufficient ground for transfer. AIR (Vol 24) 1937 Pat 131 : 17 PLT 627 : 3 BR 379 : 38 Cr LJ 484 : 167 Ind Cas 881.

**——S. 526 — Mere fact that Magistrate has a lot of work.**

The mere fact that a Magistrate has a lot of work is not alone a ground why a case in which almost the entire prosecution evidence has been recorded by him should be transferred from his Court to another Court. AIR (Vol 23) 1936 Lah 827 (828) : 38 Cr LJ 181 : 166 Ind Cas 373 (2).

**——S. 526 — Magistrate unwilling to proceed with case.**

That Magistrate is himself unwilling to proceed with the case is certainly no reason for removing the case from his file. ('36) 18 NLJ 279 : 37 Cr LJ 861 : 163 Ind Cas 694.

**——S. 526 — Unjudicial remark.**

The remark of a Magistrate that the accused is thrice previous convict from his personal knowledge is an unjudicial remark and certainly prejudices the accused. (1935) 1935 MWN 468.

**——S. 526 — Accused appearing as defence witness in another case before same Magistrate — Remarks in judgment in latter case against accused — Held, case should be transferred.**

Accused, in a particular case, appeared as a defence witness in another case before the same Magistrate and was examined as such. In the course of his judgment in that case, the Magistrate said that in the circumstances, it appeared that the accused was dealing in illicit sale of salt :

Held, that although the Magistrate may have honestly intended to confine that remark to the position of the accused as a witness in the other trial, without any prejudice to his position in the trial in which he was an accused, yet it was too plain that a remark of that kind would suffice to raise a reasonable apprehension in the mind of the accused that he was not likely to receive an impartial trial from the Magistrate, and as such, the case should be transferred. AIR (Vol 22) 1935 Rang 446 : 37 Cr LJ 220 : 160 Ind Cas 85.

**——S. 526 — Failure to take action under S. 552.**

Failure of a District Magistrate to take action under S. 552, Criminal P. C., cannot cause a reasonable apprehension in the mind of the petitioner that he will not get justice in the District. AIR (Vol 21) 1934 Lah 516 : 36 PLR 240 : 150 Ind Cas 1095.

**——S. 526 — Magistrate trying another case against the same accused — Whether sufficient reason for transfer.**

The fact that a Magistrate is trying or has tried one case against an accused person is no reason why he should not try any subsequent case against the same person, especially when no allegation of prejudice or unfair treatment has been made against the Magistrate. AIR (Vol 20) 1933 Nag 201 : 34 Cr LJ 1035 : 29 NLR 338 : 145 Ind Cas 445.

——S. 526 — The fact that the Magistrate proposes to examine complainant who is a very old man and who for many years has not left the precincts of his residence, as a witness, at the latter's residence, and where the accused is given every opportunity of being represented and conducting his case there, does not call for a transfer of the case. AIR (Vol 13) 1926 Oudh 290 . 27 Cr LJ 344 : 92 Ind Cas 856.

——S. 526 — Where a case was sent to a Magistrate for disposal with a remark by the District Magistrate that it was quite a clear case and the defence was ridiculous,

Held, transfer of the case to another District is justified. AIR (Vol 12) 1925 Oudh 690 : 2 OWN 688 : 26 Cr LJ 1525 : 90 Ind Cas 309.

——S. 526 — Where a Magistrate passed certain remarks regarding accused's guilt in another case before him while convicting him in one case, the other case should be transferred from his file. AIR (Vol 11) 1924 Oudh 433 : 11 OLJ 556 : 26 Cr LJ 158 : 83 Ind Cas 718.

——S. 526 — Where the only reason assigned for a transfer was that the Magistrate had already tried certain other persons charged with the same offence.

Held, that no sufficient ground for transfer was made out. AIR (Vol 11) 1924 Oudh 247 : 24 Cr LJ 800 : 74 Ind Cas 544.

**——S. 526 — Grounds — Award of compensation by way of costs for adjournment — Local inspection by Magistrate with a view to understand evidence about to be given.**

Neither the fact that a Magistrate gives compensation by way of costs for an adjournment nor the fact that the trying Magistrate makes a local inspection for the purpose of understanding the evidence about to be given is a ground for transfer. AIR (Vol 5) 1918 Pat 656 : 2 Pat LW 218 : 19 Cr LJ 6 : 42 Ind Cas 918.

**——S. 526 — Grounds — Reasonable apprehension that justice would not be done, necessary — Mere refusal to summon witnesses, if a ground.**

A reasonable apprehension on the part of the accused that justice would not be done, is necessary before transfer can be effected under S. 526 ; a mere refusal to summon witnesses when the application is purely vexatious is no ground for a transfer, neither is a disallowance of an indecent question being put in cross-examination. AIR (Vol 1) 1914 All 382 : 36 All 239 : 15 Cr LJ 212 : 12 ALJ 399 : 22 Ind Cas 996.

(v) Mistake of law.

**——S. 526 — Bona fide mistake of law by Magistrate — Whether good ground for transfer.**

A bona fide mistake of law on the part of a Magistrate is not a good ground for transfer. Similarly no apprehension should arise from the ordinary acts of the Magistrate performed in the course of a case even if the decision is against the accused. AIR (Vol 23) 1936 Nag 146: 37 Cr LJ 1146: 165 Ind Cas 425.

**——S. 526 — Transfer — Grounds.**

If it appears that a Magistrate acts from personal feelings of enmity derived from a long past dispute between one of his subordinates and the petitioners and that he is consciously straining the law to injure the petitioner, it will be the duty of the High Court to set aside the proceedings. But where the Magistrate merely acts mistakenly, i e., in a mistaken view of the law, the High Court will not interfere. The particular case was eventually transferred. (1908) C 1076 (DB).

**——S. 526 — Order by Magistrate on mistaken but bona fide view of the law — No ground.**

(1904) 8 CWN 838 (839).

**10. Jurisdiction.**

**——S. 526 and U. P. High Court's (Amalgamation) Order, Art. 14 — Application to transfer**

criminal case pending before Magistrate in Lucknow — Proper forum.

An application to transfer a criminal case pending before a Magistrate in Lucknow to the Court of a Magistrate in Allahabad should be made only to the Bench of the Allahabad High Court sitting at Lucknow. The mere fact that the applicant wants the transfer of the case to Allahabad would make no difference as the case is one arising in an area in Avadh the jurisdiction of which is for the time being vested in the Bench in Lucknow.

It is clear from Art. 14 of the U. P. High Courts (Amalgamation) Order, that it is open to the Judges of the Allahabad High Court whether they sit at Allahabad or Lucknow to order the transfer of a case from any subordinate Court in any part of the State to any other subordinate Court in any other part of the State. AIR (Vol 37) 1950 A 485: 51 Cr LJ 1302: 1950 AWR 465: 1950 ALJ 403.

——Ss. 526 (8), 528 (2) — **Transfer of Magistrate after completion of enquiry but before pronouncing judgment — Transfer of case to Magistrate to pronounce judgment.**

The only intention recognised by the Legislature for the transfer of a case is that the Court to which the case is transferred should enquire into or try it. The pronouncing of judgment is not a part of the enquiry or trial and therefore, where a Magistrate is transferred after he has completed the trial but before pronouncing judgment, the case cannot be transferred to him for the purpose of pronouncing judgment, however convenient this course may be in practice. AIR (Vol 23) 1936 Mad 163: 1935 MWN 1281: 43 LW 257: 37 Cr LJ 223: 70 MLJ 244: 160 Ind Cas 104.

——**S. 526—Application for transfer kept pending till the entire evidence is recorded — Legality of.**

If a case is made out for transfer, the order should be made forthwith or else the application should be rejected; the matter should not be ordered to be kept pending till the entire evidence is recorded. This is particularly so when the main ground for the transfer is that the Magistrate has no jurisdiction to try the case at all. AIR (Vol 21) 1934 All 499: 35 Cr LJ 982: 1934 ALJ 308: 3 AWR 506: 56 All 1047: 149 Ind Cas 420 (FB).

——S. 526 — Where the Sub-Magistrate has no jurisdiction to try the case, it cannot be transferred. ('33) 1933 MWN 1428.

——S. 526 — By S. 5 read with S. 526 High Court has jurisdiction to transfer cases from village panchayats constituted under the U. P. Village Panchayat Act of 1920. AIR (Vol 14) 1927 All 199: 49 All 188: 25 ALJ 757: 8 LRA Cr 33: 28 Cr LJ 94: 7 AI Cr R 246: 99 Ind Cas 126.

——**S. 526 — High Court cannot transfer criminal proceedings pending before village panchayat.**

A village panchayat constituted under the Local Act VI of 1920 is not a "criminal court" within the meaning of Ch. II of the amended Cr. P. Code; therefore, S. 526 would have no application. So also S. 22 of the Letters Patent (Allahabad) does not apply and the High Court has no jurisdiction to direct the transfer of a case from a panchayat constituted under the Local Act.

Per Kanhaiya Lal, J. A village panchayat is a Court for the purpose of S. 22 of the Letters patent, and in the absence of any limitation imposed by any Act, the High Court has power under the section to transfer any criminal proceeding pending before a village panchayat to another village panchayat empowered to take cognizance thereof. AIR (Vol 11) 1924 All 265: 83 Ind Cas 350: 46 All 167: 21 ALJ 925: 25 Cr LJ 1390 (DB).

——**S. 526 — Transfer of case pending in another province.**

High Court has no jurisdiction to transfer criminal cases which are in the course of hearing in another province nor has it jurisdiction to declare e g., that a particular case is triable exclusively in Benares and not in Calcutta. AIR (Vol 11) 1924 All 71: 73 Ind Cas 523: 24 Cr LJ 635.

——**S. 526 — Applicability — Extradition proceedings.**

The High Court has no jurisdiction under S. 526 Cr. P. C. to transfer extradition proceedings. AIR (Vol 6) 1919 Cal 444: 49 Ind Cas 913: 46 Cal 31: 20 Cr LJ 241 (DB).

——**S. 526 — To whom case can be transferred — Honorary Magistrate — Offence of false charge.**

An offence under the second clause of S. 211 I. P. C. should not be sent for trial to an inexperienced Honorary Magistrate who has made unnecessary adjournments. This circumstance was held to be a good ground for transfer. AIR (Vol 5) 1918 All 372: 16 ALJ 294· 19 Cr LJ 611: 45 Ind Cas 515.

——**Ss. 526 and 527 — To whom case can be transferred.**

A Magistrate before whom a case is pending cannot himself transfer it to a Court subordinate to another High Court, but if the Magistrate does pass such an order, the case no longer remains pending in the Court. The power of transfer in such a case vests only in the High Court under S. 185 Cr. P. C. AIR (Vol 4) 1917 Lah 237: 1 PWR 1917 Cr: 24 PR 1917 Cr: 74 PLR 1917: 18 Cr LJ 514: 39 Ind Cas 482.

——**S. 526 (1) (ii) — To whom case can be transferred — Transfer of any case — Letters Patent Cl. 29 — Charter Act, S. 15 — Chief Presidency Magistrate's Court — Powers of High Court.**

The Courts are of equal jurisdiction when they are empowered by law to entertain the same class of cases and to dispose of them in the same way. The Court of the Chief Presidency Magistrate is of equal jurisdiction to the Court of any other Presidency Magistrate within S. 526. Both under S 526 and under the Charter Act, the High Court can transfer a case from the file of the Chief Presidency Magistrate to that of any other Presidency Magistrate. 35 Mad 739: 22 MLJ 114: 10 MLT 518: (1911) 2 MWN 50: 12 Cr LJ 451: 11 Ind Cas 795 (DB).

——**S. 526 — Transfer of proceedings under S. 110 to another District — Jurisdiction to court to which case is transferred.**

Section 526 of the Code of Criminal Procedure enables the High Court to transfer Criminal proceedings, instituted under S. 110 of the Code, once they have been properly instituted, from one district to another, to a court of superior or equal jurisdiction and the order of the High Court will give jurisdiction to the court to which such proceedings are transferred. 16 A. 9 not foll. A Dis-

trict Magistrate admitted, in his reply to an application for transfer of a case, that he had taken a keen personal interest in the case, and was satisfied of the applicant's guilt.

Held that this was sufficient to arouse in the minds of the applicant a reasonable apprehension that he would not have a fair and impartial trial in the District. (1910) 7 ALJ 813: 32 A 642 (644) 11 Cr LJ 412.

——**Ss. 526 and 195 — To whom case can be transferred.**

A transfer under S. 526 can be made only to the Court, to which the Court before which an application under S. 195 is pending, is subordinate. 34 Mad 186: (1910) MWN 459: 8 MLT 297: 11 Cr LJ 534: 20 MLJ 982: 7 Ind Cas 861 (DB).

——**S. 526 — Transfer — Court having no jurisdiction — Procedure.**

The High Court cannot, under S. 526, Cr. P. C., transfer a case from the file of a Magistrate who had apparently no jurisdiction over the case. The Magistrate should inform the complainant that he has no jurisdiction and take bail from the accused for appearance before the proper ccurt. (1901) 3 Bom LR 121 (122) (DB).

## 11. Power of High Court.

**(a) General.**
**(b) Revision.**
**(c) Under Letters Patent.**

### (a) General.

——**S. 526 — Application for transfer to High Court — Maintainability — District Court not moved.**

The High Court would not ordinarily entertain an application for transfer when the applicant could under the law have moved the District Court for the same relief and has not done so. The High Court would interfere only in the last resort. AIR (Vol 37) 1950 Ajmer 19 (1): 51 Cr LJ 864.

——**S. 526 and Constitution of India, Art. 227 (1) — Power of High Court to transfer case from Bench Court to Panchayati Adalat.**

Section 526 of the Cr P. C. does not provide for the transfer by the High Court of a case pending before the Bench Court to the Panchayati Adalat which is competent to try it under the U. P. Panchayat Raj Act of 1947. But the High Court can, in view of the power of superintendence conferred on it by Art. 227 (1) of the Constitution, give directions to the Bench Magistrate to act in a manner justified by law. AIR (Vol 37) 1950 A 611: 1950 AWR 529: 1950 ALJ 519.

——**S. 526 — Power of High Court — Transfer of case posted for orders.**

Under S. 526 (1), Cr. P. Code, the High Court can transfer a case from a subordinate Criminal Court even after it has reached the stage when the evidence of both parties has closed, arguments have been heard and the only thing that remains to be done is to pass orders in it. If the "case" is still pending and the High Court considers that an order of transfer is expedient for the ends of justice, the High Court has full power to transfer the case, irrespective of whether the trial in the restricted sense, such as is contemplated in S. 366 or S. 497 (4) of the Code, has terminated or not.

This is the effect of the use of the word "whenever" in S. 526 (1) and of the word "case" in S. 526 (1). Cl. (ii) Sub-S. (8) of S. 526 does not impose any limitation on the power of the High Court to make an order of transfer which is dealt with under sub-S. (1) of that section. The limitations imposed by sub-S. (8) are limitations on the right of the parties to make an application for an adjournment and the power of the Court to grant an adjournment. AIR (Vol 36) 1949 Pat 105: 29 PLT 464: 50 Cr LJ 176.

——**Ss. 526, 107 — Case under S. 107, whether can be transferred from one District to another.**

Section 526, Criminal P. C., enables the High Court to transfer criminal proceedings initiated under S. 107, once they have been properly instituted, to any other Criminal Court of equal or superior jurisdiction (and which otherwise would have no jurisdiction) and the order of the High Court will give jurisdiction to the Court to which the case has been so transferred to make an inquiry under S. 117, and to pass an order under S. 118. There is no bar of jurisdiction in the way of the High Court to transfer a case under S. 107, Criminal P. C., from one District to another.

Where the District Magistrate has already expressed his opinion on the matter in a report on a riot submitted by him to the Government, it is not desirable that a connected case under S. 107, Criminal P. C., should proceed before a Magistrate of the District. AIR (Vol 29) 1942 Oudh 186: 1941 OWN 1351: 1942 AWR (CC) 3: 43 Cr LJ 365: 198 Ind Cas 433.

——**S. 526 — Extent of.**

The High Court can, of its own motion, under sub-s. (3) of S. 526, Criminal P. C., transfer a case; it can, if it thinks proper, act upon the application of a witness, and would certainly do so if it is satisfied that the process of the Court is being abused, that the proceedings are sham or bogus proceedings instituted or continued for some ulterior purpose, for a purpose not within the intention and provisions of the relevant sections of the Code.

Where, however, no useful purpose, public or private, can be served by the transfer of the case nor is there any reasonable ground for apprehension on the part of the applicant that the Magistrate will not deal fairly and honestly in his final order with the questions under the provisions of the Criminal Procedure Code, before him for his decision, the case cannot be transferred. AIR (Vol 26) 1939 Sind 238: 40 Cr LJ 803: ILR (1940) Kar 113: 183 Ind Cas 460.

——S. 526 — Joint trial of A, B and C — A claiming to be tried as European British subject but others not claiming Indian majority in jury and wishing to be tried with A — Case can be transferred by High Court to other place owing to want of European jurors. AIR (Vol 25) 1938 Nag 328: 1938 NLJ 185: 39 Cr LJ 818: ILR (1938) Nag 516: 176 Ind Cas 853 (DB).

——S. 526 — Powers of transfer conferred on High Court under S. 526 are not in any way limited or controlled by S. 269, Criminal P. C., and trial for offence triable with jury in a particular district may be transferred to another district to be tried with aid of assessors only. AIR (Vol 22) 1935 Sind 145: 28 SLR 397: 36 Cr LJ 1161 (2): 157 Ind Cas 697 (DB).

——**Ss. 526, 9 (2) and 193 (2) — Notification by Government fixing place of trial and Judge —**

**Power of High Court to transfer, in spite of — Ends of justice.**

With reference to a case which stood committed to the Court of Session at Thana, the Government of Bombay, by means of a notification under S. 9 (2) and S. 193 (2), Criminal P. C., directed that the case should be tried at Alibag by Mr. G., Additional Sessions Judge of Thana. The accused applied to the High Court to have the case transferred to Thana on the ground of convenience of parties and their witnesses and also on the ground that the accused would have the benefit of a trial by Jury at Thana instead of a trial with assessors at Alibag.

Held, (by Madgavkar and Patkar, JJ.; Murphy, J., dissenting), that the case should be transferred to the Court of Session sitting at Thana in the interest of justice and convenience of parties; the powers of transfer vested in the High Court under S 526, Criminal P. C., were in no way affected by the notification of the Local Government.

(By Patkar and Murphy, JJ. — Madgavkar, J. dubitante) — The notification by the Government directing the case to be tried at Alibag by Mr. G., was not illegal or ultra vires.

Per Madgavkar, J. — The term 'administrative orders' is one not known to British or Indian law. The powers of the Local Government like the rights of other corporations and bodies can only be derived from the law and extend no further than what the ordinary law permits. The Executive Government, Local or Imperial, is as subject to the law, and their acts and orders are not less open to test in the Courts than those of the humblest citizen.

The High Court cannot alter the regular place of sitting of any Sessions Court, from the place directed by the Local Government under S. 9. But it can, and repeatedly does, under S. 526, change the venue of trial of any case from any one of these places to another, both notified under S. 9, though it cannot to a third, not so notified and directed by itself.

Whatever its powers under S. 178, neither by S. 9 nor by S. 193 did the Legislature intend that the Local Government should interfere with the ordinary course of justice in a particular case or transfer a particular case from a particular Judge to another particular Judge. And the notification therefore, even if it is within the letter of these sections violates their spirit. AIR (Vol 18) 1931 Bom 313: 33 Bom LR 675: 32 Cr LJ 1147: 55 B 576: 134 Ind Cas 347 (SB).

——S. 526— The High Court has power to transfer case to the Court having jurisdiction from a Court not having jurisdiction. AIR (Vol 16) 1929 Sind 250: 1929 Cr C 678: 30 Cr LJ 1121: 120 Ind Cas 81.

——S. 526 — Where an offence is being inquired into and tried by a Court contrary to the provisions of S. 177, the error can be rectified by the High Court by transfer to the Court having jurisdiction. The High Court is not bound to quash the proceedings. 23 OC 87 Diss. AIR (Vol 12) 1925 Oudh 490: 26 Cr LJ 577: 85 Ind Cas 721.

——S. 526 — Ordinarily a High Court does not transfer a case pending before a Magistrate unless the party applying for transfer, has moved the District Magistrate before coming to the High Court. AIR (Vol 10) 1923 Lah 685: 24 Cr LJ 466: 72 Ind Cas 882.

——S. 526 — Power of transfer exists even in the case of proceedings under S. 145, Cr. P. Code. AIR (Vol 10) 1923 Oudh 161: 25 Cr LJ 194: 76 Ind Cas 562.

**——S. 526 — Applicability — Punjab Courts Act S. 33.**

The general power conferred upon the Chief Court by S. 33 of the Punjab Courts Act is Administrative and cannot be interpreted to enlarge the special power conferred by S. 526 Cr. P. C. AIR (Vol 1) 1914 Lah 281: 154 PLR 1914: 5 PR (Cr) 1914: 15 Cr LJ 563: 24 Ind Cas 971.

**——Ss. 526 and 145 — Applicability — High Court — Jurisdiction — Criminal case — Transfer.**

The "expression" criminal case in S. 556 includes a proceeding initiated under S. 145 of the Code. The High Court has power, therefore, to transfer such proceeding from one Court to another, subject of course to all the conditions under which a transfer can be made. 25 B 179, Diss. (1912) 34 All 533: 10 ALJ 27: 13 Cr LJ 452: 15 Ind Cas 84 (DB).

**——S. 526 — Practice — Transfer of case — High Court practice.**

Ordinarily the High Court does not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court. (1904) 6 Bom LR 480 (481) (DB).

**——S. 526 — Transfer from one Presidency Magistrate to another — Quaere.**

Whether the High Court can transfer a case from one Presidency Magistrate to another Presidency Magistrate, both being members of one and the same court. (1902) 13 MLJ 69 (70).

**(b) Revision.**

**——S. 526 — Omission to record reasons for transfer — Whether merely an irregularity — Interference in revision.**

The omission to record reasons for transfer of a case under S. 526, Criminal P. C., is merely an irregularity and does not furnish a ground for interference in revision. (AIR 20) 1933 Lah 807: 34 Cr LJ 1174: 146 Ind Cas 166.

——S. 526 — High Court has power under S. 439 to alter or refuse an order transferring a case made under S. 526, by the lower Court. AIR (Vol 20) 1933 Rang 89: 34 Cr LJ 832: 144 Ind Cas 677.

**——S. 526 — Inherent power — High Court has no power apart from S. 526.**

The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in S. 439. S. 526 is not one of these. The Letters Patent does not confer any power of transfer over and above that conferred by S. 526 since cl. 28 is qualified by cl. 36. AIR (Vol 11) 1924 Rang 100: 1 Rang 632: 2 Bur LJ 236: 25 Cr LJ 485: 77 Ind Cas 885.

**——S. 526 — Transfer of cases.**

Where a Presidency Magistrate had made up his mind regarding a case, the High Court on the case coming under its revisional jurisdiction, transferred it to another Magistrate for re-trial. (1903) 10 Bom LR 201 (203) (DB).

**——S. 526 (1) (e) (iv) — Of order of commitment passed by High Court — Revision.**

Under S. 526 Cr. P. C., the High Court cannot revise an order of commitment passed by the High Court itself under S. 526, Cr. P. C. (1903) 27 M 54 (56).

**(c) Under Letters Patent.**

**——S. 526 — Applicability — Village Magistrate — Transfer of case — Letters Patent (Bom) Cl. 29.**

The High Court can transfer a case from the file of the Village Magistrate only under Cl. 28 of the Letters Patent and not under S. 526, Cr. P. C. AIR (Vol 6) 1919 Bom 79: 21 Bom LR 274: 20 Cr LJ 315: 50 Ind Cas 491 (DB).

**——S. 526 — Transfer from Village Magistrate's file — Petty case and cases of theft — Letters Patent — S. 29.**

A District or Sub-Divisional Magistrate has no power to transfer cases of a trivial nature other than those specifically mentioned in S. 6 of Reg. IV of 1821 under S. 528, Para 4 of Cr. P. C But the High Court can transfer under S. 29 of the Letters Patent. (1902) 26 M 394 (401) (FB).

**——Ss. 526, 145 — Charter Act (24 and 25 Vic., C. 104) — Letters Patent, S. 29 — Power of High Court to transfer cases under S. 145 — Reasonable apprehension of bias.**

Ghose J. — It is doubtful whether the legislature meant to confer on the High Court power by S. 526, Cr. P. C., to make a transfer of a case other than that in which a person is charged with an offence. It may, however, under S. 15 of the Charter Act transfer a case under S. 145, Cr. P. C.

Whenever by reason of the words or conduct of a Magistrate or a Judge before whom a case is pending a party reasonably apprehends there is bias in him, the case should be transferred, though there may not be any actual bias.

Taylor, J.: It is doubtful whether S. 526 Cr. P. C., will apply to cases which do not relate to a crime or offence under the law. But the High Court can transfer under S. 29 of the Letters Patent. Meaning of 'case' and 'criminal Case' as used in the Code discussed. (1901) 5 CWN 749 (755, 756): 28 C 709 (DB).

**12. Procedure.**

See also N. 7.

**(a) General.**
**(b) De novo trial.**
**(c) Notice of transfer.**

**(a) General**

**——S. 526 — Application by State for transfer of case from one Sessions Judge to another Sessions Judge — Undesirability of police officers swearing to affidavits.**

It is not right that the State when it seeks transfer of a case from the Court of one Sessions Judge to that of another Sessions Judge, should utilise the services of a Police Officer for purposes of swearing affidavits. Such a procedure is calculated to affect the prestige as also the independence of the judiciary. AIR (V 37) 1950 A 727: 1950 AWR 521: 1950 ALJ 513 (DB).

**——S. 526 (8) — Procedure — Application for adjournment or stay — Mode of making — Sending letter or telegram to Magistrate — Propriety of.**

The proper way to approach the trial Court to give intimation of a transfer application is not by sending letters or telegrams to the presiding Magistrate. The party must either appear in person before the Court, or he must make such application as he wishes to make by a properly appointed agent.

It would be impossible for the Court to carry on its business if it were to accede to applications made by post or by telegrams. S. 526 (8) itself contemplates the presence of the party or of his advocate in Court when an application under that sub-section is made. In the absence of such proper intimation to the Court under S. 526 (8) the Court is not bound to adjourn the case under that section. AIR (V 36) 1949 Bom 172: 50 Cr LJ 633: 51 Bom LR 106: 3 AI Cr D 187 (DB).

**——S. 526 — Whether Judge exercising Sessions jurisdiction of Chief Court is subordinate to High Court.**

Quaere.—Whether the Chief Court in its original criminal jurisdiction as the Sessions Court of Karachi is Subordinate to the Chief Court in its High Court criminal appellate jurisdiction for the purpose of S. 526, Criminal P.C., AIR (V 31) 1944 Sind 65: 45 Cr LJ 505: ILR (1944) Kar 239: 212 Ind Cas 79 (DB).

**——S. 526 — Time for application.**

Section 526 (8), Criminal P.C., clearly lays down that intimation of an intention to make an application for transfer of case must be made before the defence closes its case. Where an application for transfer is made not only after the defence has closed its case but after the judgment has been written and signed by the Magistrate, it is not maintainable. AIR (V 26) 1939 Lah 21: 40 PLR 996: ILR (1938) Lah 567: 40 Cr LJ 288: 179 Ind Cas 990.

**——S. 526 — Allegations against Magistrate — If they are untrue, the Magistrate must specifically deny them.**

Where petitioners, in their application for transfer of the case, allege certain things against the Magistrate, and the High Court calls for an explanation from him, it is better, if it is a fact, for him to deny the allegations. Merely saying that "what the petitioners believe is not evidence" and that their statements are "purely conjectural and do not admit of any discussion" is not enough. AIR (V 25) 1938 Pat 376: 4 BR 519 (1): 39 Cr LJ 517: 175 Ind Cas 49.

**——S. 526 — Court from whom transfer is sought should be given opportunity to instruct Government Advocate on the matter raised in transfer affidavit.**

As a matter of practice, the better course to adopt is that when an application for transfer of the case is made, the Judge from whose Court the transfer is sought to be obtained should be given an opportunity of instructing the Government Advocate on the matters raised in the affidavits, but any formal explanation which is subsequently incorporated in the proceedings is not desirable. AIR (V 25) 1938 Rang 442: 40 Cr LJ 265: 179 Ind Cas 783 (DB).

**——S. 526 — Report from Magistrate — Power of High Court to call for — Nature of report — Contradiction of report.**

A report submitted by a Magistrate in respect of allegations made in an affidavit supporting a transfer application can be contradicted and may be disbelieved for sufficient reasons. Affidavit in support of the allegations is competent under S. 539-A, Criminal P.C.

Though there is no provision in Criminal P.C., for calling for the report from the Magistrate, the High Court has, nevertheless, power to call for such a report. Such a report, however, is not made in a judicial capacity. ('37) 1937 MWN 328

**——S. 526 — Transfer, not the remedy.**

Accused discharged — Application to review the discharge refused — Another complaint before same Magistrate on same facts — Application for transfer of case :

Held, that the application should not be granted. If the case were transferred to another Magistrate and the Magistrate were to convict the accused, the situation would arise that the accused would have been discharged by one Magistrate and without the order of discharge being set aside, the accused would be convicted by another Magistrate, a result which would be undesirable.

Proper course is to make an application under S. 436 to the Sessions Judge or District Magistrate for setting aside discharge and for making a further enquiry. AIR (V 22) 1935 All 59: 1935 AWR 623: 36 Cr LJ 128 (2): 152 Ind Cas 619.

——S. 523 — A Magistrate going to dismiss the complaint under S. 203 — Application for transfer will not be entertained. ('35) 1935 MWN 643.

——S. 526 — **Application to be made without delay.**

An application for transfer ought to be put forward at the earliest possible opportunity after the occurrence of whatever facts or circumstances are alleged as affording a reasonable ground for such an application. The applicant cannot be allowed to attorn to the jurisdiction only so long as he thinks that the decisions are likely to go in his favour and to throw aspersions upon the impartiality of the tribunal merely because decisions on preliminary points of law have not always been in his favour. AIR (V 20) 1933 Sind 17: 26 SLR 255: 33 Cr LJ 908: 139 Ind Cas 791 (DB).

——S. 526 — Section 526, sub-S. (8) makes it imperative on the magistrate to grant an adjournment if the party proposes to apply to the High Court for transfer and for this right to apply to the High Court, it is not necessary to apply before the Chief Presidency Magistrate under S. 528 for the same purpose. AIR (V 17) 1930 Bom 480: 32 Bom LR 1128: 1930 Cr C 1067 (FB).

——S. 526 — A separate application for transfer of an appeal jointly filed by two or more accused is not absolutely necessary, though a joint appeal had been filed. AIR (V 14) 1927 Nag 48: 27 Cr LJ 1062: 97 Ind Cas 38.

——S. 526 — Where a complaint has been dismissed for default by a Magistrate a fresh complaint based on the same facts, but filed in another Court should be sent to the former for trial. AIR (V 13) 1926 Lah 445: 27 Cr LJ 719: 94 Ind Cas 911.

——**S. 526 — Application for transfer lies directly to the High Court.**

An application under S. 526 for a transfer of a criminal case pending before a Subordinate Magistrate lies direct to the High Court, and it is unnecessary that such an application should be made in the first instance to the District or Sub-Divisional Magistrate under S. 528 of the Cr. P. Code. AIR (V 13) 1926 Sind 137: 20 SLR 54: 27 Cr LJ 40: 91 Ind Cas 72 (DB).

——S. 526 — Even though there is ample authority for saying that because a Magistrate has tried some other case involving somewhat similar facts possibly between the same parties, the case should be remanded to him for re-trial, still it is highly desirable that such a re-trial should not be taken by the officer who has already expressed his final opinion upon the matter. AIR (V 9) 1922 Pat 60: 72 Ind Cas 339: 3 Pat LT 147: 24 Cr LJ 339.

### (b) De novo trial.

——S. 526 — The District Magistrate cannot impose, without the consent of the accused while transferring a case, a condition that there would be no de novo trial, the right being recognized by S. 350 (1). AIR (V 17) 1930 Lah 168: 1930 Cr C 176: 121 Ind Cas 374: 31 Cr LJ 257.

——S. 526 — The trial Magistrate committed an illegality vitiating the trial. Further many of the witnesses both of the prosecution as also of the accused were examined after the illegality happened. The Magistrate had considered all the evidence and expressed his opinion on it.

Held, that it would be proper to order a de novo trial by another Magistrate. AIR (V 16) 1929 Bom 309: 31 Bom LR 593: 53 Bom 578: 1929 Cr C 130: 121 Ind Cas 588: 31 Cr LJ 309 (DB).

### (c) Notice of transfer.

——**S. 526 (6) — Notice of transfer application.**

Generally notice should be given of the application for transfer but failure to give such notice does not render the order of transfer illegal. In special circumstances, such order can be made without notice. (1910) 8 MLT 222: 11 Cr LJ 533: 7 Ind Cas 856 (DB).

——**S. 526 (6) — Notice — Transfer of Criminal case.**

The rule that notice should be given before a criminal case is transferred at the instance of a party does not apply where the District Magistrate suo motu withdraws it to his own file or transfers it or retransfers it from one Court to another Court under his control. (1909) 35 PWR 1909 Cr: 3 PR 1910 Cr: 11 Cr LJ 150: 164 PLR 1910: 4 Ind Cas 1025.

——**S. 526 — Proceedings under S. 145 Cr P.C. — Notice to parties — Necessity for.**

Where a party concerned appears and objects to the transfer of a proceeding under Sec. 145, Cr. P. C., no further notice is necessary, and he cannot afterwards set up want of notice. (1902) 6 CWN 378 (379) (DB).

### 13. Right of accused.

——**S. 526 — Jury trial — Three successive re-trials in Karachi — Transfer of case outside Karachi to non-jury District on the alleged plea of fair trial —Propriety.**

There had been three trials of the accused before a Judge of the Sind Chief Court exercising the Sessions jurisdiction and a Special Jury at Karachi and thrice the Judge ordered re-trial. It was the case of Government that there must be some limit to the number of trials of the same accused persons charged with the same offences and that this limit had been reached:

And that it was conclusively proved that a fair and impartial trial could not be held in Karachi, and that the case should, therefore, in the interests of justice, be transferred elsewhere. For the accused, it was contended that Government's application amounts to this; Government could not get a conviction at a trial by jury in Karachi, so they wanted a trial without a jury outside Karachi:

Held, that the right of trial by jury was in India not a common law right; but in Karachi it was a statutory right and was no longer dependent upon the orders of Government under S. 269, Criminal P. C.

The failure of one jury or even more than one jury, in any one particular case, to observe with fidelity their oath of offence or sufficiently to appreciate and to be worthy of the high privilege and great responsibility of their office as members of a jury, was not a good ground for doing so great a violence to the principle of trial by jury which the transfer of the case from Karachi to a non-jury District would necessarily involve.

The Chief Court would not do so unless there were no other way to resolve the deadlock which a continued difference of opinion between a Judge and jury must involve. AIR (V 31) 1934 Sind 65: 45 Cr LJ 505: ILR (1944) Kar 239: 212 Ind Cas 79 (DB).

——**S. 526 — Applicant's right to copy of report of Subordinate Court.**

The pactice which prevails in the High Court in applications for transfer, of furnishing the applicant with a copy of any report which the Court may receive from the Subordinate Court from which it is sought to transfer the case should be followed in the Chief Presidency Magistrate's Court. AIR (V 18) 1931 Bom 206: 33 Bom LR 311: 32 Cr LJ 805: 131 Ind Cas 891.

——**S. 526 — To apply to High Court direct.**

If an accused desires to go direct to the High Court for transfer of his case under S. 526, instead of first proceeding under S. 528, his right to do so as a matter of law, cannot be excluded under the Code since the passing of the present sub-s. 8, S. 526. AIR (V 17) 1930 Bom 480: 32 Bom LR 1128: 1930 Cr C. 1067 (FB)

——**S. 526 — Order for retrial from the stage of irregularity — Counsel's consent.**

Convictions of certain accused were set aside on appeal on the ground that provisions of S. 342 had not been complied with, and re-trial was ordered from the place where the irregularity had occurred. The accused prayed for transfer on the ground that as they had no further statement or evidence to offer it was a foregone conclusion that the Magistrate would convict them, again.

Held, that no general rule could be laid down for such cases but as the counsel for petitioner had said that the accused would not demand a de novo trial which otherwise they could claim, the case could be transferred to another Magistrate who was to take up the trial from the place where the irregularity had occurred. AIR (V 17) 1930 Lah 153: 124 Ind Cas 679: 31 Cr LJ 727: 1930 Cr C 161.

——**S. 526 — Sessions Judge hearing appeal from a conviction on a complaint made by him under S. 476-A—Practice explained.**

A witness made two conflicting statements in a trial before a Sessions Judge who made a complaint to the District Magistrate stating that the second of the two statements was false, the Magistrate framed a charge in respect of the second statement only and convicted the accused. On appeal which was heard by the same Sessions Judge, re-trial was ordered.

Held, that the accused is entitled to a decision from a Judge who approaches his case with an open mind; and that the proceedings should be quashed on the ground that the complainant and the appellate Court were one and the same and it would not be illegal but most inadvisable to submit the accused to a fresh trial because of the initial mistake of the Court in not framing the charge in the alternative and the principle of nemo debet visvexari applies in the spirit if not in the letter. AIR (V 14) 1927 Lah 671: 8 Lah 496: 28 PLR 688: 106 Ind Cas 342: 29 Cr LJ 6.

**14. Stay.**

See also N 1

——**S. 526 — High Court staying proceedings in lower Court — Stay Order, when operates.**

An order by the High Court staying further proceedings in the lower Court on an application under S. 526, Criminal P.C., can only be deemed to take effect when it is communicated to the lower Court concerned. AIR (V 30) 1943 Lah 191: 45 PLR 176: ILR (1943) Lah 331: 44 Cr LJ 751: 208 Ind Cas 242 (FB).

——**S. 526 — Transfer application admitted by High Court — Stay order, if implied.**

Where the High Court admits an application for transfer, invariably there is an order of stay of proceedings. Even if the order is not expressly made, it is implied, because it will be meaningless to issue a rule and send for the record and then allow the proceedings in the lower Court to continue. AIR (V 24) 1937 Pat 131: 17 PLT 627: 3 BR 379: 38 Cr LJ 484: 167 Ind Cas 881.

——**S. 526 (8) — Refusal to stay proceedings — Whether sufficient ground for transfer.**

Section 526 (8) Criminal P.C. is mandatory. The Court is bound to stay the case after intimation has been given that an application for transfer is to be made to the High Court. The action of a Magistrate in refusing to stay the proceedings in his Court on the filing of such an application must be construed as deliberate and by such action, even if it be precipitate it gives the accused person reasonabe ground for apprehension that he will not be unprejudiced in the conduct of the trial, and is sufficient ground for transfer of the case from his Court. AIR (V 23) 1936 Nag 233: 37 Cr LJ 1054: ILR (1936) Nag 219: 164 Ind Cas 1065.

——**S. 526 — Stay of proceedings by trial Court — Trial Court's power to dispose of miscellaneous applications.**

All that sub-s. (8) of S. 526 lays down is that, if in the course of any enquiry or trial the Public Prosecutor, the complainant or the accused notifies to the Court before which the case is proceeding, his intention to make an application to the High Court for transfer of the case the Court shall adjourn the case for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon.

This does not mean that the trial Magistrate loses seisin of the case by reason of his having granted such adjournment or is rendered incapable of even disposing of miscellaneous applications for grant of copies, inspection of records, etc. AIR (V 18) 1931 Lah 59: 32 Cr LJ 253: 129 Ind Cas 193.

——**Ss. 526 and 107 — Applicability — Preventive proceedings — Grounds for — Practice — Communication of stay order by wire — Duty to appear — Application for transfer on last day.**

It is only in exceptional cases that the High Court will interfere under S. 526, Cr. P. C., with the jurisdiction of the Magistrate of the District taking preventive action within his own boundaries so as to impose such foreign and extraneous duty on the Magistrate of another district.

The sending of a telegram to the effect that the High Court has stayed further proceedings does not in any way, absolve the objection of a party to appear before the Magistrate on the date fixed and if he does not appear, the Magistrate can issue a warrant. Such an action on the part of the Magistrate is not a ground for transfer.

The practice of filing petitions for transfer on the last day when the parties are given sufficient time, is to be condemned. The High Court will not stay proceedings unless sufficient time is given to issue a rule and obtain an explanation. (1913) 17 CWN 536: 14 Cr LJ 382: 20 Ind Cas 142 (DB).

——**S. 526 — Criminal court — Trial — Rule by H. C. for transfer — Information by telegram of accused — Stay of proceeding.**

Where a telegram that a rule for transfer has been issued by the High Court is brought to the notice of the Magistrate and he is asked to stay proceedings the proper course is to delay proceedings, pending final orders of the High Court. (1900) 5 CWN 110 (113) (DB).

**15. Who can apply.**

——**S. 526 — "Party interested" — Person at whose instance first information was lodged — Locus standi to apply for transfer.**

Ordinarily the complainant or the public prosecutor are parties interested who are competent to apply for a transfer under S. 526, Cr. P. Code. Where the first information was lodged by one person as an agent of another and the first informant comes to occupy the position of an accused in the case, the principal at whose instance the information was lodged, he must be held to be a "party interested" so as to entitle him to apply under S. 526, though he has not filed the information himself in person. 12 Cut LT 60: 27 PLT 257: AIR (Vol 34) 1947 Pat 166.

——S. 526 — **The words 'party interested' interpreted — Person who directed another to lodge the first information — Locus standi to apply for transfer.**

Ordinarily the complainant or the Public prosecutor or the accused are parties interested. But where the first informant has occupied the position of an accused (who was an agent while lodging the first information at the instance of the petitioner) the petitioner can legally be a 'party interested'. Hence, petitioner is entitled to apply under S. 526. ('46) 12 Cut LT 60.

——S. 526 — **Complainant applying for transfer — Crown opposing.**

Though the complainant in a cognizable case is entitled to apply for transfer under S. 526 of the Criminal P. C., his right must be subordinate to those of the Crown, and in the case of conflict between the two, the right of the Crown must prevail. Where, therefore, such an application is opposed by the Crown, it shall not be granted. AIR (Vol 25) 1938 Lah 569: 40 PLR 468: 39 Cr LJ 853 (2): 177 Ind Cas 187.

——S. 526 — **Public Prosecutor unwilling for transfer — Case, if can be transferred at instance of person who started the case.**

A person at whose instance a criminal case is lodged is a party interested within the meaning of Cl. (3) and Cl. (8) of S. 526, Criminal P. C., and is entitled to apply for transfer of the case, but his rights are subordinate to those of the Crown; in other words, if the Public Prosecutor or the person who is conducting the prosecution on behalf of the Crown is unwilling to have the case transferred, the person at whose instance the case was started has no power to get the case transferred. AIR (Vol 24) 1937 All 664: 1937 ALJ 845: 39 Cr LJ 33: 1937 AWR 729: 171 Ind Cas 934.

——S. 526 — **Private party's right to move.**

The language of S. 526 (3), Criminal P. C., is sufficiently wide and comprehensive and a person who has lodged the complaint and moved the machinery of the Police and the Criminal Courts continues to be a party interested and he is entitled to move the High Court in certain circumstances for the transfer of the case. AIR (Vol 21) 1934 Lah 612 (613): 35 PLR 567: 36 Cr LJ 222: 152 Ind Cas 1053.

——S. 526 — **Only the Court.**

Since 1923 proceedings under S. 476, Cr. P. Code are taken only by the Court in the interest of justice when it thinks fit to do so. It is not now open to a private person to take proceedings after taking sanction of the Court under S. 195. A private person may move the Court but it is for the Court to decide whether to take action and initiate the proceedings. A person moving the Court to take action under S. 476 cannot therefore be considered to be an interested person within the meaning of S. 526 (3) and also has no locus standi to apply for the transfer of a case, the Court being the "complainant". 31 PLR 840: 127 Ind Cas 152: 31 Cr LJ 1174: 1930 Cr C 917: AIR (Vol 17) 1930 Lah 873.

——S. 526 — **'Party interested' — Preferential rights of Public Prosecutor in case of conflict.**

"A party interested" in S. 526 (3) does not necessarily mean a complainant, i. e., a person presenting a "complaint" as defined in S. 4 (h), but may include a police informant. Moreover, where the conduct of a case is in the hands of a Public Prosecutor and "the party interested" the right of the former must prevail; because it is the Public Prosecutor, and not the informant, who is primarily responsible for the conduct of the case. 2 M Cr C 199: 30 MLW 640: 120 Ind Cas 80: 30 Cr LJ 1163: 1929 Cr C 612: AIR (Vol 16) 1929 Mad 844: 57 MLJ 547.

——S. 526 — Even in a cognizable case sent up for trial by the police a complainant is entitled to apply for transfer under S. 526, but his rights are subordinate to those of the Crown, so that where there is a conflict between the private prosecutor and the Public Prosecutor in the matter of a transfer of a case, the right of the latter must prevail. 6 Lah 541: 27 Cr LJ 411: 27 PLR 80: 93 Ind Cas 75: AIR (Vol 13) 1926 Lah 156.

——S. 526 — **Position of private prosecutor.**

A private person who lodges an information before the police of a certain offence and a criminal prosecution is started upon that information, is a person who is interested in the prosecution within the meaning of cl. (3) of S. 526, and therefore, he is entitled to apply for transfer under S. 526, but his rights are subordinate to those of the Crown in other words, if the Public Prosecutor, or the person who is conducting the prosecution on behalf of the Crown, is unwilling to have the case transferred, the person at whose instance the case was started has no right to get the case transferred. 88 Ind Cas 993: 7 PLT 49: 26 Cr LJ 1249: AIR (Vol 12) 1925 Pat 818.

——S. 526 (3) and (8) — **Right to apply — Parties interested, who are — First informants, if entitled to apply — Conflict between private prosecutor and Crown — Procedure.**

Per Mullick J.— A private person has the right to set criminal Law in motion, but he has no control over the proceedings. Ordinarily the only persons who are recognised by the Code as parties to a criminal case are the persons who have a right to be heard, (i. e.) persons who have the right to control the proceeding.

These are the Crown, the accused, and the parties engaged in conducting certain proceedings of a quasi civil nature which are criminal cases within the Code. A private person who sets the law in motion by giving information to the police is not entitled to apply for a transfer of the case under.

Per Jwala Prasad J.— A complainant is entitled to apply for a transfer under S. 526 but his rights are subordinate to those of the Crown. Where there is a conflict between the Private Prosecutor and the Public Prosecutor in the matter of a transfer of a case, right of the latter must prevail. 20 Cr LJ 648: 4 Pat LJ 656: (1920) PHCC 42: 52 Ind Cas 424: AIR (Vol 7) 1920 Pat 836 (DB).

——S. 527.

——S. 527 — **Governor General's power under S. 257.**

The Governor-General alone can under S. 527 pass orders binding on different high Courts. AIR (Vol 5) 1918 Mad 183 : 40 Mad 835 : 5 LW 349 : 18 Cr LJ 148 : 37 Ind Cas 516 (DB).

——S. 528.
1. Application.
2. Adjournment.
3. 'Any case'.
4. Costs.
5. Effects of order.
6. Inquiry or trial.
7. May withdraw or transfer.
8. Notice.
9. Reasons for transfer or withdrawal.
10. Record of reasons.
11. Revision.
12. Subordinate Magistrate.
13. Transfer by Sessions Judge.
14. Transfer from Court having no jurisdiction.

### 1. Application.

——S. 528 — **Application by party not necessary.**

There is nothing in S. 528, Criminal P. C., disabling a Magistrate from taking action unless he is set in motion by the petition of one of the parties. It is not the intention of the Legislature to make an application from either of the parties a necessary preliminary. An application for transfer by a witness to a proceeding is not on that ground alone incompetent. AIR (Vol 20) 1933 Sind 205 : 34 Cr LJ 861 : 144 Ind Cas 881 (DB).

——S. 528 — **Case pending before Additional Sessions Judge — Application for transfer, where lies.**

Where the case is pending in the Court of the Additional Sessions Judge, it is not obligatory on the applicant before approaching the High Court to move the District Magistrate or transfer of the case as he has no jurisdiction to transfer the case from the file of the Additional Sessions Judge. AIR (Vol 31) 1944 Nag 320 : 46 Cr LJ 601 : ILR (1945) Nag 533 : 219 Ind Cas 337.

——S. 528 — **Omission to hear Counsel — Interference.**

When the District Magistrate suo motu transfers a case giving good reasons, omission to hear the Counsel for accused will not justify interference by the High Court. AIR (Vol 30) 1943 Nag 236 : ILR (1943) Nag 637 : 1943 NLJ 269 : 44 Cr LJ 643 : 207 Ind Cas 431.

——S. 528 — When a District Magistrate can pass an order of transfer, the prejudiced party should go first to the District Magistrate before coming to the High Court. (1913) 11 ALJ 741 : 14 Cr LJ 555 : 21 Ind Cas 155.

### 2. Adjournment.

——S. 528 — An application for transfer made to the District Magistrate is under S. 528 and under S. 528 there is no injunction given to the trial Court to adjourn proceedings in order to enable the accused person to apply to the District Magistrate. AIR (Vol 15) 1928 All 753 : 9 LRA Cr 145 : 10 AI Cr R 485 : 29 Cr LJ 935 : 1929 ALJ 60 : 111 Ind Cas 855.

### 3. 'Any case'.

——S. 528 — Where with regard to an offence which has been the subject of police report and has not been finally disposed of by a Magistrate, a District Magistrate thinks it necessary to continue proceedings against the accused it is more regular for him to withdraw the pending case to his own file under S. 528, rather than to begin separate proceedings by taking cognizance of the same offence under S. 190 (1) (c). AIR (Vol 16) 1929 Pat 710 : 31 Cr LJ 472 : 1929 Cr C 582 : 123 Ind Cas 78.

——S. 528 — **"Case" meaning of — Complaint before issue of process.**

The word "case" in S. 528 (1) includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence on complaint even before process is issued. (1917) 7 NLR 97: 12 Cr LJ 437: 11 Ind Cas 621.

——S. 528 — **Transfer of case by District Magistrate — Case remanded by Sessions Judge — Notice to accused person.**

The District Magistrate has no jurisdiction to transfer a case from the file of a Subordinate Magistrate to whom it has been remanded by the Sessions Judge for further enquiry, and less so if he has given no notice to the other side. (1908) 8 CLJ 241 (241) : 8 Cr LJ 386 (DB).

——Ss. 528, 529, 145, 146, 192 (f) — **Criminal case, if a proceeding under S. 145 — Magistrate, power of, to transfer such a case.**

A proceeding under S. 145 of the Code of Criminal Procedure is a criminal case and a Magistrate has power to transfer it under Ss. 192 and 528 of the Code of Criminal Procedure. There is therefore no illegality in a Magistrate transferring a case under S. 145 to a Subordinate Magistrate and even if there was any, it is cured by S. 529, clause (f) of the Code of Criminal Procedure. (1905) 2 CLJ 614 (615) (DB).

### 4. Costs.

——S. 528 — A Magistrate has no power to award costs in applications under S. 528, Criminal P. C. AIR (Vol 25) 1938 Mad 909 : 48 LW 381 : 1938 MWN 1105 (1) : (1938) 2 MLJ 531 (1) : 40 Cr LJ 46 : 178 Ind Cas 126 (2).

### 5. Effects of order.

——S. 528 — **Transfer to the transferred Magistrate to avoid de novo trial — Not effective — Convenience of the parties to be considered.**

The Magistrate who tried the case was transferred when most of the witnesses had been examined. The succeeding Magistrate granted a de novo trial. After this, District Magistrate transferred the case to the previous Magistrate who had been transferred, on the ground that the small amount of work that remained to be done could best be done by the same Magistrate who had tried the case so far and that to transfer the case to him was therefore preferable to the whole case being heard again by a new Magistrate.

Held, that even the Magistrate to whom the case was thus transferred could not take up the case from the point at which he had left it and that he must start the case only de novo, all the previous proceedings being considered to have been wiped out.

Held, further that the District Magistrate's order of transfer took no notice of the hardship and inconvenience of parties and witnesses by such transfer and that it must be set aside. AIR (Vol 12) 1925 Mad 174 : 26 Cr LJ 510 : 20 MLW 847 : 47 MLJ 926 : 35 Ind Cas 254.

### 6. Inquiry or trial.

——S. 528 — The first part of S. 202, Criminal P. C., applies only to cases in which the Magistrate has taken cognisance himself and cannot apply to a transfer, and the second part deals only with a transfer under S. 192, Criminal P. C., and therefore excludes the case of a transfer under S. 528, Criminal P. C. AIR (Vol 25) 1938 Nag 433 : 39 Cr LJ 981 : ILR (1941) Nag 320 : 178 Ind Cas 54.

### 7. May withdraw or transfer.

——S. 528 — **Discretion under — Exercise of — Transfer of case from Magistrate on ground of his having taken particular view of law in earlier case — Propriety of.**

Under S. 528, Cr. P. Code, the District Magistrate has a very wide discretion of withdrawing a case from one Magistrate and transferring it

to another. The discretion has, however to be exercised judicially and not arbitrarily. The mere fact that if an earlier case involving a similar point of law, the Magistrate had taken a view favourable to the accused and acquitted him would not be a sufficient justification to transfer the case from that Magistrate to another. AIR (Vol 36) 1949 Cal 257 : 53 CWN 291 : 50 Cr LJ 521.

——S. 528 (2) — **Powers of District Magistrate — Additional District Magistrate withdrawing case to his own file on transfer of Magistrate and permitting withdrawal of case acting on his opinions formed as District Magistrate — Order of discharge — Legality.**

The fact that the trial Magistrate is transferred is no ground or justification for a District Magistrate or Additional District Magistrate taking to his own file a case pending before the Magistrate who is transferred and dealing with it and then permitting it to be withdrawn under S. 494, Cr. P. Code, on the basis of his opinion or consent formed or given in his executive capacity.

The proper course would be to allow the case to go to the file of the Sub-Divisional Magistrate or to the file of the successor of the original Magistrate who is transferred, and then leave it to the Public Prosecutor to file an application for withdrawal.

It would then be open to the Magistrate to decide independently whether or not withdrawal should be permitted. Where the Additional District Magistrate confuses his position as a judicial officer and his position as an executive officer, and passes orders discharging the accused, permitting the withdrawal of the case, acting on the action taken by him in his executive capacity, the proceedings are irregular and the order of discharge is liable to be set aside. AIR (Vol 35) 1948 Cal 78 (2) : 229 Ind Cas 284: 48 Cr LJ 358 (DB).

——S. 528 — **Magistrate should exercise judicial discretion — Government, if dissatisfied, may act under S. 401.**

Section 528 (2) is to be used for the interest of justice according to law and not for its frustration.

If a District Magistrate withdraws from a trying Magistrate a case, in which Magistrate is exercising his judicial discretion and sends it to another for getting the result he desires, then it is not justice according to law. If trying Magistrate exercises judicial discretion wrongly, the superior Courts should rectify it. If the Government consider that notwithstanding the Court's decision clemency ought to be exercised, the Government may allow clemency in proper cases. AIR (V 31) 1944 Cal 411 : 48 CWN 580 : 46 Cr LJ 169 : 217 Ind Cas 71 (DB).

——S. 528 — **Government should not suggest District Magistrate or trying Magistrate as to what they should do.**

It is wrong for Government Departments to suggest to the District Magistrates what they and trying Magistrate should do in cases under trial (unless they are specifically authorised by the Criminal P. C., as for instance, under S. 528 (3) to withdraw a case from a trying Magistrate). If Government desires to put in a request to Court, the proper course would be to do so directly through the Public Prosecutor and not through the District Magistrate. AIR (Vol 31) 1944 Cal 407 : 48 CWN 574 : 46 Cr LJ 100 : 215 Ind Cas 312 (DB).

——S. 528 (2) — **District Magistrate, power of, to set aside order of transfer.**

A District Magistrate has the power to set aside an order of a Sub-Divisional Magistrate transferring a case and transfer that case to some other Court. There is nothing in the sub-s. (2) of S. 528, Criminal P. C., which suggests that the discretion of the District Magistrate is fettered in any way. AIR (Vol 28) 1941 Oudh 388 : 1941 AWR 148 : 1941 OWN 590 : 42 Cr LJ 478 : 193 Ind Cas 681.

——S. 528 — **Transfer — Grounds for.**

The action of the Magistrate in transferring the case which was complete except for judgment is extraordinary, and the action of the District Magistrate in allowing the transfer is equally so, and where the order is oral and not recorded on order sheet, it is an irregularity that should not occur in handling criminal cases.

The transfer of a part-heard case should be made only in circumstances of an exceptional character, and to transfer a case which has been completely heard on the mere ground that the Magistrate is overworked is an occurrence which is unheard of. AIR (Vol 24) 1937 Nag 103 : ILR (1937) Nag 163 : 38 Cr LJ 719 : 169 Ind Cas 96 (DB).

——S. 528 — **Principles to be followed.**

Although S. 528, Criminal P. C., does not fix the limit of time within which the transfer application is permitted as S. 526, sub-s. (8) does, still the District Magistrate is bound to act generally on the principle underlying S. 526. The reason is obvious. If it is not open to a party to move the High Court for transfer of a criminal case after the defence closes its case, a fortiori it would not be open to him to do so by applying to the District Magistrate. It is expedient to transfer the case when it is mature for judgment unless it be for purely administrative reasons. (1936) 18 NLJ 279 : 37 Cr LJ 861 : 163 Ind Cas 694.

——S. 528 (2) — **Criminal trial.**

Where a case is transferred from a Court when re-transferred to the same Court, the trial need not begin afresh but will be started from where it was left. ('35) 1935 MWN 1200.

——S. 528 — **Powers to be sparingly exercised — Notice should be served upon opposite party.**

The powers given by S. 528 are very extensive but the wide discretion that the Magistrate is clothed with should be sparingly exercised. It should only be exercised where it is absolutely necessary to meet the demands of justice. AIR (Vol 16) 1929 All 932 : 31 Cr LJ 30 : 1930 ALJ 148 : 1929 Cr C 660 : 11 LRA Cr 48 : 120 Ind Cas 261.

——S. 528 — **Transfer by Magistrate with co-ordinate jurisdiction.**

A transfer order made by a Magistrate on his own initiative is good in spite of the prior refusal by another Magistrate of co-ordinate authority; but a transfer order made after an examination of the co-ordinate authority's grounds savours of the exercise of appellate jurisdiction and is therefore bad. AIR (Vol 5) 1918 Mad 1366 : 18 Cr LJ 57 : 5 LW 372 : 37 Ind Cas 41.

——S. 528 — **Refusal to transfer.**

The refusal of a Sub-Divisional Magistrate to transfer a case at the request of a party does not preclude the District Magistrate from exercising the power of transfer under section on his own initiative. There is no distinction between order passed by District Magistrate suo motu and orders passed on petitions by parties. AIR (Vol 5) 1918 Mad 1122 : 40 Mad 791 : 5 LW 501 : 21 MLT 281 : 18 Cr LJ 335 : 38 Ind Cas 447 (DB).

——S. 528 — **Transfer for enquiry or trial — Criminal Procedure Code, S. 528.**

Where a District Magistrate withdrew a case from the file of the Deputy Magistrate to his own file when the Deputy Magistrate was about

to frame a charge and dismissed it, because he thought the accused in the case (Policemen) were protected by their warrants :

Held, that the transfer was bad, it being for the Deputy Magistrate to say whether the charge was made out and what excuse the accused had if the charge was made out. (1903) 30 Cal 693 (695) (DB).

**——S. 528 — Accused not sent up for trial — Refusal by Magistrate to issue process — Transfer by District Magistrate — Jurisdiction.**

Where only some of those complained against were sent up by the Police for trial and the complainant's application for issue of process against the rest was refused by the Magistrate, and the District Magistrate called up the case and issued process against them :

Held, that the case against them had not been finally disposed of by the order refusing to issue process, and that therefore the District Magistrate had, rightly transferred the case to his own file and issued process.

Held, also that if the case against them was not pending the District Magistrate could take cognisance of the case under S. 190. (1901) 5 CWN 488 (489).

**——S. 528 — Sessions Court — Withdrawal of from jury.**

Under the present Code of Criminal Procedure a Court of Session does not possess the power to withdraw a case from the jury on any ground whatsoever. (1901) 5 CWN 411 (413) (DB).

### 8. Notice.

**(a) General.**
**(b) Essential.**
**(c) Not essential.**

### (a) General.

——S. 528 — An order of transfer by a District Magistrate is not invalid merely for want of notice to the opposite party. AIR (Vol 32) 1945 Nag 56 : ILR (1944) Nag 836 : 1944 NLJ 508 : 46 Cr LJ 654 : 220 Ind Cas 77.

——S. 528 — The transfer of the case to another Magistrate without notice to the accused is not illegal. AIR (V 29) 1942 Mad 221 : 43 Cr LJ 278: 1941 MWN 1027 : 197 Ind Cas 799.

——S. 528 — There is nothing in S. 528, Criminal P. C., itself which makes it obligatory on the District Magistrate to issue notice to the opposite party, before transferring a case under S. 528 (2) and it is undesirable to fetter his discretion. AIR (V 28) 1941 Oudh 388 (391) : 1941 OWN 590 : 42 Cr LJ 478: 1941 AWR 148: 193 Ind Cas 681.

——S. 528 — It may well be that it is advisable for a District Magistrate ordinarily to issue notice to the accused or complainant or both before transferring a case from one Court to another but there is certainly no law which requires him to do so.

Any person can bring to the notice of the District Mgistrate the facts suggesting that the transfer of a case was advisable. The mere fact that the District Magistrate received information on an application would not debar him from making an order for transfer if it appears to be a proper order. AIR (V 25) 1938 All 517 (518, 519) : 1938 ALJ 703 : 1938 AWR 477 : 39 Cr LJ 878 : ILR (1938) All 738 : 177 Ind Cas 460.

——S. 528 — Although S. 528, Criminal P. C., does not provide for any notice to the opposite party, yet it is desirable that a notice should be given to the opposite party before an order of transfer is passed. But the omission to give the notice is a mere irregularity and is not a sufficient ground for setting aside the order of transfer. AIR (V 22) 1935 All 815 : 1935 ALJ 1063 : 36 Cr LJ 918 : 1935 AWR 799 : 156 Ind Cas 163.

**——S. 528 — Notice — Absence of.**

Where absence of notice has led to miscarriage of justice, the order transferring the case should be set aside. AIR (V 21) 1934 Lah 194 (2) : 35 Cr LJ 1439 (1) : 36 PLR 274 : 151 Ind Cas 839.

**——S. 528 — Notice — Omission to state reasons for transfer.**

There is no provision in the Criminal P. C., which requires a Magistrate acting under S. 528, to give notice to the opposite party, although it is usually advisable and desirable to issue notice to the opposite party when an application under S. 528 is to be disposed of. The mere fact that a Magistrate has not issued notice to the opposite party, does not make his order bad in law.

Omission to record reasons for the transfer of a case is a mere irregularity and does not vitiate the subsequent proceedings. AIR (V 20) 1933 Lah 385 : 34 Cr LJ 630 : 34 PLR 577 : 143 Ind Cas 474.

——S. 528 — As a general rule, a Magistrate will exercise a wise discretion if he issues notice before making an order under S. 528. But want of notice does not amount to such an illegality as would make the order ineffectual. The question is one to be decided upon the facts of each case and will depend largely upon the balance of convenience. AIR (V 20) 1933 Sind 205 : 34 Cr LJ 861 : 144 Ind Cas 831 (DB).

——S. 528 — An order of transfer without giving notice to the opposite party, though not desirable, is not illegal. AIR (V 14) 1927 Lah 80 : 28 Cr LJ 38 : 99 Ind Cas 70 : 7 AI Cr R 199.

**——S. 528 — Question as to is not of legality, but one of propriety.**

Although S. 528 does not provide for the giving of a notice to the opposite party, still on general principle notice should be given to the party affected, before an order for transfer is made. But a want of notice under S. 528 does not amount to illegality. The question of notice is one of propriety rather than of legality, and as such, it is one to be decided on the facts of each particular case. AIR (V 14) 1927 Nag 244 : 102 Ind Cas 213 : 28 Cr LJ 517 : 8 AI Cr R 186.

**——S. 528 — Transfer without notice to opposite party is not illegal.**

A transfer under S. 528 is not illegal for want of notice to the opposite party. 23 P. R. 1902, Cr. Diss. from. AIR (V 13) 1926 Lah 156 : 6 Lah 541 : 27 Cr LJ 411 : 27 PLR 80 : 93 Ind Cas 75.

**——S. 528 — Non-issue is not fatal.**

The omission to issue a notice to the accused before ordering the transfer on application of complaint is certainly irregular. Although, as a rule of practice, it is desirable that notices should be issued, the law is not mandatory upon the point and the omission to issue notice is not in itself a reason for setting aside an order of transfer. AIR (V 10) 1923 Pat 228 : 83 Ind Cas 345 : 2 Pat 333: 1923 PHCC 47 : 1 Pat LR Cr 109 : 25 Cr LJ 1385 (DB).

**——S. 528 — Transfer of case — Notice — Delay.**

An order, transferring a case under S. 528, is not illegal though made without notice to the other party. The question of notice is more of propriety than of legality. Transfer of a case after two months, and eleven hearings and the framing of charges and without notice to the complainant is improper and should be set aside. AIR (V 6) 1919 Bom 161 : 21 Bom LR 276 : 20 Cr LJ 320 : 50 Ind Cas 496 (DB).

(b) Essential.

——S. 528 — Notice to opposite party — Necessity.

Though under S. 528, Cr. P. Code, it is not obligatory to issue notice to the opposite party, yet the authorities of the High Court have laid down as a matter of prudence, that notice should issue to the opposite party. AIR (V 37) 1950 HP 42.

——S. 528 — Case should not be transferred without notice to accused. ('41) 1941 NLJ 619.

——S. 528 — For transfer of a case, notice to accused is necessary. ('34) 1934 MWN 98.

——S. 528 (5) — Transfer of case — Notice.

Before a District Magistrate orders the transfer of a case pending in a Subordinate Court, he must give notice to the respondent. He should also give reasons for making the transfer.

It is a principle of universal justice that no order should be passed to the prejudice of a party in his absence and that he should be given an opportunity of contesting such an order before it is passed. AIR (V 18) 1931 Lah 29 : 32 Cr LJ 492: 32 PLR 356 : 130 Ind Cas 330 (2).

——S. 528 — Before an order of transfer is made, it is proper and it is just that the notice of the application for transfer together with the copy of the affidavit, if any, should be served upon the other party and an opportunity afforded to the latter to show cause why the application for transfer should not be granted. AIR (V 16) 1929 All 932 : 120 Ind Cas 261 : 31 Cr LJ 30 : 1930 ALJ 148 : 1929 Cr C 660 : 11 LRA Cr 48.

——S. 528 — Madras High Court practice.

Although S. 528 (2) does not say that notice of an application for the transfer of a case from one Court to another shall be given to the accused, still according to the practice of the Madras High Court it is desirable to give such notice. And so a transfer made without such notice must be set aside for want of notice. AIR (V 16) 1929 Mad 511 : 119 Ind Cas 385 : 1929 MWN 265 : 2 M Cr C 93: 30 MLW 401 : 30 Cr LJ 1043: 1929 Cr C 12.

——S. 528 — Baker, J. — A case should not be transferred without notice to the parties. AIR (V 15) 1928 Bom 184: 52 Bom 151: 30 Bom LR 70: 9 AI Cr R 563: 29 Cr LJ 317: 108 Ind Cas 27.

——S. 528 — Transfer after hearing parties — Re-transfer without notice to one of the parties.

Where after hearing all the parties a Sub-divisional Magistrate transferred a criminal case from one Subordinate Court to another, the District Magistrate cannot re-transfer the suit without notice to all the parties concerned. AIR (V 7) 1920 Mad 740 : (1920) MWN 767 : 39 MLJ 714 : 12 LW 633 : 60 Ind Cas 55.

——S. 528 — Notice of transfer — Absence of.

Notice to the other party before a transfer is ordered, is necessary, but where after order without notice the party affected, examined certain witnesses in the Second Court and did not apply for even copy of order for about a month and where he was not prejudiced the irregularity was cured. (1911) 7 NLR 97 : 12 Cr LJ 437 : 11 Ind Cas 621.

——S. 528 — Notice to accused before transfer.

Where a case is transferred under S. 528 after all the prosecution witnesses have been examined, it is only right that the accused should be given notice and he should be heard before making the transfer. (1909) 6 MLT 14 : 9 Cr LJ 407 : 1 Ind Cas 889.

——S. 528 — A Sub-divisional Magistrate before transferring a case from one magistrate to another, should give notice to the other side and should give an opportunity to the trying magistrate of answering the allegations made against him by the applicant. (1903) 5 Bom LR 28 (28).

(c) Not essential.

——S. 528 — Section 528, Criminal P. C., does not expressly require notice to be given before passing the final order but notice should be given to the opposite party in accordance with the recognised maxim audi alteram partem. ('36) 163 Ind Cas 694 : 18 NLJ 279 : 37 Cr LJ 861.

——S. 528 — Although strictly speaking it is not necessary to issue notice before transferring a case, nevertheless the practice has been to do so. AIR (V 10) 1923 Lah 380 : 71 Ind Cas 603 : 5 LLJ 230 : 24 Cr LJ 187.

——S. 528 — Notice if necessary.

Notice is not ordinarily necessary before making an order under S. 528, but where notice is given to the accused, he must be given sufficient time to make effective representation in the matter. (1911) 5 SLR 190 : 13 Cr LJ 32 : 13 Ind Cas 224 (DB).

——S. 528 Cl. (c) — Omission to state reasons of transfer, mere irregularity — Notice of transfer not necessary — Magistrate's acting upon a private report not illegal.

A complaint originally filed in the court of a Deputy Magistrate was transferred to the court of the District Magistrate. No notice was served on the complainant of the transfer, and no reasons were stated for such transfer. The District Magistrate called for a private report from the accused, who was a Sub-Inspector of Police.

Held (1) that by virtue of a Government order the District Magistrate having been directed to withdraw all cases in which complaints had been made against a police officer the omission to record reasons therefor was a mere irregularity and did not vitiate the subsequent proceedings.

(2) that no notice to the complainant was necessary.

(3) that the Magistrate having placed the private report upon the record and acted thereupon, his action was not illegal. (1906) 28 A 421 : 3 ALJ 224 : 1906 AWN 76 (77).

——S. 528 — When transfer is requested by Magistrate.

No notice need be given to the other side when the Magistrate on whose file the case stands requests the case to be transferred. (1900) 24 M 317 (318) (DB).

9. Reasons for transfer or withdrawal.

——S. 528 — The mere fact that if an earlier case involving a similar point of law, the Magistrate had taken a view favourable to the accused and acquitted him would not be a sufficient jurisdiction to transfer a case from that Magistrate to another. AIR (V 36) 1949 Cal 257 : 50 Cr LJ 521: 53 CWN 291.

——S. 528 — 'The fact that the trial Magistrate is transferred is no ground or justification for a District Magistrate or Additional District Magistrate taking to his own file a case pending before the Magistrate who is transferred and dealing with it and then permitting it to be withdrawn under S. 494 Cr. P. Code, on the basis of his opinion or consent formed or given in his executive capacity.' AIR (V 35) 1948 Cal 78 (2) : 229 Ind Cas 284 : 48 Cr LJ 358 (DB).

——S. 528 — The transfer of a part heard case should be made only in circumstances of an exceptional character, and to transfer a case which has been completely heard on the mere ground that the Magistrate is overworked is an occurrence which is unheard of. AIR (V 24) 1937 Nag 103

(103) : ILR (1937) Nag 163 : 38 Cr LJ 719 : 169 Ind Cas 96 (DB).

**——S. 528 — Transfer — Discretion — Previous knowledge, if disqualification.**

Section 528, Criminal P. C., does not contain words which have the effect of fettering the discretion in transferring cases from the files of Magistrates subordinate to them. Before such an order is made, the Magistrate must and should have reasons and those reasons should be such as the law regards as satisfactory from the point of view of principle. If the accused persons are prejudiced by the fact that they have no locus standi before the issue of process, it is not the proper way to counteract that prejudice by ordering the case to be dealt with by a particular Magistrate who happens to have knowledge of matters which the law prevents person complained against from bringing to his notice. So far as from previous knowledge of the fact being a qualification for the enquiring Magistrate, it is in many cases, a disqualification. An order of transfer is entirely a matter of discretion and in setting it aside, the circumstances of the particular case should not be disregarded. AIR (V 21) 1934 Cal 137 : 58 CLJ 214 : 35 Cr LJ 597 (2) : 148 Ind Cas 121 (DB).

**——S. 528 — Communal feeling.**

Courts should not be influenced by general allegations regarding the so-called communal feelings and cases should not be transferred on basis of such allegations for an intolerable position would arise if it were open to any accused person in a case of communal or quasi communal nature to obtain a transfer of a case from the Court of a Hindu Magistrate merely because he, the accused, was Mohamedan or vice versa. AIR (V 17) 1930 Lah 168 : 1930 Cr C 176 : 121 Ind Cas 374 : 31 Cr L J 257.

——S. 528 — The convenience of the accused must be regarded in considering the question whether a fair and impartial trial is likely to be held. AIR (V 15) 1928 Pat 347 : 9 AI Cr R 537 : 29 Cr LJ 373 : 108 Ind Cas 329.

——S. 528 — An order for transfer of a criminal case without reasons required by cl. 5 is bad and should be set aside. AIR (V 11) 1924 Mad 873 : 83 Ind Cas 1005 : 20 MLW 384 : 26 Cr L J 221.

——S. 528 — It is not the object of S. 528 that a case should be transferred merely because it is going against a particular party. AIR (V 10) 1923 Pat 228 : 83 Ind Cas 345 : 2 Pat 333 : 1923 PHCC 47 : 1 Pat LR Cr 109 : 25 Cr LJ 1385 (DB).

**——S. 528 — Delay in disposal — Not a sufficient ground.**

It is for the Subordinate Magistrate to determine whether a case under S. 500 or 504 of the Penal Code was made out and the District Magistrate is not at that stage competent to decide whether an offence under S. 500 was or was not committed.

The delay in disposing of the case could not be a ground for taking action under S. 528 of the Cr. P. Code and if the District Magistrate thought there was delay he should have asked the Subordinate Magistrate to expedite the trial; the order of the Dt. Magistrate transferring the case was bad and must be set aside. AIR (V 5) 1918 Pat 152 : 19 Cr LJ 119 : 1918 Pat HCC 78 : 43 Ind Cas 407.

**——S. 528 — Racial dispute.**

In a case relating to mosque as between Hindus and Mahomedans, it is desirable that the District Magistrate or some other European Magistrate tries it. AIR (V 2) 1915 Lah 449 : 1 PWR 1915 Cr : 127 PLR 1915 : 16 Cr LJ 213 : 27 Ind Cas 837.

**——S. 528 — Magistrate having no time to dispose of case — Transfer.**

The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient reason for directing a transfer of the case from his Court under S. 528 Cr. P. C. AIR (Vol 6) 1919 Pat 250: 20 Cr LJ 402: 51 Ind Cas 162 (DB).

**——S. 528 — Magistrate expressing strong views.**

In a case triable by a Court of Session, it is no ground for transfer that the Inquiring Magistrate expressed strong views against a party or that he was going to be called on as a witness.

When a District Magistrate can pass an order of transfer, the prejudiced party should go first to the District Magistrate before coming to the High Court. (1913) 11 ALJ 741 : 14 Cr LJ 555 : 21 Ind Cas 155.

**——S. 528 — Loss of confidence in the impartiality of the Judge.**

Where one of the accused was informed by his pleader that the Magistrate had told him that he would convict the persons accused unless they compromised a certain civil suit with the complainant,

Held, that this communication by the pleader whether the message was in fact given by the Magistrate or not coupled with the fact that a warrant was issued in a summons case in the first instance was sufficient to deprive the accused of all confidence in the impartiality of the Magistrate and that the case should be transferred. AIR (V 15) 1928 Lah 75 : 28 Cr LJ 988 : 105 Ind Cas 812 : 9 AI Cr R 129.

**10. Record of reasons.**

**——S. 528 — Recording of reasons for transfer — Necessity.**

A Magistrate ought to record his reasons for transferring a case. AIR (V 37) 1950 HP 42.

**——S. 528 (2) and (5) — Powers of transfer and withdrawal — Transfer of case to one magistrate — Magistrate absent — Transfer to another magistrate — Name of first magistrate scored and name of second inserted — Case not actually withdrawn by order — Reasons not recorded — Effect on trial — S. 537.**

A Sub-Divisional Officer made an order under S. 192, Cr. P. Code, transferring a case for disposal to a First Magistrate, R. P. On being informed that that Magistrate was absent that day, the Sub-Divisional Officer transferred the case from R. P. to B. S., merely by crossing the name R. P. and writing thereover the name of B. S., without recalling the case to his own file as required by S. 528 (2), Cr. P. Code, and without recording reasons for so doing. It was contended for the defence that the whole trial by the Magistrate, B. S., was void and without jurisdiction.

Held: (1) that the power of withdrawal and the power to recall under S. 528 (2), Cr. P. Code, are each equivalent to a power of cancellation of the previous order as from the date of the order of withdrawal or recall;

(2) that it was erroneous to suggest that the Magistrate acting under S. 528 (2) must first recall the case to himself before transferring it to another Magistrate;

(3) that the defect, if any, was no more than an error or irregularity curable under S. 537, Cr. P. Code; and

(4) that the failure to record reasons in writing also amounted to no more than an irregularity

curable under S. 537. AIR (V 34) 1947 Pat 339 : 25 Pat 571 (DB).

——S. 528 — The mere fact that the Magistrate has decided a question in a particular way on particular evidence does not make him unfit to decide it in a subsequent case. 1941 NLJ 619 (620).

——**S. 528 — Duty of Magistrate to hear opposite party and record reasons.**

Where a Magistrate transfers a case from one Court to another, he must hear the opposite party and give his reasons for passing the order of transfer. AIR (V 23) 1936 Sind 42 : 37 Cr L J 545 (1) : 161 Ind Cas 939 (1) (DB).

——S. 528 — Before a District Magistrate orders the transfer of a case pending in a Subordinate Court, he must give notice to the respondent. He should also give reasons for making the transfer. AIR (V 18) 1931 Lah 29 : 32 Cr LJ 492 : 32 PLR 356 : 130 Ind Cas 330 (2).

——S. 528 — It is also necessary that the Magistrate should record his reasons for the transfer to bring out the fact that it was not an arbitrary order but was a judicial pronouncement. AIR (V 16) 1929 All 932 : 120 Ind Cas 261 : 31 Cr LJ 30 : 1930 ALJ 148 : 1929 Cr C 660 : 11 L R A Cr 48.

——**S. 528 — Reasons for order under S. 528 need not necessarily be given.**

Section 528 does not require in terms that the Magistrate should give any reason, but it is a sound rule of practice that there should be something on the record showing why the order was made. AIR (Vol 14) 1927 Pat 59: 5 Pat 229: 97 Ind Cas 974: 8 PLT 66: 27 Cr LJ 1214 (DB).

——**S. 523 (3) — Omission to record reasons.**

Mere omission to record reasons as required by S. 523 (3) does not necessarily invalidate the subsequent proceedings. (1911) 7 NLR 97: 12 Cr LJ 437: 11 Ind Cas 621.

——**S. 528 (3) — Omission to record reasons.**

Under S. 523 (3) the reasons for transfer should be recorded; but the omission to record reasons does not necessarily vitiate the order of transfer. 35 PWR 1909 Cr: 3 PR 1910 Cr: 11 Cr LJ 150: 164 PLR 1910: 4 Ind Cas 1025.

——**S. 528 — Magistrate withdrawing a case — No reasons given — Irregularity — Effect of.**

Omission to record reasons by a Magistrate transferring a case to his own file is only an irregularity and the order of transfer cannot be set aside if the accused has not been prejudiced. (1909) 9 Cr LJ 310: 1 Ind Cas 553.

——**S. 528 Cl. (c) — Omission to state reasons of transfer, mere irregularity — Notice of transfer not necessary — Magistrate's acting upon a private report not illegal.**

A complaint originally filed in the court of a Deputy Magistrate was transferred to the court of the District Magistrate. No notice was served on the complainant of the transfer, and no reasons were stated for such transfer. The District Magistrate called for a private report from the accused, who was a sub-inspector of Police.

Held (1) that by virtue of a Government order the District Magistrate having been directed to withdraw all cases in which complaints had been made against a Police Officer the omission to record reasons therefor was a mere irregularity and did not vitiate the subsequent proceeding.

(2) that no notice to the complainant was necessary.

(3) that the Magistrate having placed the private report upon the record and acted thereupon, his action was not illegal. (1906) 28 A 421 : 3 ALJ 224: 1906 AWN 76 (77).

### 11. Revision.

——**S. 528 — First class Magistrate not being District Magistrate, if can transfer case triable by him under distribution memo to another Magistrate — Such transfer made — No objection in revision or otherwise — High Court if can set matter right.**

Where a Magistrate of the First class, not being a District Magistrate, transfers a case of which he has taken cognizance and which is triable by him under the distribution memo, to another Magistrate for trial, the transfer is illegal, and the High Court (and also the District Magistrate) has power to set aside the transfer and send the case for trial to a Magistrate having jurisdiction; even though the transfer order has not been challenged or objected to by a revision or otherwise. AIR (Vol 34) 1947 Nag 79: 1946 NLJ 460: 47 Cr LJ 794: 225 Ind Cas 624.

——**S. 528 — Transfer — No notice — Interference by High Court.**

When a case is transferred from one Magistrate to another and no reasons for the transfer are given in the order and no notice issued to the other side before the order is passed, the order, although irregular, may not be wholly illegal. But the High Court can interfere in revision even with a legal order where it appears just to do so :

Held, the order was unsatisfactory and as there was nothing to show that the discretion of the lower Court was exercised properly, and that the other side ought to be given a chance to advance its objections, the order of transfer should be set aside. AIR (V 23) 1936 Nag 181: 37 Cr LJ 1006: ILR (1936) Nag 87: 164 Ind Cas 692.

——S. 528 — The Sessions Judge has no authority to revise the order of a District Magistrate passed under the provisions of S. 528, any more than the High Court has any such authority. AIR (Vol 22) 1935 Rang 446 (446): 37 Cr LJ 220: 160 Ind Cas 85.

——S. 528 — If it is found that the Magistrate had applied his mind to questions requiring his consideration and that the order which he makes, is in the exercise of a discretion neither capricious nor arbitrary, the High Court would not interfere. AIR (Vol 20) 1933 Sind 205: 34 Cr LJ 861: 144 Ind Cas 881 (DB).

——**S. 528 — Interference by High Court.**

The High Court will not ordinarily entertain an application for a relief which could equally be granted by a Subordinate Court until recourse has first been had to the Court. AIR (Vol 12) 1925 All 640: 87 Ind Cas 112: 26 Cr LJ 960: 6 LRA Cr 87.

### 12. Subordinate Magistrate.

——**S. 528 — Jurisdiction — First Class Magistrate transferring case — Legality — Transfer not objected to — If rendered valid — Power of High Court and District Magistrate to re-transfer.**

A first class Magistrate taking cognizance of a complaint has no power to transfer it to another Magistrate, but must try it. The fact that the order of transfer is not objected to by any of the parties does not render the order legal and valid. The High Court in such a case has power to set aside the order of transfer and remit it for trial by a Magistrate having jurisdiction. The District Magistrate has also like powers. AIR (Vol 34) 1947 Nag 79: ILR (1947) Nag 80: 225 Ind Cas 624: 1946 NLJ 460: 47 Cr LJ 704.

——**S. 528 (2) — Transfer of case — Jurisdiction of District Magistrate.**

While it is true the District Magistrate has not appellate jurisdiction under S. 528 (2), Criminal P. C., he has a concurrent jurisdiction, and that

jurisdiction is not barred merely because it has been exercised by the Sub-Divisional Magistrate in the first instance. AIR (Vol 23) 1936 Sind 237: 38 Cr LJ 133 (2): 30 SLR 327: 166 Ind Cas 83 (2).

**——S. 528 — District Magistrate has no appellate powers as regards an order by a Sub-Divisional Magistrate withdrawing a case from a subordinate Magistrate.**

Under S. 528 (2) the District Magistrate and the Sub-Divisional Magistrate have equal authority in withdrawing cases from a subordinate Magistrate and the District Magistrate shall not exercise powers of an appellate Court as regards orders passed by the Sub-Divisional Magistrate. If he considers the Court to which the case is transferred by the Sub-Divisional Magistrate not the proper Court for the trial of the case, for reasons to be stated by him, he should transfer the case to any Court which he thinks proper after notice to the accused. AIR (Vol 15) 1928 All 546: 10 AI Cr R 1: 9 LRA Cr 85: 30 Cr LJ 654: 116 Ind Cas 751.

——S. 528 — Section 528 cannot be so read as to imply that after a District Magistrate has transferred some cases from one file to the file of another Magistrate, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file. AIR (Vol 12) 1925 All 283: 47 All 288: 23 ALJ 133: 26 Cr LJ 538: 6 LRA Cr 57: 85 Ind Cas 378.

**——S. 528 — Chief Presidency Magistrate can recall a case transferred by Additional Chief Presidency Magistrate.**

A complaint was made of criminal breach of trust against one to the Additional Chief Presidency Magistrate who directed the Police to enquire and report. Thereon the Additional Chief Presidency Magistrate transferred the case for disposal to the fourth Presidency Magistrate. The accused applied to the Chief Presidency Magistrate asking on the ground of jurisdiction, that the case should be recalled to his file. The Chief Presidency Magistrate withdrew the case to his own file from the file of the fourth Presidency Magistrate under S. 528 of Cr. P. Code.

Held, that as the Additional Presidency Magistrate was subordinate to the Chief Presidency Magistrate, the Chief Presidency Magistrate had jurisdiction to make the order of recall. AIR (Vol 11) 1924 Cal 911: 83 Ind Cas 661: 51 Cal 820: 39 CLJ 595: 28 CWN 903: 26 Cr LJ 101 (DB).

**——S. 528 — Superior magistrate — Cancellation of order.**

Where a competent Magistrate has issued an order of transfer of a case after hearing both parties, a superior Magistrate should not cancel the order and retransfer the case to the original Court without hearing the complainant in support of the transfer. AIR (Vol 7) 1920 Mad 740: 12 LW 633: 60 Ind Cas 55: 22 Cr LJ 199.

**——S. 528 — Order by Sub-Divisional Magistrate — Forum.**

A District Magistrate cannot set aside an order of transfer passed by a Sub-Divisional Magistrate. (1912) 13 Cr LJ 782: 17 Ind Cas 414.

**——S. 528, para 4 — Construction of.**

"The head of a village under Mad. Reg. IV of 1821" in para. 4 of S. 528, Cr. P. C., means the head of a village acting under Mad. Reg. IV of 1821. (1902) 26 M 394 (398) (DB).

**——S. 528 — Transfer of case — — District Magistrate's power to cancel order of transfer by Sub-divisional Magistrate.**

The Sub-Divisional Magistrate and the District Magistrate have co-ordinate powers of transfer under S. 528 and the District Magistrate has no power to cancel an order of transfer passed by a Sub-divisional Magistrate. But the District Magistrate may, on application made for that purpose, withdraw the case from the file of the Magistrate to whom it has been transferred and either try it himself or refer it for trial to another Magistrate. (1902) 26 M 130 (131, 132).

**13. Transfer by Sessions Judge.**

——S. 528 — Powers of transfer of the Sessions Judge are expressly set out in S. 528 (1); it is impossible to allow any further "inherent" powers of transfer. AIR (Vol 18) 1931 All 435: 1931 ALJ 591: 33 Cr LJ 158: 135 Ind Cas 252.

**14. Transfer from Court having no jurisdiction.**

**——Ss. 528 (2), 526 — District Magistrate — Powers to transfer — Sub-Magistrate having no jurisdiction — Procedure — Transfer by District Magistrate or High Court — Legality.**

Neither the District Magistrate nor the High Court ought to transfer a case where the Subordinate Magistrate has no jurisdiction; the proper tribunal to decide whether the case is one within his jurisdiction and whether or not he should continue the trial is the Subordinate Magistrate himself and not the District Magistrate or High Court.

It is open to him to try an accused for an offence less than that revealed in the complaint, although it would ordinarily be improper for him to do so. If he has no jurisdiction, he should return the complaint for presentation to proper Court. AIR (Vol 29) 1942 Mad 715: 55 LW 549: (1942) 2 MLJ 308: 1942 MWN 593: 44 Cr LJ 122: 203 Ind Cas 620.

——S. 528A.

**——S. 528-A -- Time for making claim — Accused must claim his right before Magistrate — If not, he is barred from raising it subsequently.**

It is a condition precedent to the determination of the status of an accused person that he should assert his right to be tried as a person belonging to a particular nationality before the Magistrate to whom he is sent up for trial. It is the assertion of that claim which gives jurisdiction to the Magistrate to inquire into the matter and to give a finding thereon, which, if adverse to the accused, may be challenged in the subsequent proceedings. But if the accused has failed to assert the plea at the proper time, the provisions of S. 528-B in express terms prevent him from asserting it in any subsequent stage of the case. AIR (Vol 16) 1929 Sind 23: 22 SLR 472: 29 Cr LJ 721: 110 Ind Cas 577.

**——S. 528-A — No duty to ask accused — Claim to be tried as European British subject.**

Magistrate is not obliged to ask the accused whether he would claim to be tried as a European British subject. AIR (Vol 15) 1928 Cal 97: 29 Cr LJ 245: 9 AI Cr R 471: 54 Cal 1041: 107 Ind Cas 353 (DB).

——S. 528-A — The claim to be tried as a European British subject under S. 29-A, Cr. P. Code, must be made before the enquiry or trial actually begins so far as a case which falls within S. 528-A, Cr. P. Code, is concerned. Not having made this claim when a person is first brought before the Magistrate for the purpose of trial or inquiry, it is not open to revive or make it at any subsequent stage. AIR (Vol 15) 1928 Cal 97: 54 Cal 1041: 29 Cr LJ 245: 9 AI Cr R 471: 107 Ind Cas 353 (DB).

**——S. 528-A — Procedure on claim — Procedure in Mofussal and in Presidency Towns discussed.**

An Indian British subject to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of enquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mofussal. If the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal. This applies to Presidency Magistrates as well as to Magistrates in the mofussal. If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not the High Court exercising Original Criminal Jurisdiction. If the Court of Session rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such trial. It necessarily follows that if a claim is made before a Presidency Magistrate and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, under S. 275 of the Cr. P. Code, before the High Court, a further claim for being tried by a jury the majority of whom should be Indians. Where no such claim is put forward before a Magistrate, there being no provision for repetition of the claim before the High Court, S. 528-B is a bar to the assertion of the same in any subsequent stage of the case. AIR (Vol 12) 1925 Cal 384: 51 Cal 980: 29 CWN 384: 26 Cr LJ 385: 84 Ind Cas 929.

**——S. 528-A — Claim under S. 275 Cr. P. C.**

The claim to be tried as an Indian British subject mentioned in Ss. 528-A and 528-B is different and distinct one from the claim to be tried by a majority of Indian Jury as mentioned in Section 275, though it can only be put forward by a person who has, in the language of that section been found under the provisions of the Code to be an Indian British subject. AIR (Vol 12) 1925 Cal 384: 51 Cal 980: 29 CWN 384: 26 Cr LJ 385: 84 Ind Cas 929.

**——S. 528-A — Jurisdiction of High Court — European British subject, 28 and 29, Vic. Ch. 15 — Privilege — Waiver of privilege.**

Under 28 and 29 Vic., Ch. 15 and notification 178 J of 23rd September 1874, the High Court of Bombay has jurisdiction to decide whether an accused, an European British subject residing at the Residency Bazars, Hyderabad, is an European subject, and also to decide whether the accused has waived his privilege to be dealt with as such, and the legal effect of such waiver, if any. (1903) 5 Bom LR 869 (870, 871).

**——S. 528-B.**

**——S. 528-B — Omission in trial Court to claim to be dealt with as an European British subject — Revision — Forum.**

Proceedings in revision before the High Court on a conviction by a trial Court or an Appellate Court are a subsequent stage of the case for the purpose of S. 528-B, and consequently, if an European British subject residing in Coorg does not claim to be dealt with as an European British subject, either in the trial Court or the Appellate Court, it is the Court of the Judicial Commissioner of Coorg and not the High Court of Madras that has revisional jurisdiction over the matter. AIR (V 24) 1937 Mad 14: 1936 MWN 1091: 44 LW 755: 71 MLJ 827: 38 Cr LJ 336: ILR (1937) Mad 339: 167 Ind Cas 160 (DB).

**——S. 528-B — Government Notification ordering that Calcutta High Court should exercise original and appellate jurisdiction and discharge functions of High Court in criminal proceedings in the Nicobar Islands against European British subjects:**

Held, that the High Court can interfere in the case of such a subject even though he had not pleaded that he was European British subject in the trial Court. AIR (Vol 20) 1933 Cal 240: 34 Cr LJ 671: 60 C 676: 143 Ind Cas 892 (DB).

**——S. 528-B — Construction favourable to accused to be given.**

If the language of S. 528-B is ambiguous, a construction favourable to accused and convicted persons should be adopted, as the section purports to curtial privileges conferred by other provisions in the Code. AIR (Vol 20) 1933 Cal 240: 34 Cr LJ 671: 60 C 676: 143 Ind Cas 892 (DB).

**——S. 528-B — Time for making claim.**

The claim on the ground of status may be made at any time before the commitment is made. AIR (Vol 12) 1925 Cal 384: 29 CWN 384: 26 Cr LJ 385: 51 Cal 980: 84 Ind Cas 929.

**——S. 528-B — Scope and effect — Cr. P. C. S. 443 — Failure to avail of S. 528-A does not debar accused from relying on S. 443 cl. (a) or (b).**

Per Walmsley, J.— The omission of the accused person to avail himself of the right to claim the benefit of S. 528-A does not conclude the matter and he is not debarred from urging that the consideration mentioned in cl. (a) or (b) of S. 444 exist.

Per Mukerji, J.— A claim to be tried under the provisions of Chapter 33 of the Code is wholly different from a claim to be tried as an European British subject or an Indian British subject or an European not being an European British subject or an American. It is the latter claim only which is dealt with in Chapter 44 of the Code in which Ss. 528-A and 528-B occur and so far as the former claim is concerned the questions of status of the claimant does not always arise as is evident from the provisions of S. 443 (1)(b) of the Code. Consequently Ss. 528-A and 528-B can have no application to S. 449 under which the right of appeal is claimed in Ch. 33. AIR (Vol 12) 1925 Cal 14: 52 Cal 347: 40 CLJ 256: 1929 CWN 447: 26 Cr LJ 401: 84 Ind Cas 1041 (DB).

**——S. 529.**

1. **Applicability and scope.**
2. **Cognizance of offences under S. 190.**
3. **Transfer of cases by Magistrates.**
4. **Magistrate, erroneously acting in good faith.**

**1. Applicability and scope.**

**——Ss. 529 (e) and 530 (k) — Relative scope and effect.**

Under S. 529 (e), Criminal Procedure Code, if any Magistrate not empowered by law to take cognizance of an offence under S. 190 (1) (a) or (b) erroneously but in good faith does not take cognizance, the proceedings are not to be set aside merely on the ground of his not being so empowered. It is only when the case comes under Cl. (c) of S. 190 (1) that S. 530 (k) provides that the proceedings shall be void. AIR (Vol 37) 1950 A 5: 51 Cr LJ 222: 1949 AWR 485.

**——S. 529 — Applicability.**

Section 529, Criminal P. C., does not refer specifically to action taken under the Ben. Municipal Act

and therefore, strictly speaking has no application. But, even if the provisions of the Criminal P. C. are considered and applied as far as possible to proceedings under the Municipal Act, S. 530 would be the proper section to apply rather than S. 529. AIR (Vol 29) 1942 Cal 288: 46 CWN 316: 74 CLJ 499: 43 Cr LJ 593: ILR (1942) 1 Cal 530: 199 Ind Cas 792 (DB).

**——Ss. 529, 530 — Scope.**

Section 529 or S. 530 does not mention the proceedings under S. 164, Criminal P. C., as proceedings which are not to be set aside on the ground of a Magistrate not being empowered, or as void owing to that lack of power. AIR (Vol 28) 1941 Rang 301: 1941 Rang LR 258: 43 Cr LJ 123: 197 Ind Cas 131.

**——S. 529 — Magistrate otherwise competent to try case specially appointed to try it.**

Provisions of S. 529, Criminal P. C. do not apply where in consequence of a wrongly given sanction under S. 197 a Magistrate otherwise competent to try the case, is specially appointed to try the particular case. AIR (Vol 27) 1940 Pesh 41: 42 Cr LJ 68: 191 Ind Cas 91.

**——S. 529 — Effect of irregularity.**

Irregularities during the course of the preliminary Police investigation may affect the weight to be attached to the evidence of the complainant and his witnesses, but will not vitiate the proceedings. AIR (Vol 20) 1933 Sind 188: 34 Cr LJ 256: 141 Ind Cas 879 (DB).

**——S. 529 — Joinder of charges.**

Where an accused is charged with and tried at one trial for four offences, it is not merely an irregularity but an illegality which vitiates the trial. AIR (Vol 17) 1930 Mad 508: 1930 Cr C 580: 3 M Cr C 185: 127 Ind Cas 295.

**——S. 529 — Non-compliance with provisions.**

It is not every failure to comply with a mandatory provision of the law which renders the proceedings void. AIR (Vol 13) 1926 Rang 193: 5 Bur LJ 100: 27 Cr LJ 1281: 98 Ind Cas 177.

**2. Cognizance of offences under S. 190.**

**——S. 529 — Power to take cognizance and power to dismiss complaint.**

Power to take cognizance and power to dismiss a complaint go together. The District Magistrate is precluded from setting aside proceedings before a Magistrate merely on the ground of his not being empowered to take cognizance, to transfer a case or to take it on his own file and to dispose of it himself. ('33) 34 Cr LJ 923: 145 Ind Cas 280.

**——S. 529 (e) — Taking cognizance.**

The power to try includes power to take cognizance. Power to take cognizance once given remains personal to the Magistrate and independent of the local area, until withdrawn by the authority conferring it. AIR (Vol 18) 1931 Bom 517: 33 Bom LR 1192: 33 Cr LJ 68: 134 Ind Cas 1230 (DB).

**——S. 529 —Trial without jurisdiction.**

Where a Magistrate, not having jurisdiction but othewise competent, tries a charge, the irregularity is excused by the provisions of S. 529 (e). AIR (Vol 14) 1927 All 791: 8 AI Cr R 402: 8 LRA Cr 144.

**——S. 529 — Offence beyond powers.**

A Magistrate of the 2nd Class cannot take cognizance of a complaint that certain persons were guilty of murder. Where therefore he does entertain such a complaint and finding it to be false takes action under S. 190, though defect in conviction could be cured by S. 529, complainant cannot be prosecuted for false complaint. The powers of a 2nd Class Magistrate can be extended only to the extent specified in S. 37 and Sch. 4 which provisions are to be read with S. 190 in such cases. AIR (Vol 13) 1926 Pat 400: 5 Pat 447: 7 PLT 335: 27 Cr LJ 704: 94 Ind Cas 896 (DB).

**3. Transfer of cases by Magistrates.**

**——Ss. 529 (e) and 528 — Applicability — Transfer of a case which was improperly taken cognizance of.**

Where a magistrate not competent to take cognizance of case takes cognizance of it and is succeeded by another Magistrate who was also not competent to try it and the trial is proceeded with, it is not open to the District Magistrate at that stage to transfer it to a magistrate competent to try it. S. 529 (e) cannot be relied upon because it contemplates completion of inquiry and trial. The proceedings prior to transfer were not erroneously 'bona fide' as contemplated by S. 529 (e). AIR (Vol 37) 1950 HP 42.

**——S. 529 — Applicability — Transfer of case to Magistrate having no jurisdiction.**

S. 529, Cr. P. Code, presupposes that the transfer is made to a Magistrate who has the jurisdiction to try the case by a Magistrate who had no jurisdiction to make the order of transfer. The section, therefore, does not apply to a transfer of a case to a Magistrate who has no power to decide it. AIR (Vol 36) 1948 Cal 637: 51 Cr LJ 205: 54 CWN 228.

**——S. 529 (f) — Conditional order under S. 133 by Sub-Divisional Magistrate — Transfer of case — Irregularity, if curable.**

Where the conditional order is made under S. 133, Criminal P. C., by a Sub-Divisional Magistrate and on appearance of the person, the case is transferred to a competent subordinate Magistrate, the transfer order would be a mere irregularity curable under S. 529 (f) and S. 537. AIR (Vol 32) 1945 Pat 316: 12 BR 134: 47 Cr LJ 179: 24 Pat 23· 221 Ind Cas 418

**——S. 529 — Transfer of case in good faith.**

District Magistrate appointing Sub-Divisional Magistrate for particular period — Authority to be in charge of S. D. O.'s file during his tour — Such appointed Magistrate, not empowered under S. 192, transferring case in good faith to his own file:

Held, that by virtue of S. 529 (f), the transfer is valid. AIR (Vol 25) 1938 Cal 195: 42 CWN 246: 39 Cr LJ 417: 174 Ind Cas 513 (DB).

**——S. 529 — Transfer of case under S. 144.**

Where the District Magistrate transfers an application made under S. 144 (4), Criminal P. C. even assuming that there was no power of transfer, the order of transfer cannot be regarded as void and cannot be set aside merely on that ground in view of S. 529 (f), Criminal P. C., and also of S. 531 of the same Code. AIR (Vol 24) 1937 Mad 487: 1937 MWN 210: 45 LW 367: 38 Cr LJ 864: 170 Ind Cas 193.

**——S. 529 — Proceedings in the transferred Court are not invalid.**

Where the first Class Magistrate having had the case transferred to him by the Sub-Divisional Magis-

trate transferred it 'bona fide' to a Third Class Magistrate who finally disposed of it and there was nothing to show that the First Class Magistrate did not believe that he had power to so transfer.

Held, that the case was one that fell under cl. (f), S. 529, Cr. P. Code, and though the First Class Magistrate was not empowered by law to transfer the case to the Third Class Magistrate, the transfer being 'bona fide' his order of transfer should not be treated as so invalid as to prevent the Third Class Magistrate, who took cognizance upon the transfer, from having jurisdiction to try the accused. 36 All 166, Not followed. AIR (Vol 15) 1928 Bom 286: 30 Bom LR 653: 30 Cr LJ 467: 12 AI Cr R 303: 115 Ind Cas 399 (DB).

——Ss. 529 and 530 — **Transfer to Bench of case not triable summarily — Trial in regular way — Effect — Re-trial whether may be ordered.**

Where a District Magistrate transfers a case under Section 456 of the I. P. C. to a Bench of Second Class Honorary Magistrates not empowered to try it summarily, and the Bench proceeds with the same in the regular way the proceedings are not on that account void and the District Magistrate has no jurisdiction to order a re-trial. UBR (1910) 1, 70: 12 Cr LJ 383: 11 Ind Cas 247.

——**S. 529 (f) — Transfer by Magistrate not competent to transfer — Irregularity.**

A transfer of a case by a Magistrate not competent to transfer is an irregularity covered by S. 529 (f) Cr. P. C. (1909) 36 C 869 (872) (DB).

**4. Magistrate, erroneously acting in good faith.**

——**S. 529 — Acting with care and caution.**

Complaint dismissed under S. 203 by Sub-Divisional Magistrate — Sessions Judge ordering further inquiry — Sub-Divisional Magistrate ordering other Magistrate to hold enquiry and report — Such Magistrate issuing summons on accused and discharging them holding trial — Sub-Divisional Magistrate ignoring trial and accused convicted.

Held, that the Magistrate was only ordered to hold inquiry and that he had no jurisdiction to try the case. The Sub-Divisional Magistrate was justified in ignoring the trial. As the Magistrate ignored that order and overlooked it, he could not be said to have acted with care and caution within the meaning of S. 529 and hence his action could not be allowed to stand. AIR (Vol 25) 1938 Pat 369: 19 PLT 336: 4 BR 750: 39 Cr LJ 778: 176 Ind Cas 715 (DB).

——**S. 529 (e) — Magistrate erroneously, but in good faith taking cognizance of case.**

Under S. 529 (e), Criminal P. C., if a Magistrate not empowered by law to take cognizance of an offence under S. 190, sub-s. 1, cl. (a), or cl. (b), erroneously and in good faith, does take such cognizance, his proceedings shall not be set aside merely on the ground of his not being so empowered unless prejudice has been caused to the accused. AIR (Vol 20) 1933 All 399: 34 Cr LJ 761: 1933 ALJ 735: 144 Ind Cas 380.

——**S. 529 — Erroneous procedure.**

Complaint to Magistrate — Order for investigation by Police — Police sending charge sheet — Even such a procedure is erroneous proceedings of Magistrate, but cannot be set aside merely on this ground in view of S. 529, Criminal P. C. AIR (Vol 19) 1932 Lah 579: 33 Cr LJ 737: 33 PLR 840: 14 Lah 194: 139 Ind Cas 139 (DB).

——**S. 530.**

See also Criminal P. C., S. 529.

**1. Trial of offenders by Magistrates not empowered.**
**2. Summary trials.**
**3. Deciding appeals or revising orders when not empowered.**
**4. Effect on proceedings.**

**1. Trial of offenders by Magistrates not empowered.**

——S. 530 — Offence under S. 190 (1) (a) or (b) — Magistrate taking cognizance in good faith without being empowered — Proceedings are valid. AIR (Vol 37) 1950 All 5: 1949 AWR 485.

——**S. 530 (p) — Magistrate trying person for offence less serious than actually committed.**

Where a Magistrate tries a person for an offence less serious than was actually committed, the High Court will interfere only where the Magistrate had deliberately overlooked certain aggravating facts with a view to securing for himself jurisdiction over the offence. If the Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him, and he had, in fact, jurisdiction to try the lesser offence, his proceedings would be proper and the High Court would not interfere. AIR (Vol 29) 1942 Mad 31: 43 Cr LJ 361: 1941 MWN 811: (1941) 2 MLJ 420: 54 LW 738: 198 Ind Cas 428.

——**S. 530 (p) — Clutching at jurisdiction.**

The Deputy Tahsildar saw a number of goats grazing in the forest and finding that the owner had no license for so grazing them, he proceeded to drive them to the cattle pound. On the way, he was met by accused Nos. 1 and 2, owners of the goats, and by accused No. 3, their friend. Without disclosing the fact that accused Nos. 1 and 2 were the owners of the goats, they told the Deputy Tahsildar that they would assist him in driving the goats to the pound and they led him not to the pound but to their own pen. The Deputy Tahsildar duly drove the goats into the pen and upon entering the village to inform the village Magistrate, he was told that the enclosure into which he had driven the goats was not a cattle pound but a private pen of the owners of the goats. The Deputy Tahsildar, thereupon, filed a complaint in the Court of the local Sub-Magistrate, and in due course, a charge was framed against all the three accused under Ss. 417 and 379, Penal Code. It was contended on behalf of the accused that the offence actually committed was one under S. 420, Penal Code, an offence punishable only by a First Class Magistrate:

Held, that the offence did not fall under S. 420 and that there was no ground for believing that the Magistrate clutched at jurisdiction in framing charge under S. 417, Penal Code. AIR (Vol 29) 1942 Mad 31: 54 LW 738: 1941 MWN 811: 43 Cr LJ 361: (1941) 2 MLJ 420: 198 Ind Cas 428.

——**S. 530 (p) — Magistrate not empowered to try — Omission to raise question of jurisdiction — Jurisdiction by waiver, if conferred.**

When a Magistrate, not being empowered by law in this behalf, tries an offender, the proceedings shall be void under S. 530 (p), Criminal P. C. An omission to raise a question of jurisdiction in the first Court does not amount to waiver so as to confer jurisdiction. Hence a trial of an offence under R. 81 (4), Defence of India Rules, by Sub-Divisional Officer not specifically empowered is void as there is nothing in the list (Sch. III, parts 3 and 4) to enlarge the power of a Magistrate of the second class in respect of a trial of offences. AIR (Vol 30) 1943 Pat 380: 9 Cut LT 19: 10 BR 179: 45 Cr LJ 166: 209 Ind Cas 639.

**——S. 530 (p) — Sanction.**

Duty of Excise Sub-Inspector to sign certificate for goods imported in bond into Afghanistan — He signing, knowing that goods were not so imported — Trial along with other accused — Sanction for his prosecution not obtained:

Held, it was an act done in discharge of official duty. Whole trial was without jurisdiction and void. AIR (Vol 24) 1937 Pesh 52: 38 Cr LJ 1042: 170 Ind Cas 772 (DB).

**——S. 530 — Public Gambling Act (III of 1867), S. 14 — Trial by Magistrate issuing warrant — Desirability of.**

An accused is materially prejudiced by the trial of the case by the very Magistrate who had issued the warrant. This is especially so in a case under the Gambling Act and it is not desirable that the Magistrate who issued the warrant should try the case ultimately. (The conviction in a trial by the same Magistrate was quashed). AIR (Vol 21) 1934 All 987 (2): 4 AWR 345: 36 Cr LJ 293: 153 Ind Cas 146 (1).

**——S. 530 — Trial of offence which might have been charged beyond Magistrate's jurisdiction.**

When a complaint was made to a third class Magistrate of offences under Ss. 323, 426 and 379, Penal Code, all of which were triable by him, and the accused were convicted under Ss. 323 and 379:

Held, that the trial could not be held illegal merely because the offence under S. 225, Penal Code, which is not triable by a Magistrate of third class might also have been charged in the complaint. AIR (Vol 18) 1931 All 10: 1930 ALJ 1422: 32 Cr LJ 360: 129 Ind Cas 257.

**——S. 530 — Trial for charges named in complaint.**

A magistrate was entitled to try the accused under the sections named in the complaint and he tried him accordingly.

Held, that it cannot be said, because another section could also be charged in the complaint, therefore the trial under the sections charged in the complaint is void. 1930 ALJ 1422: AIR (Vol 18) 1931 All 10: 32 Cri LJ 360.

**——S. 530 — Offence triable by a Higher Court.**

Where the Magistrate doubted whether the facts justified a charge of dacoity or not and where he was invited by the defence to deal with the case himself and accepting the invitation framed a charge under Ss. 147, 440 and 380, Penal Code, and convicted the accused under those sections and did not frame a charge under S. 395, Penal Code, it is not open to the defence to object on the ground that the Magistrate had no jurisdiction. 1930 Cr C 1182: 32 Bom LR 1279: AIR (Vol 17) 1930 Bom 595 (DB).

**——S. 530 — Transfer of case.**

The proceedings of a Magistrate trying a case transferred by him to another Magistrate but which has not been retransferred to him are without jurisdiction and altogether void. 125 Ind Cas 557: 31 Cr LJ 895: 1930 Cr C 763: 1930 MWN 413: AIR (Vol 17) 1930 Mad 705.

——S. 530 — Where part of the evidence in a case is recorded by a Magistrate who has no jurisdiction, and part of the evidence by a Magistrate who has jurisdiction, conviction is illegal and retrial is necessary. 109 Ind Cas 175: 55 Cal 65: 47 CLJ 122: 29 Cr LJ 464: AIR (Vol 15) 1928 Cal 183 (DB).

——S. 530 — When an offence under S. 332, Penal Code, which is triable by a Court of Session or by a Presidency Magistrate or by a 1st Class Magistrate, is tried by a 2nd Class Magistrate and the accused is convicted the conviction is certainly illegal. (1928) 111 Ind Cas 126: 10 AI Cr R 561: 1928 MWN 465: 1 M Cr C 173: 29 Cr LJ 798.

**——S. 530 — Conviction for a lesser offence when facts constitute a graver offence — Not void.**

When a Magistrate convicts the accused of an offence triable by him though the facts disclosed also constitute a graver offence, not triable by him, his proceedings are not void under the provisions of S. 530. High Court will not interfere, when no objection was taken either before the Magistrate or in the Court of appeal to the jurisdiction of trial Court and the accused are not prejudiced. 96 Ind Cas 873: 7 PLT 496: 27 Cr LJ 1017: AIR (Vol 13) 1926 Pat 393.

**——S. 530 — Bench of Magistrates — Conviction — Legality — Some of members not having whole evidence.**

For a conviction by a Bench of Magistrates to be legal, it must be by the quorum of Magistrates required under the rules, each of the members of which has heard the whole evidence. 13 SLR 166: 20 Cr LJ 769: 53 Ind Cas 609: AIR (Vol 6) 1919 Sind 66 (FB).

**——S. 530 — Conviction for less serious offence.**

A conviction for a less serious offence need not be set aside separately because the facts disclose a more serious offence provided the Court had jurisdiction to try the offence of which it has convicted the accused. 16 Cr LJ 5: 26 Ind Cas 309: AIR (Vol 2) 1915 Cal 715.

**——S. 530 — Jurisdiction — Cognisance — Magistrate trying a case which ought to be tried by Sessions Court — Effect of — Practice.**

The accused was tried by a First Class Magistrate, who convicted him alternately under S. 363 or S. 498 of the Indian Penal Code and sentenced him to rigorous imprisonment for one year. The District Magistrate referred the case to the High Court on the grounds that the offence was under S. 366 of the Code which was exclusively triable by the Court of Session, and that the trial by the Magistrate being beyond his jurisdiction, was void.

Held, that, having regard to the remarks in 13 Bom 505, the trial could not be regarded as illegal, and that the accused might, no doubt, have been convicted of a graver offence but the sentence was not so entirely inadequate as to call for a fresh trial. (1902) 4 Bom LR 267 (268): 26 Bom 551 (DB).

**——S. 530 — Trial by First Class Magistrate for offence under S. 193, I. P. C., though facts disclosed offence under S. 194 as well.**

Where a First Class Magistrate tried persons for an offence under S. 193, I. P. C., though the facts disclosed offence under S. 194 as well, his proceedings are not void within the meaning of S. 530, Cr. P. C. (1901) 24 Mad 675 (677): 2 Weir 699 (DB).

**2. Summary trials.**

**——Ss. 530, 260 — Charges under Ss. 147 and 452, Penal Code — Summons only under S. 448 — Case tried summarily and conviction under S. 452.**

The accused persons were charged with offences under Ss. 147 and 452, Penal Code. The summons issued to them was, however, only under S. 448, Penal Code. The Magistrate held a summary trial and convicted the accused under S. 452:

Held, that the Magistrate was not empowered by law to hold a summary trial in such a case and the proceeding was void under S. 530 (q), Criminal P. C. AIR (Vol 26) 1939 All 693: 1939 AWR 710: 1939 ALJ 783: 41 Cr LJ 91: ILR (1939) All 931: 184 Ind Cas 712.

**——S. 530 (q) — Magistrate trying offence under S. 4, Bombay Prevention of Gambling Act, summarily.**

Trying an offender summarily under S. 530 (q), Criminal P. C., means trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused.

Where, therefore, a Magistrate tries an offence under S. 4, Bombay Gambling Act summarily, S. 530 (q), Criminal P. C., applies. AIR (Vol 26) 1939 Sind 341: ILR (1940) Kar 123: 41 Cr LJ 190: 185 Ind Cas 543 (DB).

**——S. 530 — Summary trial — Subsequent notification.**

Magistrate not invested with summary powers at the time of trial — Summary trial — Subsequent notification purporting to invest him with such powers retrospectively:

Held, that the notification could not grant powers retrospectively and hence the irregularity vitiated the proceeding. AIR (Vol 20) 1933 Pesh 97: 35 Cr LJ 462: 35 PLR 310: 147 Ind Cas 757.

——S. 530 — Where on a charge under Ss. 147, 323 and 506, Penal Code, the Magistrate issued process and tried the accused summarily but convicted them only under S. 323.

Held, that the proceedings of the Magistrate were void as the case fell under S. 530 (q), Cr. P. Code. It is mainly of an offence with regard to which process is issued, for which the accused is tried and it could not be said that the accused was not tried under S. 147. 109 Ind Cas 220: 30 Bom LR 371: 52 Bom 254: 10 AI Cr R 191: 29 Cr LJ 492: AIR (Vol 15) 1928 Bom 142 (DB).

### 3. Deciding appeals or revising orders when not empowered.

**——S. 530 — Order void for want of jurisdiction — Whether valid until set aside by competent Court.**

An order which was void for want of jurisdiction must, nevertheless, be regarded as valid unless it is set aside by a Court of competent jurisdiction.

On conviction by the Sub-Divisional Magistrate the accused appealed to the Sessions Judge who dismissed the appeal on merits. Subsequently, learning that the Sub-Divisional Officer was exercising power of a Magistrate of the Second Class, he then filed an appeal in the Court of the District Magistrate. On reference to the High Court:

Held, that although the proceedings before the Sessions Judge were void, it was not imperative on the High Court to set aside an order made on appeal, without jurisdiction. Therefore, strictly speaking, before filing his appeal in the Court of the District Magistrate, the accused ought first to have applied to the High Court to set aside the order of the Sessions Judge:

But held, also, that to avoid waste of time, the order of the Sessions Judge should be set aside and the District Magistrate directed to hear the appeal. AIR (Vol 24) 1937 Cal 256: 38 Cr L J 688: ILR (1937) 2 Cal 116: 169 Ind Cas 34.

——S. 530 — Sub-Divisional Magistrate not exercising powers of District Magistrate hearing appeal from order under S. 514, Criminal P. C. — Proceedings are void. AIR (Vol 21) 1934 Lah 294: 36 Cr LJ 557: 154 Ind Cas 522.

**——S. 530 — Magistrate.**

'Magistrate' includes a Sessions Judge, so that the dismissal of an appeal by a Sessions Judge where appeal lay only to the High Court was held to be void ab initio. 84 Ind Cas 437: 26 Cr LJ 293: 2 Rang 386: AIR (Vol 12) 1925 Rang 39.

### 4. Effect on proceedings.

**——S. 530 (p) — Charge under S. 409, I. P. Code, altered to one under S. 408 — Transfer of case after the alteration — Quashing of proceedings by High Court on the ground that offence alleged amounted to an offence under S. 409 and that the trying Magistrate had no jurisdiction to try — Effect — Power of proper Court to frame proper charges and continue trial.**

The accused was charged with an offence under S. 409, I. P. Code. On a petition by the police the charge was altered to S. 408, I. P. Code and the case was transferred to the Stationary Sub-Magistrate who took the case on file and framed a charge under S. 408. The High Court quashed the charge on the ground that the offence alleged really amounted to an offence under S. 409, which the Stationary Sub-Magistrate had no jurisdiction to try. The records having been submitted to the Sub-Divisional Magistrate for orders, he took the case on file. It was objected on behalf of the accused that the order of the High Court quashing proceedings wiped out the first information report and the charge sheet.

Held, S. 530 (p) of the Code does not apply. The quashing of proceedings before the Stationary Sub-Magistrate does not affect the proceedings before the Sub-Divisional Magistrate who could proceed with the case, by framing the proper charges on the complaint and continue the trial. AIR (Vol 35) 1948 Mad 178: 1947 MWN 605: (1947) 2 MLJ 308: 60 LW 610: 49 Cr LJ 174.

**——S. 530 — Applicability — Joint conviction for two offences — Holding of one conviction illegal for want of Court's jurisdiction does not vitiate the other conviction — S. 530 if applies.**

Where a person is properly charged with two separate offences in one trial, his conviction upon each must constitute a separate conviction, and the invalidity of one conviction should not affect the other conviction. So in a case if one conviction is set aside for want of jurisdiction to try S. 530 would not vitiate the other conviction. The wording of S. 530 should be construed in its ordinary plain and grammatical meaning. (1946) 25 Pat 298: AIR (Vol 34) 1947 Pat 23 (DB).

**——S. 530 — Proceedings under Special Criminal Courts Ordinance (II of 1942) — S. 530, if can be applied.**

Section 530, Criminal P. C., is in no way inconsistent with the provisions of the Ordinance, and its operation is, therefore, preserved by S. 27 thereof. Hence proceedings by Special Magistrate who is not properly empowered to do so are void. AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 BR 193: 45 Cr LJ 177: 209 Ind Cas 482 (SB).

**——S. 530 — Transfer of case under S. 192.**

The Magistrate to whom a case is transferred under S. 192 must be empowered to try it, otherwise the trial would be void under the provisions of S. 530. AIR (Vol 28) 1941 Cal 185 (188): 72 CLJ 104: ILR (1941) 1 Cal 67: 44 CWN 1114: 42 Cr LJ 490: 194 Ind Cas 38.

**——Ss. 530, 561-A — Complaint under S. 420, Penal Code, disclosing offence under S. 477 — Accused tried and acquitted under former section — Magistrate having no jurisdiction to try under S. 477 — Proceedings, validity of.**

Where the fact disclosed in the complaint under S. 420 constitutes an offence under S. 477 and it is found that the Magistrate trying the case and acquitting the accused under the former section had no jurisdiction to try the same under the latter section, the proceedings before him are void and the accused should be re-tried under the latter section but he should not be allowed to adduce fresh evidence so as to fill in gaps under S. 561-A, Criminal P. C. AIR (Vol 26) 1939 Lah 513: 41 PLR 198: 41 Cr LJ 184: 185 Ind Cas 415.

**——S. 530 — Non-compliance with request that a witness should be re-summoned and re-heard.**

Non-compliance with the demand that a witness should be re-summoned and reheard is not an irregularity which vitiates the trial; and where all the witnesses were further cross-examined before the Magistrate who decided the case, the accused cannot be said to have been prejudiced by the refusal to re-summon and re-hear the witnesses, and the conviction cannot be set aside on this ground. AIR (Vol 25) 1938 Mad 724: (1938) 2 MLJ 41: 1938 MWN 820: 48 LW 248: 39 Cr LJ 932: 177 Ind Cas 598.

——S. 530 — Complaint by public servant to Police — Complaint to Magistrate — Acquittal for want of proper complaint as required by S. 195 (1) (a), Criminal P. C. — Subsequent complaint by public servant:

Held, that the prior acquittal was void under S. 530, Criminal P. C. AIR (Vol 24) 1937 Mad 301: 1937 MWN 17: 45 LW 226: (1937) 1 MLJ 334: 38 Cr LJ 457: ILR (1937) Mad 664: 167 Ind Cas 571 (FB).

**(Impliedly overrules ('13) 36 Mad 308: 14 Cr LJ 214: 19 Ind Cas 310).**

**——S. 530 — "Proceedings," scope of.**

The word "proceedings" is not defined in the Criminal P. C., but is frequently used therein and, from the nature of its use throughout the Code, it includes in connection with a trial, the whole bundle of actions taken and recorded by the Court from the moment of taking cognizance of the case until the disposal. The "proceedings" in a joint trial cannot be differentiated into separate "proceedings" against each accused person. So where there is a joint trial against three accused, one of whom is a public servant and no previous sanction of the Provincial Government has been obtained the whole proceedings as against all the three accused are void and not merely those in respect of the accused who is a public servant. AIR (Vol 24) 1937 Pesh 52: 38 Cr LJ 1042: 170 Ind Cas 772 (DB).

**——S. 530 — Admitting depositions in another case.**

If in a trial Court the depositions given by defence witnesses, when examined as prosecution witnesses in the counter case, are filed with the consent of both sides, and if these witnesses are called and examined in the presence of the accused and swear to the truth of their previous statements, which are then filed with their consent to save time that there is nothing illegal or irregular in such procedure. 127 Ind Cas 289: 53 Mad 775: 31 Cr LJ 1191: 1930 MWN 410: 3 M Cr C 188: 1930 Cr C 577: AIR (Vol 17) 1930 Mad 505: 58 MLJ 547 (DB).

**——S. 530 — Wrong attachment.**

Where land has been attached under S. 88 without a warrant, the High Court would interfere under inherent powers to set right the irregularity though not according to S. 89. 96 Ind Cas 977: 27 PLR 825: 8 LLJ 608: 27 Cr LJ 1025: AIR (Vol 13) 1926 Lah 662.

**——S. 530 — Offences within and without jurisdiction — Magistrate — Ignoring circumstances of aggravation so that the offence may be within the jurisdiction — Improper but not void.**

Where the facts disclose an offence within the jurisdiction of the Magistrate it is a fallacy to say that he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as, for instance, if a second class Magistrate should ignore the violence used in committing theft (S. 379), instead of sending the accused before a first class Magistrate to be tried for robbery (S. 392). Here the action of the second Class Magistrate would be improper, but his proceedings would not be void. 88 Ind Cas 276: 26 Cr LJ 1108: 2 Rang 455: AIR (Vol 12) 1925 Rang 45.

**——S. 530 — Opium Act S. 9 — Summary trial — Subsequent regular trial — If competent.**

Where the offence under the Opium Act punishable with one year's rigorous imprisonment was tried summarily and then the District Magistrate held a regular trial, held that both the trials were nullities, the former because the offence being punishable with imprisonment of one year, the Magistrate had no jurisdiction to try it summarily and the second because the first trial was not quashed by the High Court. (1912) 4 Bur LT 271: 13 Cr LJ 58: 13 Ind Cas 394.

**——S. 530 — Sessions trial — Change of judge — Evidence recorded by one judge and orders passed by another — Validity.**

A Sessions Judge cannot act on evidence recorded by his predecessor in office: on a change of the judge, a sessions trial must commence de novo. The judgment passed by a Sessions Judge on evidence partly recorded by his predecessor in office is illegal and must be set aside. (1908) 8 CLJ 59 (61, 63) (FB).

**——Ss. 530 (J) and 145 — Jurisdiction, meaning of.**

The word 'jurisdiction' in Cl. (j) of S. 530, Cr. P. C., does not mean local jurisdiction, but the right or capacity of the Magistrate by reason of his position or power to deal with the case before him. A trial under S. 145 by a Magistrate competent to act under that section, but having no local jurisdiction over the subject-matter (except by a transfer made to him), is not within S. 530 (j). (1901) 5 CWN 686 (689) (DB).

**——S. 531.**

1. **Scope.**
2. **Objection to local jurisdiction.**
3. **Absence of territorial jurisdiction.**

See also N. 5.

4. **Wrong sessions division or other local area.**
5. **Failure of justice.**

**1. Scope.**

**——S. 531 — Section does not entitle Magistrate having no territorial jurisdiction and having knowledge of this fact to proceed with trial — Section confers no jurisdiction on Magistrate.**

Section 531 cures irregular proceedings wrongly held in a wrong local area unless it appears that the error as to territorial jurisdiction has in fact occasioned a failure of justice. Section 531, however, does not entitle a Magistrate to proceed with the trial in the wrong local area with his eyes open to the fact that he has no territorial jurisdiction. It does not in fact confer a jurisdiction on the Magistrate. AIR (Vol 33) 1946 Cal 459 (DB).

——S. 531 — S. 531, Cr. P. Code, cures irregular proceedings wrongly held in a wrong local area unless it appears that the error as to territorial jurisdiction has in fact occasioned a failure of justice. It does not entitle a Magistrate to proceed with a trial in the wrong local area with his eyes open to the fact that he has no territorial jurisdiction. It does not in fact confer a jurisdiction

on the magistrate. AIR (Vol 33) 1946 Cal 459 : 227 Ind Cas 212 : 50 CWN 552 : 47 Cr LJ 1020 (DB).

——S. 531 — **Charge under S. 6, Merchandise Marks Act, not tried at place where offence was committed — Defect if curable.**

Where the charge under S. 6, Merchandise Marks Act, is not tried at the place where the offence of applying the false trade description had been committed, the defect is curable under S. 531, Criminal P. C. AIR (Vol 27) 1940 Cal 583 : 43 Cr LJ 334 : 192 Ind Cas 835.

——S. 531 — **Subsequent transfer of locality to another jurisdiction.**

Magistrate taking cognizance of offence committed within limits of his jurisdiction and committing accused after enquiry — Locality of offence subsequently transferred to other District :

Held, that such want of jurisdicton would not be a good ground for setting aside the order of commitment according to S. 531. AIR (Vol 26) 1939 Cal 159 (160) : ILR (1938) 2 Cal 357 : 40 Cr LJ 270 : 179 Ind Cas 805 (DB).

——Ss. 531, 526 — **Case transferred but order not communicated — Accused convicted — Conviction, if void.**

With regard to stay applications in criminal matters, the stay order operates only from the date on which the order is communicated to the Court whose proceedings are stayed. The order of prohibition does not take away the jurisdiction of the trial Court, it merely suspends it. If, therefore, the order has not been received, the Court does not lose its jurisdiction because the order has been passed. This reasoning would not, however, apply to an application for transfer. The ordinary rule is that any order operates from the date on which it is passed, the rules with regard to stay proceedings and injunctions being exceptions to that general rule. Hence the Magistrate acts without jurisdiction when he convicts the accused after the order of transfer but before its communication. Nevertheless, it does not follow from the mere fact that the Magistrate had no jurisdiction, that his order is void. Section 531, Criminal P. C., would apply to a case of this kind and so prevent the passing of this order without jurisdiction from being void. The whole principle underlying the various provisions of chap. XLV is that no order or sentence shall be void on the mere ground of some irregularity or want of jurisdiction, unless it leads to a miscarriage of justice or prejudices the accused. AIR (Vol 25) 1938 Mad 832 : 1938 MWN 830 : 48 LW 287 : (1938) 2 MLJ 394 : 39 Cr LJ 987 : ILR (1938) Mad 1003 : 178 Ind Cas 40.

——S. 531 — **Application under S. 144 (4) — Transfer of, by District Magistrate having no power to transfer.**

Where the District Magistrate transfers the application made under S. 144 (4), Criminal P.C., even assuming that there is no power of transfer, the order of transfer cannot be regarded as void and cannot be set aside merely on that ground in view of S. 529 (f), Criminal P.C., and also of S. 531 of the same Code. AIR (V 24) 1937 Mad 487: 1937 MWN 210: 45 LW 367: 38 Cr LJ 864: 170 Ind Cas 193.

——S. 531 — The policy of the Code as shown by Ss. 531 to 538 is to uphold in most cases the orders passed by the Criminal Court which lacked local jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned thereby. AIR (V 23) 1936 Pat 410: 2 BR 629: 15 Pat 418: 17 PLT 543: 163 Ind Cas 518 (DB).

**2. Objection to local jurisdiction.**

——S. 531 — **Plea raised in trial Court.**

When the question of jurisdiction is raised before the trial Magistrate, he must determine the point, otherwise the provisions as regards jurisdiction given in the Criminal P.C., would never be enforced. Section 531 cannot be applied to the case. AIR (V 31) 1944 Pesh 25: 45 Cr LJ 749: 214 Ind Cas 230.

**3. Absence of territorial jurisdiction.**

See also N. 5.

——S. 531 — **Autrefois acquit.**

Two persons were brought to trial before the Sub-Divisional Magistrate, Vellore. It was contended that he had no jurisdiction to try the case, but he decided he had, and acquitted the accused. On revision, the High Court held that the Magistrate had no jurisdiction and dismissed the revision petition. Fresh complaints were filed on the same facts before the Chief Presidency Magistrate. The accused pleaded that the fresh trial was barred under S. 403, Criminal P.C.,

Held, that in view of the provisions of S. 531, Criminal P.C., even the High Court could not have set aside the order of the Magistrate on the ground of mere want of territorial jurisdiction and therefore the Presidency Magistrate could not ignore the order of acquittal passed by the Sub-Divisional Magistrate and the complaints to the Chief Presidency Magistrate were barred under S. 403, Criminal P.C. AIR (V 20) 1933 Mad 765: 1933 MWN 713: 38 LW 562: 65 MLJ 529: 34 Cr LJ 1080: 56 Mad 996: 145 Ind Cas 878 (FB).

——S. 531 — **Trial without jurisdiction.**

The Section does not justify the Chief Court in refusing to interfere with the order of acquittal, when the court passing the order had no jurisdiction to pass it. (1910) 7 PLR 1910 Cr: 7 PWR 1910 Cr: 11 Cr LJ 253: 172 PLR 1910: 5 Ind Cas 830

——S. 531 — **Proceedings in wrong place.**

Section 531, Cr. P. C. applies to a case where the Magistrate has authority to commit, but has not territorial jurisdiction in the place where the offence is alleged to have been committed. (1903) 26 M 640 (643): 1 Weir 190 (DB).

**4. Wrong sessions division or other local area.**

——S. 531 — **Applicability — Applies only to inquiries in British India — Bangalore Courts.**

Section 531, Criminal P.C., is intended to apply only to inquiries in British India, for the Criminal P. C., applies only to British India. It certainly does not condone the wrongful exercise of jurisdiction by a British Indian Court, when no British Indian Court would have jurisdiction in the matter. If it were otherwise, a person, by instituting a proceeding in a British Indian Court might obtain a remedy that was not open to him in the Court having jurisdiction.

Bangalore is within the Mysore State and so the Bangalore Courts — even those in the Civil and Military Station — are foreign Courts. Hence where a Magistrate in British India tries a case which is triable only by a Court in Mysore State, S. 531, will not cure any defect in jurisdiction of the Magistrate in British India. AIR (V 29) 1942 Mad 666: 55 LW 306: 1942 MWN 369: (1942) 2 MLJ 134: 44 Cr LJ 741: 208 Ind Cas 192.

——S. 531 — **"Local area" — Trial taking place within local area other than one where offence was committed.**

The expression "local area" used in S. 531, Criminal P.C., is not confined to a province but includes all local areas governed by the Criminal P.C., which extends to the whole of British India. Where the Magistrate who tried the case was competent

to try the case, the conviction cannot be reversed for the simple reason that the trial took place within a local area other than the one where the offence was committed. AIR (V 23) 1936 Nag 55: 8 RN 219: 37 Cr LJ 474 (2): 19 NLJ 84: 161 Ind Cas 635 (DB).

**——S. 531 — Federated Shan States Laws and Criminal Justice Order, 1926, R. 4.**

Criminal misappropriation in Shan States — Trial in Mandalay:

Held, that S. 531 applied to the case by reason of R. 4 of the Federated Shan States Laws and Criminal Justice Order, 1926. AIR (V 18) 1931 Rang 164: 32 Cr LJ 1120: 134 Ind Cas 209 (DB).

——S. 531 — Section 531, Criminal P.C., operates wherever in British India any finding, sentence or order of any Criminal Court has been arrived at or passed "in a wrong Sessions Division, District Sub-Division or other local area" ejusdem generis, with a Sub-Division provided that in such area, the Criminal P.C., runs. AIR (V 18) 1931 Rang 164: 32 Cr LJ 1120: 134 Ind Cas 209 (DB).

**——S. 531 — Offence outside jurisdiction.**

The High Court has got power to quash a commitment order passed by a Magistrate ordering an accused person to stand his trial in a Sessions Court which has no territorial jurisdiction over the place where the offence alleged was committed. AIR (V 12) 1925 Pat 187: 83 Ind Cas 577: 3 Pat 417: 26 Cr LJ 49 (DB).

**5. Failure of justice.**

**——S. 531 — "Local area" — If includes area outside the jurisdiction of the High Court.**

There is nothing in S. 531, Cr. P. Code, to indicate that the term "local area" occurring in the section is inapplicable to a case in which the offence had been committed within the jurisdiction of another High Court.

A conviction will not be set aside merely on the ground that the trial took place in a wrong Court unless the error had occasioned a failure of justice. AIR (V 37) 1950 A 482: 1950 ALJ 401: 51 Cr LJ 1286: 1950 AWR 511 (DB).

**——S. 531 — Trial held in wrong Court — If renders proceedings void — Conviction — If liable to be set aside.**

The fact that a trial is held in a wrong district is no ground for setting aside the conviction had at such a trial in view of S. 531, Cr. P. Code, in the absence of proof that the error has in fact occasioned a failure of justice. AIR (V 34) 1947 Cal 290: 228 Ind Cas 187: 48 Cr LJ 118 (DB).

**——S. 531 — Objection to territorial jurisdiction of trial Court — Revision.**

An objection that the trial Court had no territorial jurisdiction to try the case will not be entertained in revision unless the trial of the accused in that Court has occasioned a failure of justice. AIR (V 29) 1942 Oudh 473: 1942 OWN 485: 1942 AWR CC 295: 43 Cr LJ 830: 18 Luck 408: 202 Ind Cas 382.

——S. 531 — Magistrate proceeding under S. 108 against person residing in his jurisdiction upon information given by police— Preliminary order passed under S. 112 when person not within jurisdiction — Order not illegal and cannot be interfered with in revision in view of S. 531. AIR (V 24) 1937 Nag 70: 19 NLJ 183: ILR (1936) Nag 200: 38 Cr LJ 447: 167 Ind Cas 739.

**——Ss. 531, 403 — Court of competent jurisdiction within S. 403 — Finding not set aside but which could have been set aside under S. 531 — Effect.**

Sections 403 and 531, Criminal P. C., must be read together and a Court is a Court of competent jurisdiction within the meaning of S. 403, Criminal P.C., where the findings, sentence or order of the Court could have been set aside under the provisions of S. 531, Criminal P.C., but has not, in fact, been so set aside. Section 531, Criminal P.C., must be deemed to give jurisdiction to a Court which would otherwise lack it unless it appears that such lack of jurisdiction has, in fact, occasioned a failure of justice. Clearly, it is not competent for a Court not acting under the provisions of S. 531, Criminal P.C., to say whether a failure of justice has or has not been occasioned. AIR (V 24) 1937 Sind 179: 38 Cr LJ 959: 170 Ind Cas 314 (DB).

**——S. 531 — Offence under S. 182, Penal Code — Irregularity in jurisdiction cured.**

Where in a case under S. 182, Penal Code, the information given to a public servant is contained in a letter posted at one place and delivered at another, the offence is committed partly in one local area and partly in another. The Court at place where the letter is posted has jurisdiction to try the case. Even if that Court is supposed to have no jurisdiction, S. 531 will cover the case. AIR (V 23) 1936 All 105: 1935 AWR 1476: 37 Cr LJ 157: 1936 ALJ 416 :159 Ind Cas 808 (DB).

——S. 531 — Where failure of justice has not occasioned objection as to the trial in wrong District Court will not be maintained. ('36) 38 PLR 963.

**——S. 531 — Want of jurisdiction — Failure of justice not occasioned — Defect, if cured.**

Section 531, Criminal P. C., cures any defect due to want of legal jurisdiction unless there has been a failure of justice by the exercise of such irregular jurisdiction. AIR (V 21) 1934 Oudh 200: 11 OWN 534: 35 Cr LJ 973: 9 Luck 607: 149 Ind Cas 533.

——S. 531 — Under S. 531, Criminal P. C., no finding of a Criminal Court can be set aside solely on the ground that the Magistrate had no local jurisdiction to hear the case unless it appears that a failure of justice has, in fact, been occasioned. AIR (V 18) 1931 Oudh 277: 8 OWN 827: 32 Cr LJ 1177: 134 Ind Cas 477.

**——S. 531 — Want of territorial jurisdiction — Conviction — No failure of justice — Effect.**

The provisions of S. 531, Criminal P. C., are mandatory and where it is nobody's case that the wrong assumption of territorial jurisdiction has, in fact, occasioned a failure of justice nor has the Judge expressed himself to that effect, a conviction cannot be set aside by the Appellate Court on the ground of want of such jurisdiction. AIR (V 18) 1931 Oudh 273: 8 OWN 341: 32 Cr LJ 828: 132 Ind Cas 50 (DB).

**——S. 531 — Accused beyond jurisdiction.**

Where the place where the breach of the peace was apprehended was within the Magistrate's jurisdiction, but the accused resided outside it, and no question of jurisdiction was raised in the trial Court and the Magistrate passed order under S. 107, and no prejudice is caused to the accused.

Held, that the irregularity, if there was one, is cured by S. 531. AIR (V 13) 1926 All 767: 97 Ind Cas 652: 49 All 223: 25 ALJ 44: 27 Cr LJ 1132: 7 LRA (Cr) 174

**——S. 531 — Concurrent jurisdiction. — Appeal made over to Addl. Sessions Judge heard by Sessions Judge himself — Hearing is not without jurisdiction.**

The jurisdiction of the Sessions Judge in respect of an appeal is not ousted in consequence of any arrangement, which he might previously have made for the convenient disposal of the work of the Sessions Court. The absence of any corresponding provision to S. 531 in respect of cases tried within the same Sessions Division, by a lawfully appointed

Judge of that Sessions Division, whether he be the Sessions Judge or an additional Sessions Judge, shows that the legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of section 9 of the Cr. P. C. AIR (V 9) 1922 All 387: 65 Ind Cas 491: 44 All 157: 19 ALJ 952: 23 Cr LJ 107 (DB).

——S. 531 — The fact that the offence was committed outside the trying Magistrate's jurisdiction, does not of itself vitiate trial where it has not in fact occasioned a failure of justice. The fact that objection was taken at an early stage of the proceedings is not conclusive proof that the accused has been prejudiced by the irregularity. AIR (V 8) 1921 Cal 114: 63 Ind Cas 458: 34 CLJ 200: 22 CLJ 666 (DB).

——S. 531 — **Want of territorial jurisdiction — Effect of.**

An order of a Criminal Court cannot be set aside simply because the proceedings took place in a wrong sub-division unless there has been a failure of justice. (1912) 9 ALJ 448: 13 Cr LJ 203: 14 Ind Cas 203.

**——S. 531 — Trial without jurisdiction.**

The accused was found within municipal limits and not within cantonment limits, but was tried by the Cantonment Magistrate and hence the trial was illegal: Held that there would be no ground to interfere unless it could be shown that failure of justice had been occasioned or the accused was prejudiced thereby. (1911) 4 Bur LT 117: 12 Cr LJ 280: 10 Ind Cas 921.

**——S. 532.**

**——S. 532 — Applicability.**

Section 532 does not apply to a case where there is no question that the Magistrate who committed the accused for trial to Sessions Court had the power to do so but the only defect is that there was no previous sanction such as sanction for prosecution under S. 83, Registration Act. AIR (V 21) 1934 All 963: 1934 ALJ 965: 57 All 412: 36 Cr LJ 137: 4 AWR 524: 152 Ind Cas 667 (FB).

**——S. 532 — Applicability — Offence not triable by Sessions or High Court — Accused committed — S. 532 does not apply.**

Section 532 has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which upon true construction of the Code is not triable by a Court of Session or High Court. AIR (V 16) 1929 Cal 756: 123 Ind Cas 433: 31 Cr LJ 506: 57 Cal 1042: 50 CLJ 408: 34 CWN 13: 1929 Cr C 468 (FB).

**——S. 532 — Interpretation.**

Section 532 is a curing or remedial section and it must be strictly interpreted in the interests of the accused person. AIR (V 16) 1929 Cal 756: 123 Ind Cas 433: 31 Cr LJ 506: 57 Cal 1042: 50 CLJ 408: 34 CWN 13: 1929 Cr C 468 (FB).

**——S. 532 — Want of territorial jurisdiction — Order of committal if valid.**

Section 532 of the Cr. P. Code does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction. AIR (V 6) 1919 Mad 229: 20 Cr LJ 416: 51 Ind Cas 176 (DB).

**——S. 532 — Scope.**

Section 532 applies only to a commitment to a Sessions Court. (1910) 12 Bom LR 667: 11 Cr LJ 543: 7 Ind Cas 934 (DB).

**——S. 533.**

See also Criminal P. C. Ss. 164 and 364.

1. **Curable defects.**
2. **Record of confession.**
3. **Examining Magistrate as witness.**
4. **Mode of proving confession.**

**1. Curable defects.**

——S. 533 — Curability under — Confession recorded on holiday without questioning accused on the day of recording it. AIR (Vol 37) 1950 Mad 579: (1950) 1 MLJ 659.

**——S. 533 — Remand of accused for two days without giving reasons — Prejudice to accused — Defect, if can be cured.**

Section 533, Criminal P. C., can only cure a defect which is more or less formal in character. A defect which is not merely one of form, but is one of substance, and which prejudicially affects the accused as to his defence on the merits cannot be cured by S. 533, Criminal P. C.

When a Magistrate remands an accused person to Police custody for two days without recording his reasons for doing so, there is a defect of procedure which results in gravely prejudicing the accused in his defence on the merits. AIR (Vol 20) 1933 Oudh 315: 10 OWN 466: 8 Luck 518: 35 Cr LJ 10: 146 Ind Cas 465 (DB).

**——S. 533 — Operation of saving clause in S. 533 is to cure want of proper certificate by Magistrate.**

The words "notwithstanding anything contained in the Evidence Act, 1872, S. 91" indicate that a confession must in every case be recorded in the first instance; but S. 533 is by its terms confined to confessions or statements recorded under S. 164 or S. 364 of the Code. Moreover, the words "notwithstanding anything contained in the Evidence Act, 1872, S. 91" so far as they apply to S. 164 really are intended to make the oral testimony of the Magistrate admissible to prove the fact that notwithstanding the absence of a certificate that he complied with the provisions of that section, he did as a matter of fact comply with such provision. The operation of this saving clause is therefore intended to cure the defect of want of proper certificate by the Magistrate. AIR (Vol 17) 1930 Lah 534: 1930 Cr C 682 (DB).

**——S. 533 — Formal defects.**

S. 533 is intended primarily to cure a defect of form only and not one of substance. AIR (Vol 17) 1930 Oudh 449: 7 OWN 909: 1930 Cr C 1073 (DB).

**——S. 533 — Scope — Non-compliance with S. 164, Cr. P. Code — Illegality.**

Section 533 is intended primarily to cure a defect of form only and not of substance such as an irregularity in recording a confession as required by S. 164 of the Code. AIR (Vol 17) 1930 Oudh 449: 7 OWN 909: 1930 Cr C 1073: 128 Ind Cas 215 (DB).

**——S. 533 — Irregularity in procedure.**

Even if a statement is not recorded strictly in conformity with S. 164 so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidnce, S. 533 can be resorted to and evidence taken that an accused person duly made the statement recorded. S. 533 plainly provides that notwithstanding anything contained in S. 91, Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits. 17 Cal 862, Diss. from. AIR (Vol 17) 1930 Rang

53: 7 Rang 759: 31 Cr LJ 297: 1930 Cr C 245: 121 Ind Cas 782 (DB).

——S. 533 — Magistrate failing to write questions and answers as required by S. 364 — Defect is curable.

Section 533 applies not only to omissions to comply with the provisions of law also to infractions of the law.

Where a Magistrate while recording a confession of the accused fails to reduce into writing the questions and answers as required by S. 364, the defect is curable under S. 533 by examining the Magistrate as a witness provided no injury is caused to the accused as to his defence on the merits. Further the confession recorded by the Magistrate is itself admissible because the expression "such statement" in S. 533 refers to statement regarding which the Magistrate is called to give evidence. AIR (Vol 16) 1929 Bom 327: 31 Bom LR 565: 31 Cr LJ 97: 120 Ind Cas 350 (DB).

——S. 533 — S. 533 completely cures any formal defects in the recording of the confession such as taking it down in English in a narrative form, and translating it to the accused. 17 C 862, Diss. AIR (Vol 10) 1923 All 90: 20 ALJ 915: 24 Cr LJ 6: 45 All 166: 71 Ind Cas 54 (DB).

——S. 533 — Non-compliance with the formalities as to verification at the end of the confession is an irregularity cured by S. 533. AIR (Vol 8) 1921 Sind 145: 16 SLR 143: 26 Cr LJ 609: 85 Ind Cas 833 (DB).

——Ss. 533 and 164 — Scope of.

The Section does not apply if the confession of an accused before Magistrate is not recorded at all. (1913) 35 All 260: 14 Cr LJ 211: 11 ALJ 286: 19 Ind Cas 307 (DB).

### 2. Record of confession.

——S. 533 — Applicability — Confession — Record not stating that statement was read over to maker — Defect — If curable.

Where a confessional statement recorded by a Magistrate does not itself show that it was read over to the maker, the defect cannot be cured under S. 533, Cr. P. Code, when the Magistrate is unable to advance any other explanation than that he forgot to write the same. (1948) 231 Ind Cas 408: 48 Cr LJ 794 (Lah).

——S. 533 —Evidence that confessional statement was duly recorded, if admissible.

It is impossible to construe S. 533, Criminal P. C., so as to render it inadmissible to give evidence that the confessional statement was duly recorded i.e., that the statement was voluntarily made and represents what was said. AIR (Vol 26) 1939 Nag 295: 40 Cr LJ 937: 1939 NLJ 442: ILR (1941) Nag 506: 184 Ind Cas 274 (DB).

——S. 533 — Omission of foot-note.

When the Magistrate has complied with the provisions of S. 164, but has failed to append to the record the necessary certificate required by S. 164, S. 533 comes into operation and on proof by the Magistrate that he had complied with the provisions of S. 164, the record becomes admissible. S. 533 is by its terms confined to confessions or statements recorded under S. 164 or S. 364. After the Magistrate has been examined and the Court is satisfied that the statement was duly made it is the record of such a statement that has been made admissible by S. 533 and not the evidence of the Magistrate about the terms of the statement. (Case law discussed.) AIR (Vol 17) 1930 Lah 534: 1930 Cr C 682 (DB).

——S. 533 — Defective footnote — Presumption under principle explained.

If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by S. 164(3), a presumption arises under S. 80 of the Evidence Act that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof. If, however, the said memorandum does not appear or is defective, the document is inadmissible unless the defects can be cured by the examination of the Magistrate who recorded it, under S. 533. The provisions of S. 164(3) render it incumbent on a Magistrate who is called on to record a confession to explain to the person who is to make it that he is not bound to make a confession at all, and that if he does so it may be used as evidence against him. Further the Magistrate should only record the confession if upon examination of the person making it, he has reason to believe that it will be made voluntarily. Where the memorandum at the foot of confession recorded does not conform with the form as laid down, the defect is curable if it is of form and not of substance. If as a matter of fact the statement was duly recorded, that is to say, after the required explanation had been given, but the Magistrate had failed to embody that fact in the certificate, such a defect would be curable. If the explanation had not in fact been made the statement could not be held to have been "duly made" and S. 533 cannot be appealed to. AIR (V 12) 1925 Lah 605: 93 Ind Cas 978: 6 Lah 415: 7 LLJ 482: 27 Cr LJ 514 (DB).

——S. 533 — Warning to accused — Exact words of warning are immaterial.

The exact words of the warning, which must be given to a person making a statement in the nature of a confession, are not very material provided the Magistrate explains, and the person making the statement clearly understands, that he need not make a confession. AIR (V 12) 1925 Lah 448: 89 Ind Cas 1026: 7 LLJ 250: 26 PLR 579: 26 Cr LJ 1458 (DB).

——S. 533 — Where there is no record that the Magistrate gave any warning to the accused before recording his confession, the confession so recorded is extremely defective. Prejudice that may be caused to the accused persons by such a record cannot be exaggerated. But defects of this character can be remedied under S. 533. AIR (V 8) 1921 Pat 337: 60 Ind Cas 56: 2 PLT 773: 22 Cr LJ 200 (DB).

### 3. Examining Magistrate as witness.

——S. 533 — A defect in compliance with S. 164 can be cured under S. 533 by taking the evidence of the Magistrate before whom the confession or statement of the accused is tendered. AIR (V 29) 1942 Pat 113: 43 Cr LJ 90: 8 BR 129: 21 Pat 153: 196 Ind Cas 852 (DB).

——S. 533 — Oral proof by a Magistrate of a confession which he could have recorded is inadmissible, for, when the Legislature has prescribed a particular mode of proof, no other method will

suffice. AIR (V 25) 1938 Lah 594: 39 Cr LJ 907 (2): 40 PLR 890: 177 Ind Cas 617 (DB).

——S. 533 — **That maker of statement is person in Court, if can be proved by Police Officer.**

The fact that the person who made a statement under S. 164, Criminal P. C., is the person in Court can be proved by the Police Officer who had the statement recorded and the trying Magistrate need not be examined. AIR (V 25) 1938 Lah 477: 11 RL 276: 40 PLR 752: 39 Cr LJ 864(2): 177 Ind Cas 32.

——Ss. 533, 164 — Recording of confession under S. 164 — Actual questions and answers not recorded — Magistrate giving evidence under S. 533 — Court satisfied that usual precautions were taken — Confessions, held admissible under Ss. 164 and 533 taken together. AIR (V 25) 1938 Lah 200: ILR (1937) Lah 658: 40 PLR 401: 39 Cr LJ 488: 174 Ind Cas 881 (DB).

——S. 533 — **Procedure under S. 164 not followed — Examination of Magistrate under S. 533 — Desirability.**

For obvious reasons, it is most undesirable that the Magistrates and Judges should be in the position of witnesses. It should be avoided as far as possible. Sometimes it cannot be avoided as under S. 533, but where matter can be made of record and therefore admissible as such, there are the strongest reasons of policy for supposing that the Legislature designed that it should be made available in that form and no other. AIR (V 23) 1936 PC 253: 38 Bom LR 987: 63 IA 372: 1936 OWN 505: 1936 MWN 745: 1936 ALJ 895: 1936 AWR 620: 37 Cr LJ 897: 40 CWN 1221: 17 PLT 594: 71 MLJ 476: 39 PLR 43: 44 LW 583: 19 NLJ 214: 17 L 629: 64 CLJ 445: 163 Ind Cas 881.

**(Impliedly overrules**

**(1) ('81) 1881 PR 21 Cr.**

**(2) AIR (V 9) 1922 Mad 40: 23 Cr LJ 680: 69 Ind Cas 264.**

**(3) AIR (V 5) 1918 Lah 92: 19 Cr LJ 651: 45 Ind Cas 843).**

——S. 533 — **Proof of confession — Magistrate examined and proving statement — Sufficiency of proof.**

Before a confession can be admitted into evidence, the first thing which requires proof is that the accused person really made it; it could hardly be said that there is any presumption that an unsigned piece of paper is a statement made by the accused. It is, therefore, necessary that the Magistrate should take the signature of the accused person. If the Magistrate is not examined as a witness, in view of the fact that the appellant signed his own signature in the Judge's Court, it cannot be said that the confession was proved. But when he is examined and he has proved that it was the accused who made the statement, it is sufficiently proved. ('36) 165 Ind Cas 196: 40 CW N 872: 37 Cr LJ 1101 (DB).

——S. 533 — **Statements made before Magistrate by accused in Police custody — Magistrate not properly recording statements — Defect, if cured by examining Magistrate as witness — Statements, admissibility of — Evidence Act, Ss. 29, 26.**

Where a Magistrate recorded the statements made by the accused on the reverse of the application for remand but did not take them down in accordance with the law relating to the record of confessions made before a Magistrate by accused persons in Police custody:

Held, that this defect would be cured if the Magistrate was examined on oath as a witness and he gave evidence that these statements were actually made before him. His error in not recording the confession in the proper way would thus be cured by the provisions of S. 533, Criminal P. C.

Held, also that the statements made by the accused on the occasion were admissible in evidence. AIR (V 21) 1934 Rang 78: 35 Cr LJ 823: 148 Ind Cas 1002.

——S. 533 — **Operation of saving clause in S. 533 to cure want of proper certificate by Magistrate.**

The words "notwithstanding anything contained in the Evidence Act, 1872, S. 91" indicate that a confession must in every case be recorded in the first instance; but S. 533 is by its terms confined to confessions or statements recorded under S. 164 or S. 364 of the Code. Moreover, the words "notwithstanding anything contained in the Evidence Act 1872, S. 91" so far as they apply to S. 164 really are intended to make the oral testimony of the Magistrate admissible to prove the fact that notwithstanding the absence of a certificate that he complied with the provisions of that section, he did as a matter of fact comply with such provision. AIR (V 17) 1930 Lah 534: 1930 Cr C 682.

——S. 533 — **Magistrate failing to write questions and answers as required by S. 364 — Defect is curable.**

Where a Magistrate while recording a confession of the accused fails to reduce into writing the questions and answers as required by S. 364, the defect is curable under S. 533 by examining the Magistrate as a witness provided no injury is caused to the accused as to his defence on the merits. AIR (V 16) 1929 Bom 327: 120 Ind Cas 350: 31 Cr LJ 97: 31 Bom LR 565.

——S. 533 — **Deposition of Magistrate.**

Deposition of the Magistrate that he complied with all the requirements of S. 164 cures a defect in their compliance. AIR (V 15) 1928 Bom 413: 113 Ind Cas 65: 30 Cr LJ 49: 11 LLJ 5: 11 A I Cr R 506 (DB).

——S. 533 — **Principle explained.**

Though S. 164 lays down that no Magistrate shall record any confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, still it is nowhere laid down that the Magisrtate shall record any note showing what questions he has put to the person and how he has satisfied himself that the confession is made voluntarily. But it is advisable that the Magistrate should always record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily. The footnote to the recorded confession was as follows: "The statement was written in my presence and hearing. It was read over to the accused, and he admitted it to be correct. It contains a true and full account of the statement made by him".

Held, that the footnote complied with the provisions of S. 164 before it was amended by the Act of 1923 though not with the new provisions which had been added in 1923. As the Magistrate, how-

ever, had under the provisions of S. 533 been duly called as a witness and examined, and his evidence showed that he had in fact complied with the provisions of law, the document in which the confession was recorded was fit to be admitted in evidence. AIR (V 12) 1925 Lah 315: 88 Ind Cas 18: 6 Lah 58: 26 Cr LJ 1074: 26 PLR 346 (DB).

——Ss. 533 and 164 — Omission to make memorandum — Effect.

Where a Magistrate inadvertantly omits to certify the voluntariness as required by S. 164, such defect may under S. 533 be cured by the examination of the Magistrate himself. (1911) 12 Cr LJ 15: 9 Ind Cas 148 (All) (DB).

——S. 533 — Confession not recorded personally.

A Magistrate in whose presence a confession was taken may be examined as a witness and the irregularity in not taking down a confession himself can be cured by S. 533 Cr. P. C. 7 PWR 1909 Cr.: 2 PR 1909 Cr: 9 Cr LJ 297: 1 Ind Cas 444.

4. Mode of proving of confession.

——S. 533 — The mere reference to S. 91, Evidence Act, contained in S. 533, Criminal P. C., cannot be taken to imply that a Magistrate hearing an oral confession made by an accused person in the course of an investigation is bound to record the confession in the manner laid down in S. 164. The language of that section is "may record" not "shall record". AIR (V 21) 1934 All 351: 1934 ALJ 178: 36 Cr LJ 45: 3 AWR 459: 56 All 730: 152 Ind Cas 174 (DB).

——S. 534.

——S. 534 — Defect cured.

The omission of the Magistrate to inform the accused of their rights under Ch. 33, as required S. 534, Criminal P. C., was not applicable. 26 Cr LJ 1371: 89 Ind Cas 459: 4 Bur LJ 44: 3 Rang 220: AIR (Vol 12) 1925 Rang 239 (DB).

——S. 535.

See also Cr. P. C., S. 537.

——S. 535 — Applicability.

Where in a case conviction of an accused under S. 395, I. P. C., was altered to one under S. 148, I. P. C., it was held that the accused was seriously prejudiced and the principle laid down in S. 535, Criminal P. C., was not applicable. AIR (Vo 32) 1945 Pat 376.

——S. 535 — Conviction on charge not specified in charge sheet.

In summons case, it is not illegal to convict an accused of an offence not specified in the charge sheet laid by the Police provided, of course, the accused is not prejudiced by the consideration of some charge of which he knew nothing until the Magistrate came to write his judgment. AIR (Vol 29) 1942 Mad 354: 1942 MWN 161: (1942) 1 MLJ 357: 55 LW 255: 43 Cr LJ 851: 202 Ind Cas 468.

——Ss. 535, 232, 439 — Accused charged with murder of A — Conviction for attempt to murder B though not so charged — Conviction held vitiated by error of law — Re-trial.

An accused was charged under S. 302, I. P. C., of murdering A, but was convicted of attempting to murder B with which offence he was not charged. There was no Government appeal against his acquittal but the accused had appealed against his conviction:

Held, that the conviction for attempting to murder B, with which offence the accused was not charged was vitiated by an error which was not a mere material irregularity.

Held, also that as a Court of Revision had every power to set aside the order of acquittal and order a retrial even though there was no appeal by Government against the acquittal, the High Court could set aside the acquittal and order retrial. AIR (Vol 28) 1941 Lah 214: 43 PLR 159: 42 Cr LJ 660: ILR (1941) Lah 423: 195 Ind Cas 58 (DB).

——S. 535 — Appellate Court, if can convict accused on failure of original charge, of another charge of which they had no notice.

When the prosecution case is disbelieved in essential particulars, it is not safe to convict the accused on the residue of the evidence that may be acceptable. The accused should not be convicted by the Appellate Court of a charge of which they had no notice and which they were not called upon to answer in the trial Court. But where there was a charge under S. 323 against one of the accused, and the Appellate Court convicted others under S. 323 read with S. 114 of the I. P. C. when, however, they were not so charged the conviction under S. 323 read with S. 114 of such accused is not proper.

(Accused were given the benefit of doubt and acquitted of the charge under S. 147). AIR (Vol 28) 1941 Pat 623: 42 Cr LJ 790: 7 BR 979: 22 PLT 943: 195 Ind Cas 843.

——S. 535 — Omission to frame charge — Reversal of conviction.

Omission to frame a charge does not necessarily justify a reversal of conviction unless the failure to do so has occasioned miscarriage of justice and has prejudiced the accused. (1937) 18 PLT 582.

——S. 535 — Accused convicted under S. 325, I. P. C. — Court applying S. 34, I. P. C. — Section 34 not mentioned in charge sheet — No failure of justice caused — The defect is curable under S. 535. AIR (Vol 21) 1934 Lah 227 : 35 Cr LJ 1386 : 151 Ind Cas 741 (2).

——S. 535 — Procedure under S. 242 — Irregularity.

If there is any irregularity in the matter of recording what the Magistrate stated to the accused in explaining the offence under S. 242 but the proceedings show that he had orally explained to the accused what the offence was, the irregularity is curable under Ss. 535 and 537. AIR (Vol 21) 1934 Nag 258 : 36 Cr LJ 361 : 31 NLR 139 : 153 Ind Cas 427.

——S. 535 — Non-compliance with S. 242.

Omission to comply with S. 242 — No failure of justice — Defect is curable under Ss. 535 and 537. AIR (Vol 19) 1932 Nag 127 : 28 NLR 163 : 33 Cr LJ 938 : 140 Ind Cas 113 (2).

——Ss. 535, 537 — Charge under Ss. 363 and 379, Penal Code — Appeal — Alteration of conviction under S. 379 to one under S. 411 and acquittal under S. 363 — Revision.

Held, that the Appellate Court was justified in convicting the accused under S. 411 although he had not been expressly charged with that offence and that under Ss. 535 and 537, the High Court was prohibited from setting aside the conviction and sentence as invalid merely on the ground that no charge was framed under S. 411, I. P. C., or on the ground that a charge was wrongly framed under S. 379, I. P. C. AIR (Vol 18) 1931 All 49 : 32 Cr LJ 1007 : 53 A 233 : 1931 ALJ 1015 : 133 Ind Cas 140.

——S. 535 — Omission to frame charge — Procedure — Re-trial.

Under S. 254, Criminal P. C., a Magistrate is not bound to frame a charge unless he is of opinion that there is ground for presuming that the

accused has committed an offence punishable with death, transportation or imprisonment exceeding six months. In any case, the omission to frame a charge is no ground for setting aside conviction. Even if the omission appears to have occasioned a failure of justice, the utmost that can be done is to order that a charge be framed and the trial be recommenced from the point immediately after the framing of charge. AIR (Vol 18) 1931 All 7 : 32 Cr LJ 313 : 1930 ALJ 1314 : 53 A 206 : 129 Ind Cas 369 (1).

——S. 535 — **Omissions in charge.**

Omission to specify common object in the charge does not vitiate the trial unless the omission has prejudiced the accused or resulted in a failure of justice. AIR (Vol 15) 1928 Bom 286 : 115 Ind Cas 399 : 30 Bom LR 653 : 30 Cr LJ 467 : 12 AI Cr R 303 (DB).

——S. 535 — **Conviction in appeal — Charge under S. 147, I. P. C. — Conviction under S. 323 valid.**

Where the accused were convicted of rioting under S. 147, the common object of which was stated to be to assault and in prosecution of which they did assault and evidence was directed towards assault committed by the accused but in appeal the accused were acquitted of rioting.

Held, that though the accused were acquitted of rioting they could be convicted in appeal under S. 323 though no charge was framed under that section as the accused would not be prejudiced. AIR (Vol 15) 1928 Pat 359 : 29 Cr LJ 374 : 108 Ind Cas 333 : 10 AI Cr R 31.

——S. 535 — **Ground for quashing.**

A mere omission or irregularity to comply with S. 360 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction. AIR (Vol 14) 1927 PC 44 : 100 Ind Cas 227 : 5 Rang 53 : 54 IA 96 : 25 ALJ 117 : 31 CWN 271 : 1927 MWN 103 : 38 MLT 64 : 4 OWN 283 : 8 PLT 155 : 28 Cr LJ 259 : 6 Bur LJ 65 : 29 Bom LR 813 : 45 CLJ 441 : 7 AI Cr R 362 : 52 MLJ 585.

——S. 535 — **Contempt proceedings.**

Section 535 ought not to be applied to summary proceedings for contempt. AIR (Vol 13) 1926 Rang 188 : 4 Rang 257 : 27 Cr LJ 1241 : 98 Ind Cas 57 (DB).

——S. 535 — **Applicability.**

The contention that S. 535 only applies to a trial where no charge at all has been framed is not correct. The section is applicable to a case in which no charge had been framed of the offence of which the appellant has been convicted. AIR (Vol 12) 1925 Cal 926 : 83 Ind Cas 1055 : 41 CLJ 474 : 26 Cr LJ 1279 (DB).

——S. 535 — **Effect of setting aside — Previous order of conviction set aside — Order cannot be used in subsequent trials.**

A Magistrate is not entitled to use an order which had been set aside, as proof that the accused was an old offender, on the ground that the previous order was set aside either in appeal or revision on technical grounds. AIR (Vol 12) 1925 Rang 277 : 89 Ind Cas 320 : 26 Cr LJ 1344 : 3 Rang 156.

——S. 535 — **Charge framed against one accused.**

Where the accused was tried and convicted under S. 506, Penal Code, without framing a charge but a charge was framed against the co-accused under S. 506 who was also convicted.

Held, that the omission to frame the charge did not prejudice the accused. AIR (Vol 10) 1923 All 476 : 76 Ind Cas 568 : 25 Cr LJ 200.

——Ss. 535, 537 and 236 — **Framing of charge — Invalidity of trial.**

The words "merely on the ground that no charge was framed" in S. 535, mean a case where the offence being a petty one and the evidence being fairly taken, the Court framed no charge at all. But where the Court frames a charge then the conviction cannot be invalid on the ground that no charge was framed. Such a case does not come under S. 537 nor S. 236 applies. (1912) 40 Cal 168 : 13 Cr LJ 593 : 16 Ind Cas 161 (DB).

——Ss. 535 and 537 — **Grounds for interference.**

The omission to frame a charge does not ipso facto invalidate a sentence and to justify interference with the sentence passed, there must also have been a failure of justice. (1910) 7 MLT 77 : 11 Cr LJ 217 : 5 Ind Cas 743 (DB).

——S. 535 — Criminal Law — Complaint — Conviction for undisclosed offence — Prejudice.

See (1901) 5 CWN 296 (297).

——S. 535 (2) — **Omission to frame charge — Failure of justice caused — Procedure.**

The accused was charged for offences under Ss. 353 and 186, I. P. Code. The Magistrate found during the course of the trial that a conviction under S. 353 could not be sustained and thereafter proceeded with the case under S. 186 without framing a charge thereunder.

Held, that the omission was not fatal to the conviction.

Held, further, that even if the omission had occasioned a failure of justice he could only act under S. 535 (2). AIR (Vol 18) 1931 All 7 : 1930 ALJ 1314 : 1931 Cr C 7 : 53 All 206 : 32 Cr LJ 313 : 129 Ind Cas 369.

——S. 536.

——S. 536 (1) — **Trial by jury of offence triable with assessors — Effect of — Accused, if debarred from appeal on facts.**

Even if the trial by a jury of an offence triable with assessors is not invalid on that ground, an accused should not be debarred by reason of that from an appeal on the facts. This was a right which would have accrued to him if he had been tried with assessors and to deprive him of it because of an error in procedure would be a manifest injustice. AIR (Vol 37) 1950 Nag 49 : ILR (1949) Nag 925 : 51 Cr LJ 174.

——S. 536 — **Right of appeal — Prejudice.**

Section 536 merely cures an admitted irregularity in procedure. It does not say anything as to the validity of a trial. In any case, the section does not and cannot affect the right of appeal which is governed by S. 418 (1) read with S. 410. Where the trial ends in an acquittal and there is or is not an appeal, there will be no prejudice and the trial may stand, but where it ends in conviction and the accused appeals and the accused is sought to be shut out of an appeal on facts, he will certainly be prejudiced and on strict reading of S. 536 (1), the trial will be incurably bad. To render the trial valid in such a case, the right of appeal on facts would indeed have to be conceded. AIR (Vol 25) 1938 Cal 51 : 68 CLJ 225 : 42 CWN 129 : 39 Cr LJ 161 : ILR (1938) 1 Cal 290 : 173 Ind Cas 65 (DB).

——S. 536 — **Mixed trials with aid of jurors and assessors deprecated.**

The cumbrous device of a mixed trial with the help of jurors and assessors is apt to lead to unsatisfactory and illogical results. AIR (Vol 24) 1937 Nag 50 : 19 NLJ 320 : 38 Cr LJ 330 : ILR (1937) Nag 277 : 167 Ind Cas 61 (DB).

——S. 536 — Trial by jury of offence triable by assessors — Judge when he discovers the mistake may treat the trial as legal and on his disagreement with the verdict, refer the case to High Court under S. 307. AIR (Vol 22) 1935 Pat 433 : 16 PLT 603 : 2 BR 44 : 36 Cr LJ 1502 : 158 Ind Cas 1131 (DB).

**——S. 536 (1) — Trial by Jury — Objection to.**

The trial by jury of an offence which is triable with the help of assessors is not necessarily invalid. The objection to the trial, if any, should be raised in the trial Court and not in appeal. 1930 MWN 776.

**——S. 536 — Revision.**

On a charge under Ss. 434, 392 and 397, while the jury returned a verdict of not guilty with regard to the counts under the said sections, they at the same time found the accused guilty of voluntarily causing hurt by a dangerous weapon, an offence triable by a Judge only with assessors:

Held, that the conviction or sentence in such a case should not be set aside or interfered with in revision unless it is clear that the irregularity had led to some miscarriage of justice. AIR (Vol 15) 1928 Mad 275 : 108 Ind Cas 214 : 1927 MWN 299 : 29 Cr LJ 351 : 1 M Cr C 211.

**——S. 537.**

1. **Scope and applicability.**
2. **Irregularity and illegality — Distinction.**
3. **Irregularity — General.**
4. **Irregularity in procedure (During Trial).**
5. **Irregularity in charge.**
6. **Irregularity in judgments.**
   See also Criminal P. C., Ss. 366, 367.
7. **Irregularity in other proceedings.**
   See also Criminal P. C., S. 539-B.
8. **Irregularity in complaints.**
9. **Irregularities not cured by S. 537.**
10. **Omissions.**
11. **Misdirection or non-direction to jurors.**
    See also Criminal P. C., S. 297.
12. **Error or omission in Summons.**
13. **Error or omission in judgments or orders.**
14. **Court of competent jurisdiction.**
15. **Failure of justice — General.**
16. **Duty of Appellate Court.**

**1. Scope and applicability.**

**——Ss. 537 and 145 — Irregularity in procedure — When curable and when not cured by S. 537.**

The bare fact of an omission or irregularity in a matter of procedure unaccompanied by any suggestion of probable failure of justice having been occasioned thereby is insufficient to invalidate the proceedings. The only test in such cases is to see if the parties had been prejudiced by the irregularity or omission complained of and, if it is found that there has been substantial justice in the case the provisions of S. 537, Cr. P. Code, would permit the defect to be cured. Hence mere technical defects into the procedure adopted by a Magistrate in proceedings under S. 145, Cr. P. Code, in the absence of prejudice cannot be availed of to question the legality of the orders passed because they would be cured by S. 537. AIR (Vol 37) 1950 All 731.

**——S. 537 — Curability under — Refusal of magistrate to overlook an irregularity.**

Section 537, Cr. P. Code cannot apply to a case in which the magistrate has refused to overlook an irregularity and has acquitted. AIR (Vol 34) 1947 PC 75: 74 IA 80: 231 Ind Cas 86: 1947 MWN 222: 1947 OA (PC) 21: 51 CWN 555: 1947 AWR (PC) 21: 49 Bom LR 521: 1947 ALJ 379: 48 Cr LJ 679: 13 BR 542: 60 LW 524: (1947) 1 MLJ 339.

——S. 537 — The provisions of S. 537, Criminal P. C., are mandatory and no Court is entitled to set aside a finding, sentence or order of a Subordinate Court in direct contradiction of the terms of the section. The words "subject to the provisions hereinbefore contained" must refer to the other sections in that Chapter unless there is any specific provision in any other section of the Code which says that any particular error will vitiate proceedings in spite of the fact that no failure of justice has been occasioned by such error.

Quaere.—It is doubtful whether a distinction can be made between irregularities which may be cured under the provisions of S. 537 and illegalities which may not be so cured. The procedure in India is governed by statute and it is doubtful whether it is admissible for a Court to go outside the statute and proceed in a manner contrary to its provision merely on general principles. AIR (Vol 26) 1939 All 238: 1939 AWR 1: 1939 ALJ 81: 40 Cr LJ 549: 181 Ind Cas 537.

**——S. 537 — Recording findings.**

Section 537 would, in appropriate cases, apply to the failure to record an express finding under the provisions of S. 476, especially where an objection is taken at so late a stage that it is not possible for Government to find whether among other papers not before the Court, the finding required by S. 476, had not been expressly recorded. AIR (Vol 26) 1939 Sind 170: ILR (1939) Kar 280: 40 Cr LJ 707: 182 Ind Cas 914.

——S. 537 — Section 537 applies only to errors of procedure arising out of inadvertence and not to substantive errors of law. (1937) 20 NLJ 115.

——S. 537 — In order that an infringement of the provisions of the Criminal P. C., should be of such a nature that it does not come within the purview of S. 537, it must go to the root of the trial and must in effect vitiate the proceedings. AIR (Vol 22) 1935 Rang 98: 36 Cr LJ 665: 155 Ind Cas 66 (DB).

——S. 537 — The infringement of the provisions of S. 162, Cr. P. Code, is an irregularity which can be cured under S. 537 if it has not been occasioned a failure of justice. In considering whether a particular infringement of the provisions of the Cr. P. Code, is one which does or does not come within the purview of S. 537, what one has to consider is whether any vital rule of procedure has been broken and whether the irregularity goes to the root of the proceedings. AIR (Vol 17) 1930 Bom 595: 32 Bom LR 1279: 1930 Cr C 1182 (DB).

——S. 537 — Where there is no contravention of any express provisions of the Cr. P. Code, S. 537 cures if there is any error. AIR (Vol 16) 1929 Cal 428: 124 Ind Cas 827: 31 Cr LJ 750: 49 CLJ 374: 1929 Cr C 54 (DB).

——S. 537 — The provisions of S. 537, Cr. P. Code, are applicable to errors of procedure arising out of mere inadvertence, and not to substantive errors of law. S. 537 has no application to cases where there has been a disregard of the mandatory provisions of the Code. AIR (Vol 14) 1927 All 267: 49 All 270: 25 ALJ 155: 8 LRA Cr 25: 28 Cr LJ 159: 7 AI Cr R 198: 99 Ind Cas 415.

**——S. 537 — Miscellaneous.**

The passage beginning "unless such error" does not qualify (d) only, but also the other letters of the alphabet. AIR (Vol 14) 1927 PC 44: 5 Rang 53: 54 IA 96: 31 CWN 271: 1927 MWN 103: 38 MLT 64: 4 OWN 283: 8 PLT 155: 100 Ind Cas 227: 28 Cr LJ 259: 6 Bur LJ 65: 29 Bom LR 813: 45 CLJ 441: 7 AI Cr R 362: 25 ALJ 117: 52 MLJ 585.

——S. 537 — Section 537 applies to mere errors of procedure arising out of mere inadvertence and does not apply to cases of disregard of a mandatory and imperative provisions of the Code. AIR (Vol 14) 1927 All 286: 49 All 325: 25 ALJ 246: 8 LRA Cr 39: 28 Cr LJ 231: 7 AI Cr R 267: 99 Ind Cas 1031.

——S. 537 — Rankin, J.—S. 537 is applicable under Cl. 26 of the Letters Patent. AIR (Vol 13) 1926 Cal 470: 53 Cal 350: 30 CWN 276: 27 Cr LJ 385: 43 CLJ 310: 93 Ind Cas 33. (F.B).

——S. 537 — S. 537 (a) of the Cr. P. Code has no application to cases in which there has been a disregard or disobedience of the whole of some mandatory provision of the Code; but the section applies only to cases where there has been a failure to comply with some part of such a provision in the course of a general compliance with the whole. AIR (Vol 12) 1925 Nag 147: 81 Ind Cas 976: 25 Cr LJ 1152.

**——S. 537 — Only error going to root of trial vitiates decision.**

The test to be applied in considering whether a particular infringement of the provisions of the Cr. P. Code is one which does or does not come within the purview of S. 537 appears to be this "Does the error go to the whole root of trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature the proceedings are vitiated in their very inception and S. 537 has no application. AIR (Vol 10) 1923 All 81: 71 Ind Cas 115: 20 ALJ 874: 24 Cr LJ 67: 45 All 124.

——S. 537 — S. 537 Cr. P. C., deals merely with irregularities in procedure when they involve breaches of the rules of procedure provided by the Code itself. AIR (Vol 7) 1920 Pat 655: 1 Pat LT 609: 21 Cr LJ 621: 5 Pat LJ 61: 57 Ind Cas 285 (DB).

**——S. 537 (a) — Defective charge.**

The Section covers omission to frame a charge properly and also omission to frame distinct and separate charges. AIR (Vol 6) 1919 Mad 487: 1919 MWN 199: 20 Cr LJ 354: 25 MLT 379: 10 LW 239: 50 Ind Cas 834 (DB).

——S. 537 — Obiter. A case reviewed under clause 26 of the Calcutta Letters Patent does not fall under S. 537. AIR (Vol 4) 1917 Cal 123: 44 Cal 477: 24 CLJ 400: 21 CWN 33: 18 Cr LJ 385: 38 Ind Cas 945 (FB).

**——S. 537 — Error in proceeding — Time for correction.**

The Section cannot be applied at an intermediate stage of the case so as to allow the error to remain uncorrected whether proceedings of the Magistrate were irregular or illegal for want of sanction of the Local Government. (1912) 6 SLR 260 : 14 Cr LJ 298 : 19 Ind Cas 954 (DB).

——Ss. 537 and 215 — Though S. 537 does not apply in terms to orders made in appeal or revision, the principles contained therein should guide courts in dealing with applications under S. 215. (1911) 12 Cr LJ 320: 10 Ind Cas 616.

**——S. 537 — Irregularities vitiating a trial — What are — Cases to which section applies.**

"There is a distinction between a case in which the trial itself is contrary to law, in which event it is no trial at all under the Code of Criminal Procedure, and a case in which the trial is one within the jurisdiction of the Magistrate and if regularities occur in the method of conducting it. In the latter case the provisions of S. 537 are applicable, and the finding can only be reversed if the irregularity has, in fact, occasioned a failure of justice." (1902) 4 Bom LR 271: 26 B 533 (537) (DB).

**2. Irregularity and illegality — Distinction.**

——S. 537 — No hard and fast line can be drawn between a nullity and an irregularity. An irregularity is a deviation from a rule of law which does not take away the foundation or authority for its proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever and is void and incapable of being validated. The test of distinction is whether the objection is capable of being waived or not. 11 CWN 1011 (1019, 1020): 6 CLJ 320: 35 C 61 (FB).

**3. Irregularity — General.**

——S. 537 — Every irregularity or illegality does not ipso facto vitiate a trial or call for interference by an appellate or Revisional Court. AIR (Vol 20) 1933 Sind 37: 26 SLR 105: 34 Cr LJ 305 (2): 142 Ind Cas 74 (DB).

**——S. 537 — Error of procedure.**

In many cases, it may be difficult to distinguish between an illegality and irregularity, but it may be safely said that a mere error of procedure arising out of inadvertence will amount to no more than an irregularity. AIR (Vol 19) 1932 All 28: 33 Cr LJ 124: 1932 ALJ 523: 135 Ind Cas 226.

**4. Irregularity in procedure (During Trial).**

**(a) General.**
**(a-1) Wrong procedure followed.**
**(b) Mis-joinder of accused.**
**(c) Examination of witnesses.**
**(d) Recording of evidence.**
**(e) Admission of evidence.**
**(f) Reading over depositions.**
See also Criminal P. C., S. 360.
**(g) Recording of reasons.**
**(h) Other instances.**

**(a) General.**

——S. 537 — Per Page, J. — Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it. AIR (Vol 17) 1930 Cal 212 : 57 Cal 1228 : 1930 Cr C 212 : 34 CWN 296 : 51 CLJ 171 : 31 Cr LJ 536 : 123 Ind Cas 664 (FB).

**(a-1) Wrong procedure followed.**

**——S. 537 — Curability under — Offence under H. P. P. Ordinance tried in the ordinary way and not summarily — Trial if vitiated.**

For the purpose of S. 537, Cr. P. Code, there is no distinction between an illegality and an irregularity; both are curable under that section, the sole criterion being whether the defect had or had not occasioned a failure of justice. Where an offence under the H. P. P. Ordinance is tried in the ordinary way and not summarily in conformity with the statutory provision in that Ordinance, at worst it is a case of irregularity and that irregularity is curable by the provisions of S. 537. AIR (V 35) 1948 All 278: ILR (1948) All 80 : 1947 ALJ 654 : 49 Cr LJ 345.

——S. 537 — Failure to follow procedure indicated in S. 137, Cr. P. Code — Defect if curable. See AIR (Vol 34) 1947 Oudh 65 : 1946 OWN 108.

**——S. 537 — Summons case wrongly tried as warrant case — Mistake pointed out to Magistrate when trial was practically finished and fresh trial ordered by him.**

The petitioner had been put on his trial for certain alleged offences under the Motor Spirit (Duties) Act the maximum sentence for which offences was a fine of Rs. 1,000. The case was a summons case but the Magistrate was wrongly

following the procedure as a warrant case. The trial was then conducted in a most dilatory manner by the Crown. When the case was practically finished, the mistake was pointed out to the Magistrate who ordered fresh trial. The petitioner had to incur a great deal of expenditure on his defence :

Held, that the case was not covered by S. 537, Criminal P. C., as the accused was not convicted. The position was that it was impossible for the High Court as a Court of revision to order the Magistrate to follow an illegal procedure.

Held further, (directing quashing of proceedings), that the money which the petitioner had to spend was quite sufficient punishment of any offence that the petitioner might have committed. AIR (V 27) 1940 Cal 579 : 45 CWN 53 : 42 Cr LJ 264 : 192 Ind Cas 268 (DB).

**——S. 537 — Warrant case — Summons case procedure followed.**

Prosecution under S. 46 (a), Bengal Excise Act — Accused previous convict and, therefore, liable to conviction exceeding six months — Magistrate following summons case procedure instead of warrant case procedure :

Held, that the trial is not in accordance with law, and must be set aside, the irregularity being of such a character as not to be curable by S. 537, or by any of the other curative provisions of the Code. AIR (Vol 25) 1938 Cal 205 : 39 Cr LJ 438 : 42 CWN 222 : 10 RC 674 : 174 Ind Cas 454.

**——S. 537 — Trial of warrant case as summons case.**

The trial of a warrant case as a summons case is an illegality and vitiates the trial. AIR (Vol 19) 1932 Nag 111 : 28 NLR 18 : 33 Cr LJ 573 : 137 Ind Cas 150.

——S. 537 — Where in a summary trial a Magistrate instead of following the procedure prescribed for a warrant case follows that prescribed for a summons case and there is nothing to show that the procedure adopted by the Magistrate caused the accused any prejudice, the trial is not vitiated. AIR (Vol 17) 1930 Sind 53 : 1930 Cr C 69 : 31 Cr LJ 123 : 120 Ind Cas 526 (DB).

——S. 537 — An accused was charged of an offence triable summarily under Chap. 22 but the trying Magistrate commenced trial under Chap. 21 until the framing of the charge and subsequently changed the procedure and completed the trial under Chap. 22. Held, that the change of procedure was a mere irregularity and did not vitiate the trial as there was no failure of justice. AIR (Vol 4) 1917 Sind 69 : 10 SLR 185 : 18 Cr LJ 621 : 39 Ind Cas 989 (DB).

**(b) Misjoinder of accused.**

——S. 537 — Curability under — Joint trial — Absence of prejudice — Defect can be cured under S. 537. AIR (Vol 36) 1949 All 187 : 1948 OWN 373.

——S. 537 — In a case of misjoinder of persons contrary to S. 239 (e), Criminal P. C., though it is an illegality and not a mere irregularity, it is yet curable by S. 537 if it has not, in fact, occasioned injustice. AIR (Vol 31) 1944 Oudh 239 : 1944 OWN 190 : 45 Cr LJ 719 : 1944 AWR 137 : 213 Ind Cas 373.

——S. 537 — Where there is a misjoinder of accused, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately, Court should ordinarily presume prejudice until it is quite certain that there could have been none.

Trees were cut by two sets of persons in different parts of the forest. Separate charges were framed but they were tried together. There was no evidence of any common intention or object of the two sets :

Held, that there was a misjoinder of parties.

(The convictions and sentences were set aside and the case remanded for fresh and separate trial). AIR (Vol 28) 1941 Mad 910 : 54 LW 387 (2) : 1941 MWN 869 : 43 Cr LJ 215 : ILR (1942) Mad 322 : 1941-2 MLJ 534 : 197 Ind Cas 588.

——S. 537 — The infringement of the provisions of S. 239 (d), would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed, and that S. 537 can be of no avail to remedy the defect. AIR (Vol 27) 1940 Pat 499 : 6 BR 461 : 41 Cr LJ 452 : 187 Ind Cas 361 (DB).

——S. 537 — When one accused is charged with having murdered a certain person at certain place, and another accused is charged with having murdered the same person at the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed, one of the accused will have to be convicted, whereas if the other set of evidence is believed, the other accused will have to be convicted, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction within the meaning of S. 239, Criminal P. C. "The same offence" means an offence arising out of the same act or series of acts and can mean nothing else. When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together ; and the joint trial of the two persons is not a mere irregularity which can be cured under S. 537, Criminal P. C. : it is an illegality which goes to the very root of the trial. AIR (Vol 26) 1939 Rang 390 : 1940 Rang LR 203 : 41 Cr LJ 153 : 185 Ind Cas 303 (DB).

——S. 537 — There is an express direction in the Criminal P. C., as to which persons may be tried jointly if this can be done without prejudice, and in the absence of any evidence bringing the case under the provisions of S. 239 (f), Criminal P. C., a Magistrate has no jurisdiction to try persons jointly. The disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by S. 537, Criminal P. C.

Where a person charged with having stolen the property and a person charged with having received it knowing it to be stolen are sought to be tried jointly, the property alleged to have been received should constitute the proceeds of the single act of theft and not several acts of theft. AIR (Vol 25) 1938 Cal 525 : 42 CWN 729 : 39 Cr LJ 739 : 176 Ind Cas 525 (DB).

——S. 537 — Where the irregularity, if any, in the joint trial of several persons at one and the same trial is not one which, in the actual facts of the case, caused any prejudice to the accused or by itself entailed any failure of justice, it is no ground for quashing the proceedings, the more so when no protest or complaint is made by or on behalf of the accused against the course adopted by the Magistrate. AIR (Vol 24) 1937 Cal 269 : 38 Cr LJ 1018 : 171 Ind Cas 183 (DB).

——S. 537 — There is no distinction between illegality and irregularity. The sole criterion given by S. 537, Criminal P. C., is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice but if in spite of even a total disregard of the rules of procedure, justice has been done, there

would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong. Where the misjoinder of persons is contrary to S. 239 (e), it is an illegality and not a mere irregularity, but even so it is yet curable by S. 537, Criminal P. C., if it has not, in fact, occasioned injustice. AIR (Vol 23) 1936 All 337 : 1936 ALJ 518 : 1936 AWR 1 : 37 Cr LJ 794 : 58 All 695 : 163 Ind Cas 253 (DB).

——S. 537 — A case of joint trial of several persons of acts not committed in the course of the same transaction is not a mere case of irregularity which can be cured by the provisions of S. 537, but on the other hand, it is a case of illegality and vitiates the whole trial. AIR (Vol 14) 1927 Lah 274 : 28 Cr LJ 357 : 7 AI Cr R 558 : 100 Ind Cas 965.

——S. 537 — It is very doubtful whether the provisions of S. 537 do not apply to joint trial of persons against whom proceedings are taken under S. 110. AIR (Vol 8) 1921 Cal 625 : 25 CWN 334 : 22 Cr LJ 377 : 61 Ind Cas 233 (DB).

**——S. 537 — Defective sanction — Wrong interpretation of order — Irregularity.**

Accused filed two false suits both of which were dismissed. The Court in giving sanction to prosecute in one of them sent for the records of the other. The Magistrate who tried the accused construed the order to be an order sanctioning the prosecution in both the suits and tried him accordingly.

Held, that the accused was not prejudiced at the trial which was valid. The joinder of charges even if the Magistrate misunderstood the order was only an irregularity which did not vitiate the trial. AIR (Vol 6) 1919 All 26 : 42 All 12 : 17 ALJ 883 : 20 Cr LJ 642 : 52 Ind Cas 418.

**——S. 537 — Misjoinder — Of trials — Omission of accused to object — Effect — Cr. P. C., S. 233.**

The omission of the accused to object to wrong joinder of trials of two accused will not cure the defect and the trials must be set aside. (1902) 4 Bom LR 53 (54, 55) (DB).

**(c) Examination of witnesses.**

See also N. 4 (d).

——S. 537 — It does not necessarily follow that a Magistrate or a Judge is being unfair if he puts a stop to cross-examination. AIR (Vol 30) 1943 All 18 : 1942 ALJ 607 : 44 Cr LJ 189 : ILR (1942) All 947 : 1942 AWR 322 : 204 Ind Cas 310.

——S. 537 — Calling as witness a Police Prosecutor who had taken advantage of his position to question accused must be deprecated. The trial, however, cannot be held to be bad on this ground where the Police Prosecutor's evidence can be dissociated from the other evidence and ignored. AIR (Vol 28) 1941 Sind 168 : ILR (1941) Kar 270 : 42 Cr LJ 850 : 196 Ind Cas 363 (DB).

——S. 537 — Where an accused, after seven prosecution witnesses were examined, claimed to be tried as a European British subject and he is dealt as such and some witnesses are examined but as regards the remaining, i.e., previous seven witnesses for the Crown the course adopted was as follows: When each witness came into the box the recorded statement of the evidence given by him at the first hearing was read out to him. A few further questions were then put to the witness and he was tendered for cross-examination; some witnesses were not even sworn.

Held, that this method of presenting the evidence for the prosecution is irregular, and not only irregular but entirely illegal, and the defect is not curable by S. 537. AIR (Vol 11) 1924 Lah 17 : 4 Lah 382 : 25 Cr LJ 377 : 77 Ind Cas 425.

——S. 537 — S. 257 leaves to a Magistrate no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Where several witnesses from among those summoned are not present on the day of hearing, if the Magistrate refuses to resummon on the ground that the request is for delaying the case and that their evidence is superfluous, that is a mistaken view of law. A refusal to summon witnesses for the accused in such circumstances amounts to an illegality not curable by S. 537. AIR (Vol 9) 1922 Lah 71 : 22 Cr LJ 497 : 6 PLR 1922 : 62 Ind Cas 321.

——S. 537 — If the Judge refuses to recall the prosecution witnesses for cross-examination, the refusal amounts to an improper exercise of jurisdiction and vitiates the trial. AIR (Vol 7) 1920 Pat 351 : 22 Cr LJ 219 : 5 Pat LJ 706 : 60 Ind Cas 331 (DB).

**(d) Recording of evidence.**

**——S. 537 — Evidence dictated by Sessions Judge taken down by stenographer in shorthand and then transcribed into typed record in English — Typed record alone signed by Sessions Judge — Procedure, held irregular.**

The effect of the N.-W. F. P. Government Notification No. 3174L/D dated 26th January 1937, is that the evidence is to be taken down in English by the Sessions Judge with his own hand in the presence of the accused or it is to be taken down from his dictation in open Court in the presence of the accused. It is to be signed by him and is to form part of the record. When the latter procedure is to be adopted, the Sessions Judge has to record the reasons for his inability to take down the evidence with his own hand.

Where the Judge, without recording any reasons as to his inability to take down the evidence in his own hand, dictates the evidence in open Court to a stenographer who takes it down in shorthand and subsequently transcribes it into a typed record in English and what is signed by the Judge and forms part of the record is not the shorthand notes but the typed record, that is, the transcript of what was taken down in open Court, the procedure is open to gravest objections and constitutes an irregularity so vital as to vitiate the trial. AIR (Vol 30) 1943 Pesh 21 : 44 Cr LJ 329 : 205 Ind Cas 134 (DB).

——S. 537 — Where two cross-cases are tried by the same Magistrate and the evidence recorded in one case is relied upon in the other, there is an irregularity and unless the accused has been prejudiced by reason of the evidence in the cross-case being acted upon, the trial should not be set aside. AIR (Vol 29) 1942 Oudh 444 : 1942 OWN 440 : 1942 AWR (CC) 286 : 43 Cr LJ 781 : 201 Ind Cas 791.

**——S. 537 — Use of evidence produced in another case is illegality not curable under S. 537.**

The very use of evidence which is not part of the record is by itself proof of prejudice to the accused and the use in the case of evidence produced in another case is not a mere irregularity cured by S. 537, Criminal P. C., but an illegality. AIR (Vol 28) 1941 Oudh 20 : 41 Cr LJ 816 : 1940 OWN 923 : 1940 AWR (CC) 370 : 16 Luck 353 : 190 Ind Cas 71.

——S. 537 — Cross-case — Evidence not recorded in accordance with S. 353, Criminal P. C. — Procedure followed at request of accused — No

prejudice — Trial could not be held to have been so vitiated that the irregularity could not be cured by the application of S. 537, Criminal P. C. AIR (Vol 25) 1938 Oudh 253 : 1938 AWR 96 : 40 Cr LJ 1 : 1938 OWN 1064 : 178 Ind Cas 169.

——S. 537 — Where the Sessions Judge does not take down the depositions of the witnesses in writing by himself or make a memorandum of their substance as required by S. 355, cl. (3), Criminal P. C., but the evidence is taken down in the presence and hearing and personal direction of the Judge and the depositions read over and interpreted in the presence of the accused and their pleader and admitted to be correct, the irregularity does not vitiate the trial, but is cured by S. 537, Criminal P. C. AIR (Vol 21) 1934 Cal 636 : 38 CWN 659 : 61 Cal 399 : 35 Cr LJ 1479 : 152 Ind Cas 44 (DB).

——S. 537 — Judgment of Presidency Magistrate — Merely recording evidence and saying case is 'proved' does not constitute compliance with S. 370, Criminal P. C., though the defect is curable under S. 537, Criminal P. C. The practice of following this defective procedure should be discontinued. AIR (Vol 19) 1932 Cal 655 : 36 CWN 852 : 33 Cr LJ 729 : 139 Ind Cas 244 (DB).

**——S. 537 — Non-compliance with S. 356, Cr. P. Code — Irregularity.**

An error in procedure, which neither goes to the root of the trial nor prejudices the parties, does not vitiate the trial and is curable under S. 537. Where in an inquiry under S. 145, the Magistrate failed to comply with the provisions of S. 356, in recording evidence :

Held, that the error in procedure did not vitiate the inquiry. AIR (Vol 18) 1931 All 2 : 1931 Cr C 2.

**——S. 537 — Proceedings under S. 145.**

Proceedings under S. 145, Criminal P. C.—Failure to record evidence in vernacular according to S. 356 (1) Criminal P. C., held was mere irregularity curable under S. 537, Criminal P. C. A I R (Vol 18) 1931 All 2 : 32 Cr LJ 368 : 129 Ind Cas 265.

——S. 537 — An omission to comply with provisions of S. 356 (1), Criminal P. C., in proceedings under S. 145 of the Code is a mere irregularity curable by S. 537. AIR (Vol 18) 1931 All 3 : 1930 ALJ 1504 : 32 Cr LJ 372: 53 All 172 : 129 Ind Cas 269.

**——S. 537 — Non-compliance with S. 356 — Irregularity.**

The mere fact that an imperative statutory rule of procedure has been broken is not enough to vitiate the trial of proceeding. The Courts should consider the gravity of the irregularity of the omission and whether it might have worked actual injustice to the accused. Where the Magistrate recorded the evidence in English but it appeared that the accused were not prejudiced thereby.

Held, that the non-compliance with S. 356 was a mere irregularity. AIR (Vol 18) 1931 All 3 : 1931 Cr C 3 : 1930 ALJ 1504.

——S. 537 — The trial Magistrate is competent to record the evidence of witnesses himself although the order of remand directed to have evidence recorded by means of commission ; and even if this be an irregularity, it is covered by S. 537. AIR (Vol 16) 1929 Lah 104 : 30 Cr LJ 948 : 11 LLJ 370 : 118 Ind Cas 643.

**——S. 537 — Witness giving opposite answers — Charge to the jury — Defective procedure.**

One of the witnesses, in answer to a question put in cross-examination, said that the reason why information was not given to the police immediately after the occurrence although the police station was only a short distance away from the scene of occurrence was that the persons who had committed the offence were then unknown. The Judge then told the foreman of the jury to put the question in another form to the witness and the witness said that he and others had recognized the appellants at the place of occurrence and seen them running away. The Judge said to the jury in his charge "as to this particular witness he had no doubt said in answer to an invalid question from the pleader for the defence which was repeated by me that the culprits could not be ascertained that night. If you think that he gave the answer after understanding the question there is an end of the case for prosecution and the accused should be forthwith acquitted. If on the other hand you think that he did not understand the question you are to consider what he had stated before and what he said later on in answer to foreman's question". The Judge did not record anything from which it could be inferred that the witness did not understand the question put to him.

Held, that the procedure followed by the Judge was wrong. AIR (Vol 15) 1928 Cal 551 : 30 Cr LJ 120 : 113 Ind Cas 280 (DB).

**——Ss. 537 and 362 — Irregular procedure.**

In a case falling under S. 362, the Magistrate recorded evidence in the form of indirect narration. The irregularity falls within the scope of S. 537. AIR (Vol 5) 1918 Mad 1197 : 18 Cr LJ 336 : 38 Ind Cas 448.

**(c) Admission of evidence.**

——S. 537 — Whether the misreception of evidence is an irregularity within the meaning of S. 537. AIR (Vol 33) 1946 PC 82.

**——Ss. 537 and 162 — Breach of provisions of S. 162 is curable.**

Breaches of the provisions of S. 162, Criminal P.C., are not in themselves necessarily fatal to the proceedings and may in appropriate circumstances be cured under the terms of S. 537 of the Code. Consequently, the fact that a statement made by witness to a police officer has been used by him to refresh his memory at the time of giving evidence will not vitiate the trial when there is no prejudice to the accused caused thereby and when there is ample evidence on record to support the conviction. AIR (Vol 33) 1946 Cal 483 (DB).

——S. 537 — There is no prohibition in law against the admission of relevant and admissible evidence for proving an offence after a certain stage in a trial. Every Court has got inherent power to allow relevant evidence to be produced by any party at any stage of the trial. If such evidence is allowed to be produced by the prosecution, all that the accused can urge is that he should be given a full opportunity of rebutting it.

There is, therefore, nothing illegal or irregular where the Magistrate allows certain documents to be produced while the prosecution witnesses are being cross-examined by the defence. Even if it is assumed that the admission of the documents at that stage is an irregularity, S. 537, Criminal P.C., would cure the irregularity if it has not materially prejudiced the accused in the trial. AIR (V 25) 1938 All 637: 1938 ALJ 1010: 1938 AWR 638: 40 Cr LJ 145: ILR (1938) All 968: 78 Ind Cas 894.

——S. 537 — Misreception of a piece of evidence which is inadmissible but which has very little weight & admission of which causes no substantial injustice does not vitiate the trial. AIR (V 17) 1930 Pat 247: 11 PLT 148: 124 Ind Cas 836: 31 Cr LJ 721: 9 Pat 474: 1930 Cr C 515 (DB).

——S. 537 — It is only an irregularity curable by S. 537 to consolidate more than one similar com-

plaint and to record evidence by consent of the accused in one of them and to use it in the other. AIR (V 13) 1926 Bom 231: 50 Bom 174: 28 Bom LR 115: 98 Ind Cas 407: 27 Cr LJ 1335 (DB).

——S. 537 — **Irregular procedure — Personal knowledge.**

A Magistrate commits serious irregularities if (1) he bases any of his findings on his own personal knowledge and (2) if he treats his own memo made after the examination of a spot as evidence in the case. (1909) 18 PWR 1909 Cr: 11 Cr LJ 110: 4 Ind Cas 990.

**(f) Reading over depositions**

See also Criminal P. C. S. 360

——S. 537 — An omission to comply with the terms of S. 360 only amounts to an irregularity which if a failure of justice has not been caused, will not necessitate the setting aside of the proceedings. However Magistrates should follow the procedure strictly. AIR (V 14) 1927 All 764: 102 Ind Cas 210: 7 AI Cr R 530: 8 LRA Cr 78: 28 Cr LJ 514 (DB).

——S. 537 — Per Maung Ba, J. — The sole object of this provision of the law seems to ensure the accuracy of the record. A proposition that failure to strictly comply with the provisions of S. 360 will under any circumstances vitiate a trial, no matter whether it has caused a failure of justice or not, is too broad. Failure to strictly comply with the provision of S. 360 should be considered as a mere irregularity curable by S. 537 if no prejudice is caused. Each case should be decided on its own merits. The plain provisions of the law should not be disregarded for the sake of convenience. A.I.R. 1925 Cal. 831 and A. I. R. 1924 Cal. 889, Diss. Disobedience of S. 360 of the Code of Criminal Procedure is an irregularity not amounting to an illegality. The convenience of advocate or a desire to accelerate the disposal of a case are not sufficient reasons for disobeying a mandatory injunction. Expediency per se has never been regarded as a warrant for a deliberate violation of law. AIR (V 13) 1926 Rang 53 : 94 Ind Cas 717 : 4 Bur LJ 213 : 27 Cr LJ 669. (DB).

——S. 537 — The violation of S. 360 Cr. P. Code is incurable under S. 537. AIR (V 11) 1924 Cal 889 : 83 Ind Cas 905 : 52 Cal 159 : 28 CWN 968 : 26 Cr LJ 261 : 41 CLJ 224 (DB).

——S. 537 — Several cases were tried separately but the evidence of such witnesses as were common to all the cases was not recorded separately in all the cases. It was only read out to them and admitted by them to be correct. This procedure was followed with the consent of the counsel for the accused. It was however, clear that no prejudice was caused for the accused.

Held, that the procedure adopted was irregular, but it did not affect the validity of the trial as no prejudice was caused. AIR (V 11) 1924 Lah 228 : 72 Ind Cas 527 : 24 Cr LJ 415 (DB).

——S. 537 — Omission to read over the evidence to the witness does not vitiate the order under S. 145. AIR (V 11) 1924 Pat 786 : 76 Ind Cas 25 :5 PLT 237 : 2 Pat LR Cr 108 : 25 Cr LJ 89.

——**Ss. 537, 190 (1) — Irregular procedure.**

Where during the trial of an accused for theft the Magistrate acting on the report of a Police Inspector added two other persons as accused and the evidence already recorded was read over to the newly added accused. Held, that the procedure adopted by the Magistrate was not irregular as the proceedings against the two accused were started by the Magistrate on taking cognizance of the facts on a police report and that irregularity of reading over of the evidence was curable under S. 537 unless objection was taken at once or immediately after the procedure was adopted. AIR (V 5) 1917 All 133 : (1917) 18 Cr LJ 425 : 38 Ind Cas 985.

**(g) Recording of reasons.**

——S. 537 — Cross-examination of prosecution witness forthwith without adjournment and without recording any reason for so doing — No objection by Pleader of accused — Non-compliance of S. 256 (1), Criminal P. C., held cured by S. 537, Criminal P. C. AIR (V 31) 1944 Cal 319 : 47 CWN 507 : ILR (1943) 2 Cal 322 : 46 Cr LJ 257 : 217 Ind Cas 234.

——S. 537 — Where in proceedings for forfeiture of the security bonds the Magistrate holds for good and justifiable reasons that the bonds had been forfeited but fails to record the grounds of proof as required by S. 514, Criminal P. C., such an omission is only an irregularity curable under S. 537 when the surety is not prejudiced thereby, and no failure of justice has occasioned. AIR (V 28) 1941 Oudh 321 : 1941 OWN 357 : 42 Cr LJ 457 : 16 Luck 646 : 1941 AWR 219 : 193 Ind Cas 627.

——S. 537 — Magistrate on date the charge is framed asking accused whether he wants to cross-examine prosecution witnesses. His failure to record reasons for doing so in writing is irregularity and does not vitiate trial if accused is not prejudiced thereby. AIR (V 26) 1939 Pat 172 : 19 PLT 845 : 40 Cr LJ 419 : 5 BR 499 : 180 Ind Cas 839 (DB).

——**S. 537 — Discharge of accused.**

Number of accused being tried together —Magistrate discharging some only but no reasons given there — Magistrate has seisin of whole case till final order is made regarding remaining accused and can give reasons till then — Omission to give reasons while passing order of discharge held is mere irregularity curable by S. 537, Criminal P. C. AIR (Vol 25) 1938 Mad 396 : 1938 MWN 38 : 47 LW 128: 39 Cr LJ 335 (2): (1938) 1 MLJ 110: 173 Ind Cas 417.

——**S. 537 — Section 145 proceedings.**

Omission to record grounds for being satisfied of likelihood of breach of peace is curable under S. 537 unless a failure of justice or prejudice to party is caused thereby. AIR (V 22) 1935 Oudh 316 : 11 Luck 157 : 36 Cr LJ 656 : 1935 OWN 454 : 155 Ind Cas 169 (DB).

——S. 537 — It is duty of Magistrate to record how he was satisfied as to likelihood of breach of peace — Omission to do so would at most be an irregularity curable under S. 537, Criminal P. C. AIR (V 21) 1934 Nag 112 : 35 Cr LJ 1381 : 30 NLR 311 : 151 Ind Cas 348.

——**S. 537 — Section 145 proceedings.**

Omission of Magistrate to record the fact that he was satisfied that a dispute likely to cause breach of peace existed and further to record the grounds on which he was so satisfied is an irregularity curable by S. 537, Criminal P. C. AIR (V 20) 1933 All 264 : 34 Cr LJ 414 : 1933 ALJ 188 : 55 All 301 : 142 Ind Cas 537 (FB).

——Section 537 — Omission to record reasons as required by S. 11 (1), Child Magistrate Restraint Act, 1929, is a material irregularity which cannot be cured under S. 537, Criminal P. C. AIR (V 20) 1933 Cal 433 : 34 Cr LJ 554 : 37 CWN 626 : 143 Ind Cas 279 (DB).

——**S. 537 — Omission — Only irregularity.**

Omission to record reasons under S. 256, for questioning the accused forthwith after the framing of the charge, as to whether he wishes to recall any of the prosecution witnesses for further examination amounts to no more than an irregu-

larity in procedure covered by S. 537, and would not be a ground for setting aside the conviction unless it has occasioned a failure of justice. AIR (V 17) 1930 Bom 241 : 124 Ind Cas 810 : 32 Bom LR 596 : 31 Cr LJ 743 : 1930 Cr C 693 (DB).

——S. 537 — It is not so much the recording of the reasons as the adequacy thereof which should count in the determination of the question if the provisions of S. 256, have been complied with. If no good reasons are forth coming, merely recording them in writing by the Magistrate would not save the trial from the taint of an incurable irregularity if it results in prejudice to the accused. The reasons that the Magistrate had to go out for urgent work or that the prosecution witnesses had to leave the place of trial immediately are not good reasons for taking up a case on Sunday and rushing through the trial without giving the accused proper opportunity to defend himself. AIR (V 17) 1930 Nag 255 : 124 Ind Cas 619 : 31 Cr LJ 705 : 1930 Cr C 831.

——S. 537 — Omission is mere irregularity.

The omission to record the reason at the proper stage of the proceeding cannot be more than a mere irregularity. Unless that omission has prejudiced the accused person or occasioned a failure of justice, it will be an irregularity curable under S. 517. Every failure to comply with the mandatory provisions of the Code does not amount to an illegality vitiating the trial. AIR (V 14) 1927 Rang 248 : 6 Bur LJ 114 : 9 AICrR 33 : 28 Cr LJ 861 : 104 Ind Cas 637.

——S. 537 — Omission to record reasons is neither an illegality nor an irregularity which vitiates the proceedings. AIR (V 11) 1924 Lah 90 : 76 Ind Cas 398 : 5 LLJ 407 : 25 Cr LJ 174.

——S. 537 — The omission by a Magistrate to record in the first instance his reasons for issuing warrant of arrlest against the alleged abducted woman in a case under S. 498 of the Penal Code is only a mere irregularity within S. 537 (a) of the Cr. P. Code. AIR (V 7) 1920 All 245 : 18 ALJ 1149 : 22 Cr LJ 111 : LR 2 A (Cr) 14 : 59 Ind Cas 415.

(h) Other instances.

——S. 537 — Applicability and scope of — Joint trial of two accused — Witnesses examined and cross-examined before charge — Subsequent order for separate trials — Separate chagres framed and trials held separately — Statements of witnesses already examined treated as evidence in second case without de novo examination — Absence of objection by accused — Trial, if vitiated — Irregularity, if cured.

Two accused persons were tried jointly in the beginning on a charge under S. 500, I. P. Code, on the complaint of one and the same person, and all the witnesses were examined and cross-examined in their presence. But before the charges were framed, the Magistrate ordered that they should be tried separately, and the cases were then separately numbered and separate charges were framed against each. After the case against one was furnished, the case against the second was taken up. Instead, however of beginning the trials de novo, and recording fresh statements the Magistrate treated the statements of the complainant and the witnesses already recorded as evidence in the second case and asked his counsel to proceed with their cross-examination after the charge. No objection was then taken to that course by the accused. But the objection was raised in appeal against the conviction that the trial was vitiated.

Held, that the procedure was irregular, but was capable of being, and was, cured by S. 537, Cr. P. Code. There having been no illegality, but only an irregularity in procedure which occasioned no prejudice to the accused whose counsel was free to test the evidence of the witnesses by any amount of cross-examination; and the omission on the part of the Magistrate to record the cross-examination of the witnesses over again did not afford any ground for interference in appeal with the conviction and sentence. AIR (V 34) 1947 Bom 325: 230 Ind Cas 331: 48 Cr LJ 621: 49 Bom LR 144 (DB).

——S. 537 — Non-compliance with provisions of S. 256(1), held cured by S. 537. AIR (V 31) 1944 Cal 319: 47 CWN 507: ILR (1943) 2 Cal 322: 46 Cr LJ 257: 217 Ind Cas 234.

——S. 537 — Failure to comply with S. 514 (1), Criminal P. C., is irregularity and curable under S. 537, if there is no prejudice. AIR (V 30) 1943 Pesh 6: 44 Cr LJ 381: 205 Ind Cas 325.

——S. 537 — Summary trial.

Failure of Magistrate to enter the date of commission of offence in a prescribed form as required by S. 263 (b) in a summary trial does not vitiate the trial and the defect is cured by S. 537, Criminal P. C., if such failure has not led to any prejudice or failure of justice. AIR (V 27) 1940 Pat 272: 41 Cr LJ 283: 6 BR 337: 186 Ind Cas 312.

——S. 537 — Approver forfeiting pardon put up for trial — Procedure.

Approver forfeiting pardon put up for trial — Charges read and accused asked to plead to it before and not after he has been asked to plead whether or not he has complied with terms of pardon — Irregularity, held curable under S. 537, Criminal P. C. AIR (V 26) 1939 Lah 66: 41 PLR 290: ILR (1939) Lah 216: 40 Cr LJ 614: 181 Ind Cas 924 (DB).

——S. 537 — Magistrate recording evidence succeeded by another Magistrate — Succeeding Magistrate delivering judgment written by his predecessor without adopting it as his own — Held, the defect in such delivery of such a judgment goes beyond a mere irregularity curable under S. 537, Criminal P. C. AIR (Vol 26) 1939 Rang 249: 40 Cr LJ 829: 1939 Rang LR 570: 183 Ind Cas 216.

——S. 537 — S. 289 (4) — Where an accused was asked after his examination whether he wished to examine any witnesses and he stated he did not and the case was then summed up by prosecution and the defence pleader and on appeal it was contended that the trial was vitiated by non-compliance with cl. 4 of S. 289, Criminal P. C.:

Held (i) that S. 289 (4) only meant that if the accused called no witnesses, he or his pleader is to make his final address to Court and there was no non-compliance with the said provision of law;

(ii) that even otherwise omission to call upon the accused to enter on his defence is a mere irregularity covered by S. 537, Criminal P. C., and trial was, therefore, not bad. AIR (Vol 23) 1936 Mad 82: 1935 MWN 1091 (2): 37 Cr LJ 45: 159 Ind Cas 30 (DB).

——S. 537 — Improper use of Police diary.

Police diary containing statements by witness to Police Officer during investigation cannot be used to corroborate such witness. On the other hand, such improper admission of evidence will not, in

all cases, compel interference by the superior Court unless the error has led to substantial injustice or has prejudiced the accused. AIR (Vol 23) 1936 Pat 581: 3 BR 78: 38 Cr LJ 102: 165 Ind Cas 761.

——S. 537 — Although the joint trial of two cross-cases, the prosecution evidence in one of which constitutes the defence evidence in the other, is an irregularity, it can be cured under S. 537, Criminal P. C., if no prejudice has thereby been caused to the accused. AIR (Vol 22) 1935 All 647: 1935 ALJ 423: 36 Cr LJ 763: 1935 AWR 333: 155 Ind Cas 541.

**——S. 537 — Failure to give notice in proceedings under Ss. 87 and 88.**

In proceedings under Ss. 87, 88 the failure to give the necessary notice does not amount to more than an irregularity which can be cured by an application of S. 537. AIR (Vol 21) 1934 Lah 987: 36 PLR 262: 36 Cr LJ 457: 16 Lah 466: 153 Ind Cas 954 (DB).

**——S. 537 — Absence of certificate under S. 188.**

The absence of a certificate under S. 188 is curable under S. 537, if it has not, in fact, occasioned a failure of justice. AIR (Vol 21) 1934 Lah 827: 36 Cr LJ 430: 16 Lah 73: 37 PLR 419: 153 Ind Cas 747.

**——S. 537 — Non-compliance with S. 256.**

The provisions contained in S. 256, Criminal P. C., are merely directory and are not provisions relating to the mode of trial but only lay down a rule of procedure and, therefore, non-compliance of these provisions is no more than an irregularity in procedure which can be cured by S. 537, Criminal P. C. AIR (Vol 19) 1932 Oudh 242: 9 OWN 334: 7 Luck 699: 33 Cr LJ 506: 137 Ind Cas 684 (DB).

**——S. 537 — Intention to apply under S. 526 — No adjournment.**

Where the notice of the intimation of intention to apply under S. 526 is given after the close of the case but before judgment and the notice is mala fide made only to delay and defeat the ends of justice, the refusal to adjourn is a mere irregularity curable under S. 537. AIR (Vol 18) 1931 Cal 626: 35 CWN 1112: 33 Cr LJ 31 (2): 55 CLJ 34: 59 Cal 478: 134 Ind Cas 1057 (DB).

——S. 537 — Though the practice of automatically issuing notice on the accused on the filing of a complaint to show cause why he should not be prosecuted, is to be condemned as there is, in effect, a complete rehearsal of the real trial, yet there may be cases where it is desirable to allow the accused to appear and hear him and there is nothing illegal in calling the accused to an enquiry. AIR (Vol 18) 1931 Pat 302: 32 Cr LJ 1023: 12 PLT 710: 133 Ind Cas 172.

——S. 537 — Where a copy of the oral statement of the accused made to a police officer was not supplied to him on the ground that it had not been reduced to writing. Held, that in the absence of prejudice the omission to supply copies did not affect the legality of the conviction. AIR (Vol 17) 1930 Oudh 505: 7 OWN 957: 1930 Cr C 1211.

**——S. 537 — Rejection of complaint — Though order of remand is illegal is covered by S. 537.**

There is nothing in the Code which lays down that once a Magistrate declines under S. 476 to file a complaint he is functus officio, or that a complaint subsequently filed by him confers no jurisdiction to deal with the person complained against. A refusal by the Magistrate under S. 476, to file a complaint against an accused person does not attract the applicability of the doctrine of autrefois acquit enunciated by S. 403. Nor does it amount to judgment within the meaning of Ss. 366 and 369 which may not therefore subsequently reviewed. Where an application under S. 476 for prosecution of a person is rejected, but on appeal the appellate Court purporting to act under S. 476 (b) remands the proceedings for further enquiry which results in the complaint being filed against the person, and his conviction, the procedure followed is in strict conformity with the Code, and though the order of remand may be illegal, where the illegality has not led to failure of justice, it is sufficiently covered by the wide provisions of S. 537. AIR (Vol 17) 1930 Sind 315: 1930 Cr C 1147 (DB).

**——S. 537 — Non-cognizable offence — Complaint instead of charge-sheet filed — Not material irregularity.**

The Police after making investigation of a non-cognizable offence filed by a complainant to the Magistrate instead of submitting the charge-sheet.

Held, that although the course followed by the Police was irregular, there was no material irregularity. AIR (Vol 16) 1929 Mad 115: 23 MLW 769: 2 M Cr C 39: 115 Ind Cas 481: 30 Cr LJ 469: 12 AI Cr R 299.

——S. 537 — Trial and conviction by the Magistrate of an accused person, apart from the orders of the Sessions Judge directing further enquiry and setting aside dismissal of the Magistrate does not disclose any illegality of procedure so as to vitiate the conviction, but is merely an irregularity which does not affect conviction unless the irregularity has occasioned failure of justice. AIR (Vol 16) 1929 Pat 469: 8 Pat 537: 10 PLT 725: 31 Cr LJ 146: 120 Ind Cas 632: 1929 Cr C 353 (DB).

**——S. 537 — Criminal trial — Effective hearing — Last opportunity.**

The right of counsel in criminal matters is not only that they shall be heard, but that they shall be given an opportunity of being effectually heard. Where counsel on behalf of his client has the right of being heard last (where the accused has not called any evidence on his behalf) in the matter, counsel is entitled to an opportunity to be so heard. If an accused is heard in such a case, the mere fact that he was not heard last is not an illegality which would vitiate the trial but is merely an irregularity to which provisions of S. 537, Cr. P. Code, would apply. AIR (Vol 15) 1928 Bom 557: 113 Ind Cas 612: 30 Bom LR 1530: 12 AI Cr R 73: 30 Cr LJ 185: 53 Bom 119 (DB).

**——S. 537 — Hearing accused — Written address of counsel — Propriety of.**

In matters where counsel on behalf of the accused is entitled to be heard, he is entitled generally to be heard by an oral address and not by written speech. Written addresses filed by counsel do not stand higher than notes of counsel's arguments taken down by the Magistrate and cannot form part of the record. No doubt address of counsel is a valuable right which every party accused of crime who engages counsel to defend him is entitled to regard as such. But if the Magistrate asks the counsel to write out his address in lieu of addressing him

it constitutes not an illegality or nullity but only an irregularity which might be waived. The right to address the Magistrate on the case is for the benefit of the accused and he is entitled to waive such right and his counsel is entitled to waive it in favour of a written address. AIR (Vol 15) 1928 Bom 557: 30 Bom LR 1530: 12 AI Cr R 73: 30 Cr LJ 185: 53 Bom 119: 113 Ind Cas 612 (DB).

——S. 537 — In a trial of an offence under S. 43 (1) (a) of the Bombay Abkari Act, 1878, the report of the Excise Analyst that one bottle which had been sent to him contained cocaine and that some other things contained no cocaine, was tendered in evidence and upon this evidence the accused was convicted. On appeal the Sessions Judge held that the report of the Excise Analyst was inadmissible in evidence and therefore, proposed to have the Excise Analyst examined under S. 428, Cr. P. Code. Upon this the pleader for the accused stated that he did not want to challenge the genuineness or the correctness of the certificate, and that he was prepared to admit that the powder in the bottle sent to the Excise Analyst was cocaine. The Sessions Judge acted upon this statement. Held, that even if the admission could not be legally acted on, the irregularity did not vitiate the trial. AIR (Vol 15) 1928 Bom 241: 30 Bom LR 646: 52 Bom 686: 29 Cr LJ 990: 11 AI Cr R 243: 112 Ind Cas 110 (DB).

**——S. 537 — Committing Magistrate conducting identification proceedings and giving evidence before himself of those proceedings — Trial is not vitiated.**

Where the committing Magistrate, as part of his duties in connexion with the proceedings, conducted all the jail identifications in person and in order to give the defence a better opportunity of preparing their criticisms on the conduct of the investigation, took the unusual course of going into the witness box during the committal proceedings.

Held: that though it certainly would appear to be open to objection for a Magistrate to decide on the value of his own evidence yet where the Magistrate had not to decide but solely to commit, there is nothing objectionable to the course adopted by him, and the action does not vitiate the committal of the trial. AIR (Vol 14) 1927 Oudh 369: 1 LC 339: 2 Luck 631: 8 AI Cr R 449: 106 Ind Cas 721 (DB).

**——S. 537 — Complaint by Court to self.**

Petitioner gave evidence in a case tried by the Chief Presidency Magistrate. Part of his evidence was regarded as false and the Magistrate deemed it necessary to take proceedings under S. 476, Cr. P. Code. He accordingly drew up a complaint. This complaint he preferred in his own Court and then he transferred it to a Presidency Magistrate for disposal. The latter issued process, held an inquiry and committed the petitioner for trial. The petitioner was then tried and convicted.

Held, by Court (Rankin and Chakravarti, JJ. dissenting) that the procedure was not illegal.

Held, per Walmsley, J.— The Magistrate committed nothing worse than an irregularity which may be disregarded.

Held, per Rankin, J.— The proceedings have been had throughout in defiance of the express provisions of the Code of fundamental principles of law.

Held, per Cuming, J.— There is nothing in the Code that prevents a Magistrate from taking cognizance of his own complaint.

Held, per B. B. Ghose, J. — The complaint and the subsequent trial was not illegal and the irregularity was curable under S. 532 (1), Cr. P. Code. AIR (Vol 13) 1926 Cal 470: 53 Cal 350: 43 CLJ 310: 30 CWN 276: 27 Cr LJ 385: 93 Ind Cas 33 (FB).

——S. 537 — Cross-examination and arguments 'inter partes' are out of place in an enquiry into the truth of the complaint. Such departure from the strict letter of the law constitutes a mere irregularity and the High Court should not in the exercise of its discretion direct a further enquiry. AIR (Vol 13) 1926 Pat 34: 7 PLT 36: 26 Cr LJ 1394: 89 Ind Cas 706.

**——S. 537 — Burma Habitual Offender's Restriction Act (Act II of 1919), S. 7.**

Omission to state the period of restriction in the preliminary order does not render the whole proceeding void. It is only an irregularity curable by Upper Burma Criminal Justice Reg. Chap. XV. AIR (Vol 12) 1925 Rang 214: 3 Rang 74: 26 Cr LJ 1391: 89 Ind Cas 527.

——S. 537 — Where it was found that the omission to formally examine, after close of prosecution and before defence, the person called upon to furnish security had not prejudiced him, held, that the omission is only an irregularity curable under S. 537. 50 Cal 223, Not Foll. AIR (V 11) 1924 Cal 392: 50 Cal 985: 25 Cr LJ 1085: 81 Ind Cas 909 (DB).

——S. 537 — The mere fact that one question was put to the Judge by the Jury not in open Court but in chambers was no more than an irregularity and did not vitiate the trial. AIR (Vol 10) 1923 Cal 647: 27 CWN 626: 25 Cr LJ 343: 77 Ind Cas 231 (DB).

**——S. 537 — Defective sanction — Misdescription of officer sanctioning is cured by S. 537.**

S. 537 can be invoked to remedy the irregularity of a mere misdescription of the officer in the order of sanction to prosecute, as for example, in the case of an officer, who is both a First Class Munsiff and a First Class Magistrate describing himself as 'Magistrate' instead of 'Munsiff'. AIR (Vol 4) 1917 Lah 277: 18 Cr LJ 121: 37 Ind Cas 473: 23 PR 1916 Cr.

**——S. 537 — Warrants and summons — Summons to accused — Complainant not examined — Irregularity.**

A complaint of grievous hurt made to the police was not sent up. The complainant applied to the Magistrate who sent for the police papers and summoned the accused without examining the complainant. On the date fixed the complainants being absent the accused were discharged. The complainants appeared, explained their delay and the Magistrate gave them time to produce evidence, summoned the accused, found them guilty and sentenced them to imprisonment. Held, that the course the Magistrate adopted was irregular but did not vitiate the entire proceedings. AIR (Vol 2) 1915 All 417: 37 All 628: 13 ALJ 840: 16 Cr LJ 669: 30 Ind Cas 653 (DB).

**——S. 537 — Mode of trial — Irregularity — Criminal trial — Confession by some accused — Failure to record their conviction — Effect.**

If a Sessions Judge accepts the plea of guilty by some of the accused, their conviction should be recorded then and there. But if the Sessions Judge convicts them after he has taken evidence against the other accused and does not take into account their confession in passing sentence upon the others, this is a mere irregularity which is curable.

AIR (Vol 2) 1915 All 55: 12 ALJ 1239: 16 Cr LJ 103: 27 Ind Cas 511.

——S. 537 — **Irregular proceedings — Curable irregularity.**

The Magistrate commits an irregularity in simply reading over to the accused the deposition of the investigating officer, who was then cross-examined instead of examining the witness. If the mistake does not prejudice the accused, it is curable under S. 537. 9NLR 65: 14 Cr LJ 290: (1913) 19 Ind Cas 946.

——S. 537 — **Irregular procedure — Local investigation after close of defence.**

Deputation of a Magistrate for local investigation after the close of the defence is at most an irregularity and the conviction cannot be set aside on that ground alone when there is no proof that the defence has been prejudiced thereby. (1911) 15 CWN 414: 12 Cr LJ 7: 9 Ind Cas 46 (DB).

——S. 537 — **Irregular procedure — Want of formal order of discharge.**

Want of formal order of discharge under S. 494 (a) Cr. P. C. is a mere irregularity which can be cured by S. 537, when the prosecution against the discharged accused is withdrawn. (1910) 7 ALJ 86: 11 Cr LJ 21: 5 Ind Cas 21.

**5. Irregularity in charge.**

**(a) General.**
**(a-1) Vague and defective.**
**(b) Wrong particulars.**
**(c) Misjoinder of charges — General.**

See also Criminal P. C. Ss. 225, 233, 235, 242 and 335.

**(d) Misjoinder of charges — Instances.**
**(e) Non-compliance with S. 233 Criminal P. C.**

**(a) General.**

——S. 537 — **Scope.**

Section 537 is only applicable to a case where the attention of the accused is specifically drawn in the charge to the acts which he is alleged to have committed and he is specifically questioned about those acts. AIR (V 32) 1945 All 81 : 1945 AWR (HC) 156 : 1945 OWN (HC) 227 : ILR (1945) All 558 : 46 Cr LJ 750 : 220 Ind Cas 432.

——S. 537 — **Mistake in charge — No prejudice to accused.**

The mistake in the charge does not afford a ground for setting aside the conviction where no prejudice has been caused to the accused by reason of it.

(No misjoinder of charges held existed.) AIR (V 30) 1943 Pat 229 : 22 Pat 76 (DB).

**(a-1) Vague and defective.**

——S. 537 — Where having regard to the complicated nature of a case the charges pro tanto represented the case which the accused had to meet and they themselves were fully apprised of the case against them and in fact did their best to meet it no prejudice was occasioned to them by whatever vagueness or defectiveness there may have been in the charges and in these circumstances S. 537, Cr. P. Code, will come into play. AIR (Vol 37) 1950 Nag 38: ILR (1950) Nag 87 : 51 Cr LJ 427 : 1950 NLJ 384.

——S. 537 — Curability under — Defective charge in respect of refusal to sell under Drugs Control Order. See AIR (Vol 34) 1947 Mad 311 : (1946) 2 MLJ 489.

——S. 537 — **Accused not questioned under S. 342 — Effect.**

The misrepresentations and the manner in which the cheating was carried out by the accused were not set out with any precision in the charge against the accused under S. 420, I. P. C. Nor was the accused questioned with regard to the misrepresentations upon which he was convicted :

Held, that although a re-trial need not be ordered merely on account of defect in the charge, the proceedings involved a more serious irregularity and therefore, a re-trial should start from before the framing of the charge and not from before the examination of the accused under S. 342, Criminal P. C. AIR (Vol 29) 1942 Sind 102 : ILR (1942) Kar 112 : 43 Cr LJ 799 : 202 Ind Cas 206.

——S. 537 — Accused charged with offences of kidnapping and abduction in respect of some occurrence — Charge should be framed under two heads — Charge framed under one head — No prejudice — Trial, held not vitiated. AIR (V 25) 1938 Cal 460 : 39 Cr LJ 674 : 176 Ind Cas 104 (DB).

——S. 537 — Where a charge for conspiracy contained the words that accused agreed with each other "or" with others unknown to commit a certain offence :

Held, that the word "or" in the charge was not used as a disjunctive, meaning that the charge was the one alternative or the other, but it was used merely because the complicity of other persons in the conspiracy was not so certain as that of the three accused.

Held, also that it was impossible to say that the terms in which the charge was actually framed could or did mislead the accused in any way. At no stage were they left in any uncertainty as to what was alleged against them. Even supposing there was any defect it was not such as would not be sufficiently met by S. 225 or S. 537, Criminal P. C. AIR (Vol 25) 1938 Cal 195 : 42 CWN 246 : 39 Cr LJ 417 : 174 Ind Cas 513 (DB).

——S. 537 — Where the charge sheet simply charges the accused with rioting and voluntarily causing simple hurt without explaining what rioting means, the irregularity in the charge sheet is cured by the provisions of S. 535 or S. 537, Criminal P. C., if there is no prejudice to the accused. AIR (Vol 22) 1935 All 627 : 1935 ALJ 666 : 1935 AWR 685 : 36 Cr LJ 1260 : 157 Ind Cas 915.

——S. 537 — Where the charge contained only one offence regarding the acts of the petitioners as one, but the evidence showed the petitioners were guilty of two distinct acts, the defective form of charge does not invalidate either the trial or the conviction in the absence of any evidence that the form of the charge occasioned a failure of justice. AIR (Vol 18) 1931 Mad 225 : 1930 MWN 1041.

——S. 537 — Where a charge is defective under S. 234 as having been presented out of time the trial is vitiated. The defect in the charge is not a mere irregularity so as to be cured by S. 537. (1930) 34 CWN 959.

——S. 537 — **Offence under S. 415 — It is mere surplusage to state in charge that any person suffered loss as a result of misrepresentation and such defect curable.**

F borrowed money from M on security of N, on basis of two mortgage bonds and having arranged to sell the mortgaged property induced M to accompany him to a petition writer to get a sale-deed drafted. The bonds were left with the petition-writer and M went away to get a document registered. N and F making a false representation to petition-writer that M wanted to see to the bonds, took them away. F and N were followed, but the bonds could not be recovered. In the charge it was

recited that F and N obtained the bonds after making false representation to the petition-writer and that as a result of the misrepresentation, M suffered loss. It was contended that the charge was defective.

Held, that it was not necessary to state in the charge that as a result of false representation made by F and N, M suffered any loss. The mere fact that the petition-writer as a result of the deception of N handed the bond to him was sufficient to bring his conduct within the definition of cheating. The addition in the charge that M suffered loss as a result of the misrepresentation was a mere surplusage and the defect was cured by S. 537, Cr. P. Code. AIR (V 17) 1930 Lah 407 : 1930 Cr C 467.

——**S. 537 — Failure to define accurately common object.**

It is not a general proposition of law that a conviction under S. 147, I. P. Code, cannot be supported wherever the common object, as stated in the charge, is not precisely made out. Failure to define expressly and accurately the common object with which an unlawful assembly acts is an error, omission or irregularity as may be cured by S. 537. AIR (V 17) 1930 Mad 188 : 121 Ind Cas 862 : 1930 Cr C 188 : 31 MLW 236 : 1930 M WN 80 : 3 M Cr C 67 : 31 Cr LJ 347.

——S. 537 — When the charge is on the face of it meaningless and ununderstandable, but where the accused and his counsel know the nature of the offence the accused is charged with, and no failure of justice has resulted the vagueness or incomprehensibility of the charge is cured by S. 537. AIR (V 17) 1930 Rang 201 : 125 Ind Cas 266 : 31 Cr L J 793: 1930 Cr C 661 : 8 Rang 25.

——**S. 537 — Penal Code, S. 504.**

In a prosecution under S. 504, if the accused is aware of the words complained of but the Magistrate does not specifically mention the objectionable words in the charge, the accused not being misled by the technical defect in the charge, his conviction is not vitiated. AIR (V 14) 1927 Lah 702 : 104 Ind Cas 437 : 28 Cr LJ 821.

——S. 537 — Where in a prosecution under S. 498, Indian Penal Code, the accused were not charged with knowledge or reason to believe that the abducted woman was a married woman and the accused knew what they were charged with and what it was necessary for the prosecution to prove,

Held, that this fact by itself would not affect the case. AIR (V 14) 1927 Lah 432 : 101 Ind Cas 451: 28 Cr LJ 419.

——S. 537 — When a Court of appeal is dealing with an appeal against an acquittal there is no provision of the Code under which a defect in the charge can be condoned. AIR (V 14) 1927 Lah 109 : 28 Cr LJ 170 : 99 Ind Cas 602 : 7 A I Cr R 319.

——S. 537 — A trial de novo must not be ordered when no charge has been framed or when a defective charge has been framed. In such a case what must be done is to order a fresh trial from the stage at which the illegality occurred. Ss. 225 and 537 of the Cr. P. Code, remedy any defect due to the omission in the charge of the particulars required by S. 223 of the Code. AIR (V 12) 1925 Nag 147 : 81 Ind Cas 976 : 25 Cr LJ 1152.

——S. 537 (a)— A defect in a charge is immaterial if the accused has not been prejudiced thereby. AIR (V 1) 1914 Lah 101 : 20 PWR 1914 Cr : 123 PLR 1914 : 15 Cr LJ 524 : 24 Ind Cas 836.

——**S. 537 — Conviction — Validity.**

If the words are not in the charge, but are indicated with sufficient certainty, the case is one of defective charge and S. 537 applies to the case. (1909) 32 Mad 384 : 5 MLT 393 : 9 Cr L J 456 : 2 Ind Cas 33 (FB).

**(b) Wrong particulars.**

——S. 537 — S. 222 (1) — Where the particulars specified in the charge are reasonably sufficient to give the accused notice of the matter with which they were charged, the requirements of S. 222 (1), Criminal P. C. are satisfied and the fact that charge specifies only the month in which the offence was committed and not the actual date, cannot be regarded as an irregularity and even if can be so regarded, it would be curable under S. 537, Criminal P. C. AIR (V 30) 1943 Pat 212 : 22 Pat 263 : 44 Cr LJ 590 : 9 BR 425 : 207 Ind Cas 420 (DB).

——S. 537 — Offence under S. 409, I. P. C., of misappropriation — Wrong date and place of misappropriation mentioned in charge— Correct date mentiond to accused in examination under S. 364 — No dispute as to place raised — Accused in no way prejudiced — Error in charge is immaterial and cannot affect legality of trial. AIR (V 25) 1938 Nag 445 : ILR (1939) Nag 180 : 1938 NLJ 259 : 39 Cr LJ 895 : 177 Ind Cas 396 (DB).

——**S. 537 — Accused charged under non-existent S. 506 (b), I. P. C. — Accused acquitted under that charge — Mistake due to clerical error — Mistake not affecting rest of trial — Trial, if vitiated.**

Even though the accused is charged under a non-existent S. 506 (b), I. P. C., the trial is not vitiated if the mistake is merely a clerical error copied from the complaint without verification and the accused is acquitted of this charge, and the mistake does not affect the rest of the trial. AIR (V 25) 1938 Nag 325 : 39 Cr LJ 427 (2) : 10 RN 417 : ILR (1940) Nag 188 : 174 Ind Cas 523.

——S. 537 — Conviction for committing offence not on date entered in charge — Defence of alibi — Conviction, held cannot stand. AIR (V 21) 1934 Lah 455 : 36 Cr LJ 282 (2) : 35 PLR 449 : 153 Ind Cas 32.

——S. 537 — The Judge must set forth the headings of his charge and mere wrong phraseology is no ground of complaint for the accused. AIR (V 3) 1916 Pat 236 : 17 Cr LJ 353 : 1 PLJ 317 : 2 PLW 348 : 35 Ind Cas 657 (DB).

——**S. 537 — Charge — Error in — No failure of justice — Defamation.**

Where a charge stated that the defamation was of the complainant, the husband, and not of the wife, it was a mere irregularity which would not vitiate a conviction, unless the same should prejudice the accused or occasion a failure of justice. (1904) 15 MLJ 224 (224) (DB).

**(c) Misjoinder of charges — General.**

See also Criminal P. C. Ss. 225, 233, 235, 242 and 335.

——**S. 537 — Illegality or irregularity is curable under S. 537 if accused is not prejudiced.**

Unless the accused is in a position to show that he has been prejudiced by error or illegality in the joinder of charges, the illegality or the irregularity is curable by the provisions of S. 537. AIR (V 33) 1946 Oudh 26 : 1945 OWN 331.

——S. 537 — Misjoinder of charges is fatal to the trial whether it has caused a failure of justice or not and the defect is not cured by S. 537, Criminal P. C. AIR (V 31) 1944 Bom 306 : 46 Bom LR 555: ILR (1944) Bom 728 (DB).

——S. 537 — The error or illegality committed with regard to joinder of charges can be cured by S. 537, unless the accused has been prejudiced by it. AIR (V 31) 1944 Oudh 122 : 1944 OWN 1 : 1944 AWR (CC) 3 : 45 Cr LJ 538 : 19 Luck 493 : 212 Ind Cas 125 (DB).

——S. 537 — As a general rule, one should presume prejudice to an accused from a misjoinder of charges. (No prejudice held, resulted in this case.) AIR (V 30) 1943 Mad 209 : 1942-2 MLJ 686 : 1942 MWN 726 : 44 Cr L J 413 : 205 Ind Cas 336.

——S. 537 — Section 537 does not cure misjoinder of charges such as is not permissible under the Code. ILR (1938) 1 Cal 98 : 41 CWN 1112.

——S. 537 — A misjoinder of charges and an error in the statement of a charge otherwise lawful must be distinguished. Such an error in charge can be cured under S. 537, Criminal P. C. AIR (V 25) 1938 Sind 171 : 39 Cr LJ 890 : ILR (1939) Kar 204 : 177 Ind Cas 346 (DB).

——S. 537 — The test whether a trial is or is not bad owing to a misjoinder of charges is not the number of offences of which the accused has been convicted. It is the number of offences with which he has been charged. The trial is bad, not because the accused has been wrongly convicted, but because he has been wrongly tried. It is the multiplicity of charges which vitiates the trial and prejudices the accused in his defence. AIR (V 25) 1938 Sind 171 : 39 Cr LJ 890 : ILR (1939) Kar 204 : 177 Ind Cas 346 (DB).

——S. 537 — The adoption of a procedure which is positively prohibited by the Criminal P. C., would not ipso facto invalidate a trial even if no objection had been taken at the hearing of the case. But where the defect has occasioned an injustice in the sense that the accused were embarrassed in their defence in having to meet a multifarious accumulation of evidence upon a diversity of counts, several of which were illegally joined in the trial, the defect cannot be cured by S. 537, and the trial is illegal. AIR (V 24) 1937 All 714 : 39 Cr LJ 38 : 1937 ALJ 1073 : ILR (1937) All 779 : 1937 AWR 748 : 171 Ind Cas 994 (DB).

——S. 537 — The joinder of two offences in a single charge is only an irregularity cured by S. 537, and not an illegality : 40 Cal. 846 Diss. from. AIR (V 15) 1928 Cal 700 : 117 Ind Cas 596 : 48 C LJ 138 : 32 CWN 839 : 30 Cr LJ 799 (DB).

**——S. 537 — Charges illegally joined — Trial is wholly vitiated though accused is not prejudiced.**

If two offences could not be tried together, their joinder would vitiate the whole trial; and the mere fact that the accused has not been prejudiced by this wrong procedure would not constitute a valid ground for condoning the defect. The disregard of an express provision of law as to the mode of trial is not mere irregularity such as could be remedied by S. 537, Cr. P. Code, and a trial conducted in a manner prohibited by law must be treated as altogether illegal. AIR (V 8) 1921 Lah 381 : 57 Ind Cas 450 : 21 Cr LJ 626 : 1 Lah 562 : 7 PLR 1921 (DB).

——S. 537 — The violation of an express provision of law as to the mode of trial by trying a man for many different offences at the same time and those offences being spread over a long period than by law could have been joined together in one indictment, is not a mere irregularity such as can be cured by S. 537. Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury and the accused would never have been really tried at all on the charge afterwards arranged by the Court. Conviction set aside by the Privy Council. (1901) 11 MLJ 233 : 3 Bom LR 540 : 5 CWN 866 : 25 Mad 61 (97) : 28 IA 257 (PC).

**(d) Misjoinder of charges — Instances.**

**——S. 537 — Non-compliance with S. 222.**

Where, in a charge of criminal misappropriation, the inclusion of items extending beyond the period of one year prescribed in S. 222, Criminal P. C., has prejudiced the accused in his defence on merits, the irregularity in framing charge cannot be condoned under S. 537 or S. 225, Criminal P. C. AIR (Vol 22) 1935 Oudh 241 : 1935 OWN 126 : 36 Cr LJ 477 : 154 Ind Cas 258.

——S. 537 — Inclusion of kidnapping and abduction in one head and under one charge :

Held, that there may be an irregularity, but if the defence is not misled and no failure of justice follows, it is condoned by S. 537. AIR (V 21) 1934 Sind 164 : 36 Cr LJ 231 (2) : 152 Ind Cas 1061 (DB).

——S. 537 — Where in a charge, there is a joinder of two distinct offences of kidnapping and abduction in the alternative and the case does not come under S. 236, Criminal P. C., the joinder is only an irregularity and not an illegality and defect is cured by S. 537, Criminal P. C., when no failure of justice has been caused. AIR (V 20) 1933 Cal 676 : 60 Cal 1394 : 37 CWN 1074 : 34 Cr LJ 1219 : 146 Ind Cas 305 (DB).

——S. 537 — Accused charged for an offence under Ss. 4 and 5 of the U. P. Prevention of Adulteration Act, 1912, and for having kept a ghee shop without a sign board — Accused convicted for former offence — It is misjoinder of charges which is fatal to the prosecution despite anything contained in S. 537 and despite the fact that the accused was acquitted of one of the offences charged. AIR (Vol 18) 1931 All 705 : 1931 ALJ 690 : 32 Cr LJ 1031 : 133 Ind Cas 418.

——Ss. 537, 439—The accused who was the manager in charge of a branch of a firm of a Chettyar, took Rs. 500 from another Chettyar firm on the 4th October, 1928, and entered it falsely as a loan in the accounts. A false entry or re-payment was made a few days later. He took a loan of another amount on 1st January, 1929, and paid Rs. 1,000 on 20th January but made a false entry of re-payment of Rs. 1,500. On the 16th January, 1929, and 27th January, 1929, he took two sums of money from another firm on the false allegation that these amounts were required for his firm. No entry was made in the accounts about these amounts. The accused was jointly charged and tried for these four acts :

Held, (i) that the accused committed two separate and distinct offences of criminal breach of trust under S. 408, I. P. C., and two separate and distinct offences of cheating under S. 420, I. P. C., and there was misjoinder of charges and of trial of this case which misjoinder rendered the trial illegal ;

(ii) that as the accused had been prejudiced by the illegality, it was proper to interfere in revision. AIR (Vol 18) 1931 Rang 161 : 32 Cr LJ 1068 : 133 Ind Cas 489.

——S. 537 — Three accused — Joint charge for misappropriation against one, abetment against another and misappropriation of part of the same sum against third :

Held, the case did not fall within S. 222 (2), Criminal P. C., and there was a misjoinder of charges which vitiated the trial. AIR (V 18) 1931 Rang 90 : 32 Cr LJ 930 : 132 Ind Cas 548.

——S. 537 — Where the accused is charged jointly with having stolen six specific animals belonging to five specific persons by five different acts of theft from those five specific persons,

Held, that the error is not a mere technicality which can be set right under S. 537. The trial

is wholly illegal. AIR (Vol 13) 1926 Sind 129 : 20 SLR 3 : 27 Cr LJ 32 : 91 Ind Cas 64 (DB).

——S. 537 — The accused was charged in one trial with offences under Ss. 392 and 323 of the Penal Code, for carrying away by force two buffaloes grazing in a field, and for assaulting the owner a month later who was returning to his village after having recovered one of the baffaloes from the possession of the accused.

Held, there was a misjoinder of charges which vitiated the trial. The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause & effect or as principal and subsidiary acts as to constitute one continuous action. If there has been a misjoinder, it will have the effect of vitiating the whole trial, and the defect will not be cured by the application of S. 537. AIR (V 9) 1922 Lah 144 : 3 PLR 1922 : 22 Cr LJ 505 : 62 Ind Cas 329.

**——S. 537 — Criminal trial — Abetment of breach of trust — Theft and receipt of stolen property unconnected with abetment — Joinder — Prejudice.**

Where a person was charged with abetting three acts of criminal breach of trust committed by another, and also of an offence under Ss. 380 and 411, I. P. C., which was totally unconnected with the abetment :

Held, that the trial was bad for misjoinder and that the accused was prejudiced inasmuch as the confession of the main offender was used against the accused on the second charge also which was unconnected with it. (1900) 5 CWN 294 (296) (DB).

**(e) Non-Compliance with S. 233 Criminal P.C.**

——S. 537 — Where there has been a contravention of the provisions of S. 233, the effect is to vitiate the trial. This is not a question of an irregularity which can be cured under the provsions of S. 537 of the Code if there has been no prejudice. AIR (V 32) 1945 Pat 388: 24 Pat 303: 12 BR 117: 47 Cr LJ 154: 26 PLT 293: 221 Ind Cas 312 (DB).

——S. 537 — Disregard to the provisions of S. 233 is not an irregularity that can be remedied by S. 537 but is altogether illegal. AIR (V 17) 1930 Sind 62: 119 Ind Cas 532: 30 Cr LJ 1073: 1930 Cr C 126 (DB).

**——S. 537 — Omission of S. 149 I.P. Code from charge is not illegality.**

Section 149 creates no offence but is like S. 34 merely declaratory of a principle of the common law and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. A person cannot be tried and sentenced under S. 149 alone, no punishment being provided by the section. Therefore the omission of S. 149 from a charge does not create an illegality by reason of S. 233, Criminal Procedure Code which provides that for every distinct offence of which any person is accused there shall be a separate charge. AIR (V 12) 1925 Mad 1: 47 MLJ 221: 82 Ind Cas 465: 25 Cr LJ 1297: 47 Mad 746: 20 MLW 261: 35 MLT 21. (FB).

**——S. 537 — S. 537 applies to S. 223.**

The lumping of charges together in a manner which is contrary to the provisions of S. 233 is covered by the provisions of S. 537 of the Code. AIR (V 8) 1921 Oudh 49: 61 Ind Cas 168: 8 OLJ 10: 22 Cr LJ 344 (DB).

——S. 537 — No doubt S. 233 requires that for every distinct offence of which any person is accused there shall be a separate charge, but under Ss. 225 and 537 of the Code an irregularity of this kind is immaterial, unless the accused was in fact misled by the error and it has occasioned a failure of justice. AIR (V 8) 1921 Sind 47: 66 Ind Cas 672: 16 SLR 15: 23 Cr LJ 320 (DB).

**——S. 537 (a) — Defective charge — Separate charges far distinct offences — Irregularity.**

Per Sharfuddin and Beachcroft JJ.:—The words "subject to the provision hereinbefore contained" must be read as having reference only to Ss. 529 to 536 of the Code and not to the entire Code. The failure to observe the first part of S. 233 is not fatal to the trial. The framing of charges is not a "mode of trial" as used by the Judicial Committee in 25 Mad. 61. Per Fletcher, J.:— The whole of S. 537 is governed by the words "subject to the provisions hereinbefore contained" and this includes the provision of S. 233 and a neglect of its provision is not cured by S. 537. AIR (V 3) 1916 Cal 693: 19 CWN 972: 16 Cr LJ 641: 30 Ind Cas 465 (FB)

**6. Irregularity in judgments.**

See also Criminal P. C., Ss. 366, 367.

——S. 537 — Curability under — Judgment pronounced in Court by a colleague of the magistrate who wrote it — Irregularity is curable. AIR (V 35) 1948 All 339 : (1948) AWR (HC) 43.

——S. 537 — Curability under — Trial of several accused for different offences — Conviction without specifying the sections of the I.P. Code and passing of a combined sentence on all —Error held occasioned failure of justice and was not curable. AIR (V 35) 1948 All 136 : 1947 ALJ 593.

——S. 537 — Curability under — Succeeding Sessions Judge pronouncing judgment of his predecessor in case heard by the latter — Defect is not curable. AIR (Vol 34) 1947 Mad 248 : (1946) 2 MLJ 195.

——S. 537 — Where a judgment written by a Magistrate who was under orders of transfer and expected to be relieved before the date fixed for pronouncing the judgment is delivered on the date so fixed by his successor, there being no demand for trial de novo by the accused, the irregularity, if any, is cured by S. 537, Criminal P.C. AIR (V 27) 1940 Lah 289: 42 PLR 240: 41 Cr LJ 808: 189 Ind Cas 826.

**——S. 537 — Absence of Magistrate from Bench.**

If any of the Magistrates constituting the Bench which pronounces the judgment or the order has not been present throughout the proceedings, then S. 350A, Criminal P.C., is not complied with. In such a case, there would at least be an irregularity in the trial The defect is not such as involves a direct infringement of any specific provisions of the Act, but is contrary to the spirit and the principle underlying S. 350-A, and cannot be regarded as anything more than an irregularity in the judgment or proceeding within the meaning of S. 537 of the Code. AIR (V 21) 1934 All 144: 1934 ALJ 376: 4 AWR 1552: 36 Cr LJ 38: 56 A 599: 152 Ind Cas 158 (DB).

——S. 537 — Judgment prepared by Magistrate after his transfer and pronounced by successor in open Court with consent of parties:

Held, that judgment was without jurisdiction and the defect could not be cured by S. 537. AIR (V 18) 1931 Pat 386: 12 PLT 647: 32 Cr LJ 1224: 134 Ind Cas 625.

——S. 537 — A judgment of a Bench of Magistrate has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the mandatory provisions of S. 265 of the Code. Where one of the three Magistrates of a Bench merely initials

instead of signing his name, the irregularity cannot be cured by S. 537. AIR (V 17) 1930 Mad 867: 59 MLJ 674: 1930 Cr C 1123: 1930 MWN 787: 32 MLW 280.

——S. 537 — **Two factions — Two distinct trials — Evidence similar — Disposal in one judgment by appellate Court caused no injustice and hence should be upheld.**

Two parties were charged for their attacks on each other in the same occurrence, and the charges were tried separately at two distinct trials. The evidence given for the prosecution was similar to a substantial extent in each case. Each party was a witness against the other but there was also independent evidence. Although they were tried separately, the High Court gave one judgment, but treated the cases as two cases which have been separately tried. There was, however, a body of separate evidence which was applicable to each case, and that in itself was enough for the conviction.

Held, that, although technical it might have been better to keep the evidence entirely distinct and to have delivered two separate judgments, no injustice has followed from what was done. AIR (V 14) 1927 PC 26: 52 MLJ 441: 100 Ind Cas 126: 8 Lah 193: 45 CLJ 418: 29 Bom LR 784: 28 PLR 167: 25 MLW 724: 28 Cr LJ 254: 31 CWN 393: 1927 MWN 68: 7 AI Cr R 350.

——S. 537 — Where the only case in appeal was one of considering whether the evidence did justify the conclusion that the accused persons were responsible for a particular act, and the appellate Court did not state in its judgment the points for determination, and the reasons for a finding on each point specifically in the manner contemplated by Ss. 367 and 424 but in fact it had gone into the case and said: "The Magistrate's findings of fact are fully justified by the evidence."

Held, there was not an "absence" of a judgment and the irregularity in drawing up the judgment was curable under S. 537. AIR (V 13) 1926 Bom 512: 97 Ind Cas 737: 28 Bom LR 1029: 27 Cr LJ 1153 (DB).

——S 537 — Where the judgment was entirely in the handwriting of the Magistrate.

Held, in the circumstances the case of the irregularity of the judgment not being signed, was covered by S. 537. AIR (V 12) 1925 All 299: 86 Ind Cas 64: 23 ALJ 8: 6 LRA Cr 41: 47 All 284: 26 Cr LJ 688.

——S. 537 — A conviction and sentence passed by a Court without pronouncing the whole judgment are not void because the irregularity is cured by S. 537 Cr. P.C. AIR (V 2) 1915 Mad 1038: 38 Mad 498: 14 MLT 317: 25 MLJ 445: (1913) MWN 862: 14 Cr LJ 595: 21 Ind Cas 467.

——S. 537 — **Irregularity in judgment.**

The defects in a judgment clearly at variance with the directions in Ss. 367 and 424 and which materially prejudice the accused in the trial of their appeal are not cured by S. 537. (1912) 10 ALJ 435 : 13 Cr LJ 859 : 17 Ind Cas 795.

### 7. Irregularity in other proceedings

See also Criminal P. C. S. 539-B

——S. 537 — **Scope — Warrant under Extradition Act sent to proper officer but under wrong designation — If renders warrant invalid — Defect — If curable.**

Where a warrant under S. 7 of the Extradition Act was sent to an officer who happened to hold the post of District Magistrate of one District and the post of Deputy Commissioner of another place, but was addressed to the District Magistrate instead of to the Deputy Commissioner,

Held, that the validity of the warrant could not be challenged on that ground and the omission to give the correct designation of the officer was a purely technical defect which was curable by S. 537, Cr. P. Code. AIR (V 33) 1946 Pat 196: 228 Ind Cas 59: 13 BR 125: 48 Cr LJ 40: 24 Pat 699: 12 Cut LT 1. (DB).

——S. 537 — A failure on the part of a Magistrate to hold an inquiry under S. 176 into the cause of death where there is no corpse is a defect which is curable under S. 537 AIR (V 32) 1945 Nag 143: 1945 NLJ 134: ILR (1945) Nag 315: 47 Cr LJ 196 221 Ind Cas 507 (DB).

——S. 537 — **Designation of officer to whom extradition warrant is addressed not correctly given — Same person holding both posts — Defect is cured under S. 537.**

When an extradition warrant which ought to have been addressed to the Deputy Commissioner Angul, was addressed to the District Magistrate of Cuttack but the same person held both these offices:

Held, that if the designation of the officer to whom the warrant was addressed was not correctly given, this was purely a technical defect and could be cured by the provisions contained in S. 537. AIR (V 33) 1946 Pat 196: 24 Pat 699: 12 Cut LT 1 (DB).

——S. 537 — **Technical objections.**

Search genuine — Technical objection cannot be allowed to prevail. AIR (V 29) 1942 Oudh 221: 1941 AWR 402: 1941 OWN 1369: 17 Luck 516: 43 Cr LJ 416: 198 Ind Cas 714 (DB).

——S. 537 — **Confession under S. 164.**

Confession of the accused not recorded in the prescribed form — Magistrate not putting questions to elicit voluntary nature of confession as required under S. 164 — Prejudice caused to the accused person:

Held, that the defect is not curable. AIR (V 24) 1937 Nag 257. 20 NLJ 128: 38 Cr LJ 987: ILR (1937) Nag 416: 170 Ind Cas 868 (DB).

——S. 537 — **Search under S. 103 — Panchas not local people.**

Held, that this is an irregularity which can be cured under S. 537. AIR (V 19) 1932 Bom 610: 34 Bom LR 901: 33 Cr LJ 733: 139 Ind Cas 281 (DB).

——S. 537 — **Investigation.**

Failure properly to conduct an investigation into an offence cannot vitiate a trial which is started on the final report after the investigation. If there is anything wrong in the conduct of the investigation, any suspicion as to the truth of the prosecution case engendered by the irregularity would be considered by the Court in determining the truth of the charge. AIR (V 18) 1931 Pat 150: 32 Cr LJ 638: 12 PLT 393: 131 Ind Cas 17 (DB).

——S. 537 — **Investigation by Sub-Inspector where should have been by an Inspector — Irregularity is curable.**

A conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which results in his trial. That is determined mainly by the evidence that is given at the trial and considered; and the question whether that evidence has, in the first place, been elicited by an Inspector or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent that the theory is that the higher the rank of the police officer investigating, the more careful and unimpeachable his enquiry is likely to be. Therefore, an irregularity occasioned by a Sub-Inspector investigating into an offence, while investigation should have been made by an Inspector, is curable by S. 537. AIR (V 15) 1928 Bom 162: 52 Bom 238:

30 Bom LR 392: 29 Cr LJ 551: 109 Ind Cas 487: 10 AI Cr R 308 (DB).

——S. 537 — Where the discovery of the articles showing the guilt of the accused and found at the search, is proved by direct evidence any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction. AIR (V 11) 1924 All 214: 81 Ind Cas 615: 46 All 86: 21 ALJ 856: 4 LRA Cr 252: 25 Cr LJ 967.

**8. Irregularity in complaints.**

——Ss. 537, 195 — Civil Court Amin obstructed in execution of his duty — Complaint by Amin to Police — Magistrate convicting accused under S. 186, IPC on police report—Section 195, Criminal P.C., is complied with — At most complaint is irregular within S. 537 and conviction cannot be set aside unless substantial injustice has been done. AIR (V 30) 1943 All 6: 1942 AWR 346 (1): 1942 ALJ 608: 44 Cr LJ 165: ILR (1943) All 29: 204 Ind Cas 243.

——S. 537 — High Court directing Deputy Registrar to make complaint — No order specially authorising such officer — Held, the mere fact that authority in writing was not given is immaterial; the irregularity, if any, cannot, in view of S. 537, Criminal P. C. impair the validity of the decision. AIR (V 27) 1940 Nag 410: 1940 NLJ 165: 41 Cr LJ 697: 188 Ind Cas 885.

**——S. 537 — Irregularity in complaint by one Court to another, if curable.**

Although it is no longer possible to apply the provisions of S. 537 in the case of want of sanction required by S. 195, Criminal P. C., an irregularity in a complaint made by one Court to another is curable under sub-s. (a), since a complaint made by a Court is, for the purposes of S. 537, Criminal P. C., in no wise different from a complaint made by a private individual. AIR (V 25) 1938 Nag 487: 1938 NLJ 285: 40 Cr LJ 388: ILR (1939) Nag 338: 180 Ind Cas 577.

**——S. 537 — Heading of complaint irregular.**

When S. 195, Criminal P. C., was amended, S. 537 (b), Criminal P. C., became unnecessary and was omitted. The "irregularity in proceedings taken under S. 476" meant irregularity in the actual proceedings such as in the inquiry mentioned in the section and did not apply to the irregularity in the complaint itself which was the result of such proceedings. Therefore, S. 537 (a) applies to a complaint under S. 476, and hence the pure technical irregularity in the heading of such document may be cured. AIR (V 21) 1934 Lah 981: 16 L 153: 36 Cr LJ 402: 37 PLR 534: 153 Ind Cas 547.

**——S. 537 (a) — Defective complaint — Penal Code S. 124-A.**

There is no informality in a complaint for sedition which does not set out the dates of speeches or the alleged seditious words and even if a complaint is defective on that account, it is at most an irregularity within S. 537 (a) and a conviction cannot be set aside on that ground unless it had occasioned a failure of justice. (1909) 32 Mad 3: 5 MLT 1: 9 Cr LJ 108: 1 Ind Cas 22.

**9. Irregularities not cured by S. 537.**

**(a) Absence of complaint.**
See also Criminal P. C. Ss. 195, 199, 476.
**(b) Absence of evidence.**
**(c) Disregard of mandatory provisions.**
**(d) Other instances.**

**(a) Absence of complaint.**
See also Criminal P. C., Ss. 195, 199, 476.

——S. 537—Section cures the irregularity created by an absence of a complaint by local authority under S. 10, Bihar and Orissa Prevention of Adulteration Act, in proceedings under the Act. AIR (V 23) 1936 Pat 636 : 3 PR 137 : 17 PLT 953 : 38 Cr LJ 192 : 166 Ind Cas 206.

——S. 537— Absence of complaint under S. 195 for prosecution of accused under S. 185, I. P. C., is fatal to the prosecution and the conviction cannot be sustained. The defect is not a mere irregularity which is curable under S. 537. AIR (V 21) 1934 Oudh 186: 9 Luck 594: 11 OWN 473: 35 Cr LJ 789: 148 Ind Cas 784.

——S. 537 — The want of a complaint for a particular offence is quite a different thing from an error, omission or irregularity in the complaint. It affects the jurisdiction of the Court and the legality of the trial and the case does not fall within the provisions of S. 537. AIR (V 17) 1930 Rang 153 : 126 Ind Cas 530: 31 Cr LJ 1060: 1930 Cr C 585.

——S. 537 — What S. 537 provides is an error, omission or irregularity in the complaint and not the entire absence of the complaint without which no cognizance of the offence can be taken under the law. AIR (V 16) 1929 Cal 172: 116 Ind Cas 638: 33 CWN 285: 49 CLJ 342: 30 Cr LJ 658: 56 Cal 824: 13 AI Cr R 103 (DB).

——S. 537 — The absence of a complaint in writing as required by S. 195 (1), of the public servant concerned or his superior makes the Court a Court not of competent jurisdiction and, therefore renders valueless the plea of previous acquittal as a bar to his re-trial on the same facts after proper complaint is made. S. 537 (a) does not apply as in the first trial there cannot be said to be an error, omission or irregularity in a complaint but an absence of complaint altogether. AIR (V 14) 1927 Sind 10: 97 Ind Cas 417: 27 Cr LJ 1105: 21 SLR 1 (DB).

——S. 537 — The absence of sanction or complaint under S. 195, Cr. P. Code, vitiates the whole proceedings and the defect is not cured by S. 537, which applies to errors of procedure and not to substantive errors of law. Where a trial is contrary to law it is no trial at all and disobedience to an express provision of law as to the mode of the trial is not an irregularity which can be cured by S. 537, Cr. P. Code. It is an illegality which vitiates the whole trial. Absence of complaint or irregularity in complaint makes whole proceedings void ab initio. AIR (V 13) 1926 Oudh 485: 96 Ind Cas 521: 1 Luck 523: 3 OWN 614: 27 Cr LJ 969: 7 AICrR 45.

——S. 537 — Where the complainant was examined on oath by the Magistrate when cognizance was taken of the offence, absence of a complaint in writing would only amount to an error, omission or irregularity as contemplated by S. 537 of the Code. AIR (V 11) 1924 Pat 691 : 81 Ind Cas 620 : 5 PLT 505 : 1924 PHCC 18 : 25 Cr LJ 972.

**(b) Absence of evidence.**

——S. 537 — The absence of proper proof or the absence of evidence to prove a fact cannot be termed an irregularity. It goes to the root of the matter and the defect cannot be cured by S. 537, Cr. P. Code. S. 537 cannot be applied to prove what upon the record is not proved at all. AIR (V 34) 1947 Sind 122: ILR (1946) Kar 79: 228 Ind Cas 157 : 48 Cr LJ 74.

**(c) Disregard of mandatory provisions.**

**——S. 537 — Adjournment refused on application under S. 526.**

When the accused intimates his intention of applying under S. 526, it acts as automatic stay. The Magistrate must adjourn the case. But Sessions Judge is in a different position. If in his opinion — though wrongly formed — the application could have been made earlier, he can refuse ad-

journment. In such a case, it cannot be said that he has infringed any mandatory provision of law or committed an error which cannot be cured by S. 537. Hence the wrong opinion and consequent refusal, if it has not occasioned failure of justice, cannot vitiate the trial. AIR (V 31) 1944 Mad 78 : 56 MLW 640 : 1943 MWN 706 (2) : (1943) 2 MLJ 524 : 45 Cr LJ 368 : 211 Ind Cas 350 (DB).

——S. 537 — Where the provisions of S. 526 (8) were infringed by not granting adjournment, the trial is illegal. AIR (V 29) 1942 Oudh 429 : 1942 OWN 448 : 44 Cr LJ 97 : 1942 AWR (CC) 290 :15 RO 226 : 203 Ind Cas 524.

——S. 537 — **Non-compliance with S. 162.**

Failure to follow the mandatory provisions of S. 162, vitiates the trial and the accused is entitled to have a re-trial. In such a case, the provisions of S. 537 cannot be called into aid by the prosecution because unless the statements of the witnesses before the Police have been furnished to the accused or have been seen by the Court itself, the High Court is unable to say that the accused has not been prejudiced and where there is a violation of the plain directions in the statute, the High Court is bound to assume prejudice to the accused. AIR (V 26) 1939 Pat 174: 17 Pat 622: 20 PLT 70 : 5 BR 501 : 40 Cr LJ 509 : 180 Ind Cas 845 (DB).

**——S. 537 — Refusal of document asked for to which accused are entitled — Counsel prevented from entering into matters in issue between accused and prosecution.**

The refusal of documents for which one or other of the accused persons asked, and which they are entitled to see, and preventing counsel for one of the accused who was charged as an accessory after the fact, from entering into matters which were plainly in issue between himself and the prosecution, are grave defects which go to vitiate the trial. AIR (V 23) 1936 PC 242 : 44 LW 253 : 1936 ALJ 869 : 37 Cr LJ 914 : 40 CWN 1164 : 1936 MW N 889 : 38 Bom LR 1101 : 1936 AWR 741 : 163 Ind Cas 681 (PC).

**——S. 537 — Non-compliance with S. 15, U. P. Prevention of Adulteration Act.**

The provisions of S. 15, U. P. Prevention of Adulteration Act, are mandatory. Omission to state names of the prosecutor or the particulars of the offence in the summons or a delay in filing complaint or hearing of the case within less than seven days from the date of the service of the summons would certainly be an irregularity but that is not enough to make conviction illegal. These provisions are subject to S. 537. The error, omission or the irregularity must have occasioned failure of justice. (Accused, held was not prejudiced.) AIR (V 22) 1935 All 219 (220) : 36 Cr LJ 68 (2) : 4 AWR 940 : 1934 ALJ 1152 : 57 All 400 : 152 Ind Cas 367.

——S. 537 — Failure to comply with a mandatory provision of law is not necessarily an illegality that vitiates the proceedings, the real question being whether the failure has been prejudicial to the accused. AIR (V 16) 1929 Mad 544 : 1929 MWN 506 : 116 Ind Cas 366 : 30 Cr LJ 623 : 2 M Cr C 189 : 13 AI Cr R 45 : 1928 Cr C 25.

**——S. 537 — Not a curable irregularity.**

Before a complaint under S. 476 is made, it is necessary that a Court which thinks that an offence mentioned in S. 195, sub-S. (1), Cl. (b) or Cl. (c) has been committed should record a finding to that effect and, after recording such finding, may make a complaint. The provision to record a finding is not merely directory but it is mandatory. When the section of the Code requires a certain thing to be done, it is not open to the Court to say that it is optional for a Court to do it or not, and therefore, failure by the Court to record a finding is not irregularity curable by S. 537. AIR (V 15) 1928 Mad 783 : 110 Ind Cas 588 : 1928 MWN 229 : 10 AICrR 378 : 1 MCrC 126 : 29 Cr LJ 372.

——S. 537 — Wort, J. — S. 537 deals with certain specified irregularities and does not mention nor in any way affects matters of the construction of the Courts. It deals with irregular proceedings of competent Courts and not the constitution of the Court itself. AIR (V 15) 1928 Pat 1 : 7 Pat 61 : 8 PLT 800 : 28 Cr LJ 881 : 104 Ind Cas 897 (FB).

**——S. 537 — Not curable.**

S. 537 applies only to mere errors of procedure arising out of mere inadvertence, and not to substantive errors of law, and that section does not apply to cases of disregard or disobedience of mandatory provisions of the Code. The section has not the effect of curing material irregularities and absolute illegalities. The failure of a Magistrate to follow the procedure enjoined by S. 137 (1) vitiates his order, and is not a mere irregularity of the nature contemplated by S. 537 (a); 25 Mad 61, Foll. AIR (V 14) 1927 All 350: 100 Ind Cas 371 : 25 ALJ 377 : 8 LRACr 59 : 28 Cr LJ 291 : 7 AICrR 391 : 49 All 475.

——S. 537 — The provision contained in S. 256 is not mandatory, but merely directory and the irregularity can be cured under S. 537, provided that there has been no consequent failure of justice and where it is clear that the omission to record the reasons has not caused any prejudice to the accused, the trial is not illegal. AIR (V 13) 1926 Lah 155 : 6 Lah 554 : 27 Cr LJ 408 : 93 Ind Cas 72 : 27 PLR 85.

——S. 537 — The tests to be applied in considering whether a particular infringement of the provision of the Cr. P. Code is one which does or does not come within the purview of S. 537 are: Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? If the error is of such a nature, the proceedings are vitiated in their very inception and S. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceedings.

Per Doyle, J. — Mandatory directions may be either imperative or directory. They deal either with what shall or with what shall not be done. It is possible to have degrees of disobedience of positive but of prohibitory directions. Prohibitory directions offer very little difficulty since disobedience amounts nearly always to an illegality. In considering positive directions it must be remembered that the distinction between simple irregularities and illegalities is one not of degree, but of essence. If therefore the disobedience of a mandatory injunction is measurable, so to speak, quantitatively, and, if a minor infringement of that mandatory injunction which does not go to the root of a trial may be admitted, a general infringement of the same nature constitutes an irregularity which may necessitate the annulment of the particular trial, but is not an illegality incurable under S. 537 of the Code of Criminal Procedure. AIR (V 13) 1926 Rang 53: 94 Ind Cas 717: 4 Bur LJ 213: 27 Cr LJ 669 (DB).

**——S. 537 — Defects in procedure even in contravention of positive enactments are curable.**

A positive enactment by the Code that a certain trial shall not take place is obviously a very

different thing from a positive enactment that in the course of such a trial certain detailed procedure shall be followed. In the one case an infringement of the enactment amounts to an assumption of jurisdiction and vitiates the trial from the very beginning. In the other case an infringement merely amounts to an error, omission or irregularity in the procedure adopted in the course of the trial. S. 537 of the Code aims at curing infringements of the latter type. If the error is of the former nature, the proceedings are vitiated in their very inception, and S. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings. AIR (Vol 12) 1925 Rang 258 : 89 Ind Cas 312 : 26 Cr LJ 1336 : 3 Rang 139.

**——Ss. 537 and 476 — Mode of trial — Irregularity.**

A direct disobedience of an express provision of the Cr. P. C. as to a mode of trial cannot be regarded as mere irregularity and in case of this nature the question of prejudice does not arise. AIR (Vol 7) 1920 Pat 125 : (1920) PHCC 61 : 21 Cr LJ 29 : 54 Ind Cas 173.

**——Ss. 537 and 233 — Mode of trial — Joint trial — Scribe and attesting witness of alleged forged document not to be jointly tried for giving false evidence.**

The joint trial of the scribe and attesting witnesses of an alleged forged document for giving false evidence to support the document is illegal. A definite rule of law as one in S. 233, cannot be disregarded to accelerate or facilitate the disposal of a case against several accused. AIR (Vol 3) 1916 Nag 73 : 13 NLR 35 : 18 Cr LJ 339 : 38 Ind Cas 723.

**——S. 537 — Irregularity as to mode of trial.**

The disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity. (1908) 29 M 569 (573).

**——S. 537 — Grave offence — Charge for minor offence — Illegality.**

A Magistrate is bound to proceed and regulate his proceedings at the trial as for the offence made up of the facts complained of, if on the examination of the complainant there is no reason to believe that the complaint is exaggerated or false and process is issued for the attendance of the accused. When a magistrate deliberately disregards the offence actually complained of, it becomes no question of mere irregularity, but his proceedings are absolutely void under the provisions of S. 539 of the Code of Criminal Procedure. (1900) 5 CWN 252 (253) (DB).

**(d) Other instances.**

——S. 537 — Magistrate refusing to grant bail — Sessions Judge in appeal while granting bail making strong remarks against Magistrate — Magistrate, while proceeding with case commenting on those remarks — Sessions Judge ordering their expunction — Appeal by accused to Sessions Judge — Sessions Judge ordering expunction of Magistrate's comments :

Held, that the Sessions Judge's order expunging the remarks from the Magistrate's judgment was an illegality which raised an irrebutable presumption that the accused must have been prejudiced thereby and, which therefore, could not be cured under S. 537, Criminal P. C. AIR (V 28) 1941 Rang 324 : 43 Cr LJ 373 : 1941 Rang LR 566 : 198 Ind Cas 455 (DB).

**——S. 537 — Accused not informed that he was entitled to get case transferred — Subsequent proceedings, validity.**

The failure of the Magistrate to inform the accused that he is entitled to have the case transferred to another Magistrate renders all subsequent proceedings before the Magistrate void and this is an illegality which is not curable by S. 537. AIR (Vol 26) 1939 Lah 479 : 42 PLR 51 : 41 Cr LJ 65 : ILR (1940) Lah 102 : 184 Ind Cas 680 (DB).

——S. 537 — Jurisdiction of village Panchayat to entertain complaint under S. 22, Cattle Trespass Act — Complaint filed within 10 days as required by S. 20 — But case transferred to proper Court by which time the limitation expired :

Held, the complaint is out of time and S. 537, Criminal P. C., cannot cure the defect. AIR (V 25) 1938 Oudh 183 : 1938 OWN 596 : 39 Cr LJ 827 : 175 Ind Cas 662 (DB).

**——S. 537 — Complaint under S. 199.**

In the case of prosecution under S. 498, I. P.C., in the absence of evidence to show that leave was obtained from Court under S. 199, Criminal P. C., allowing some one else to make a complaint under S. 498, Penal Code, in the absence of the girl's husband, the Court has no jurisdiction to try the case. The irregularity cannot be cured by S. 537. AIR (Vol 20) 1933 Cal 880 : 34 Cr LJ 1092 : 38 CWN 113 : 145 Ind Cas 874 (2) (DB).

——Ss. 537, 195(1)(b)—Where it was alleged in a complaint that the accused fabricated a pro-note and induced A to file a suit against B and obtained a fraudulent decree with the object of getting the house of B, and the accused was convicted under Ss. 467 and 109, I. P. C. :

Held, that the complaint disclosed an offence under S. 193, I. P. C., of intentionally fabricating false evidence for the purpose of being used in a stage of judicial proceedings, and a Court confronted with such a complaint by a private person and not preferred under S. 476, Criminal P. C., had no jurisdiction to take cognizance of it and the conviction was, therefore, illegal.

Where a Court proceeds upon a complaint which is not legal complaint at all, the error cannot be cured under S. 537, Criminal P. C., nor has S. 532 any relevancy to such a case. AIR (Vol 19) 1932 Mad 253 : 35 LW 180 : 1931 MWN 1314 : 55 Mad 343: 33 Cr LJ 361: 62 MLJ 735: 136 Ind Cas 779 (DB).

——S. 537—Under the present Criminal Procedure Code, the right of prosecution to reply depends on the accused adducing oral evidence in defence after close of prosecution case and the mere fact of their having proved certain documents through a prosecution witness in cross-examination does not deprive the defence of their right to reply. But an erroneous decision as to the right of reply cannot be treated as an illegality or such a substantial irregularity as to vitiate the whole proceedings and to call for retrial. AIR (Vol 18) 1931 Lah 534 : 32 PLR 435 : 32 Cr LJ 944 : 13 Lah 172 : 132 Ind Cas 692 (DB).

——S. 537 — The omission to give the substance of the charge in an order under S. 112 is not a mere irregularity when it is shown that the objection was taken before the trial Court and when it is established that there has been a failure of justice. AIR (Vol 17) 1930 Mad 859 : 1930 MWN 698 : 32 MLW 320 : 1930 Cr C 1035 : 127 Ind Cas 652.

——S. 537 — S. 537 does not cover cases of the illegality of the trial. A Magistrate held that certain accused could not be tried jointly and professing to hold separate charges he framed separate charges. However, main evidence had been already recorded and he disposed of the cases by writing one judgment.

Held, that procedure amounted to an illegality which could not be cured under S. 537. (1928) 10 AI Cr R 319 : 29 Cr LJ 619 : 109 Ind Cas 811 (Lah).

——S. 537 — **Local inspection.**

If a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. AIR (Vol 14) 1927 All 350 : 25 ALJ 377 : 28 Cr LJ 291 : 8 LRA Cr 59 : 7 AI Cr R 391 : 49 All 475 : 100 Ind Cas 371.

——S. 537 — Irregularities in proceedings taken under S. 476 are not condoned under the law as it stands after amendment. AIR (Vol 14) 1927 Oudh 326 : 4 OWN 640 : 28 Cr LJ 681 : 8 AI Cr R 400 : 103 Ind Cas 409 (DB).

——S. 537 — The action of a Magistrate in not recording the substance of the information he had received does not amount to a mere irregularity which would be covered by S. 537. AIR (Vol 13) 1926 All 759 : 49 All 5 : 24 ALJ 908 : 7 LRA Cr 165 : 28 Cr LJ 9 : 99 Ind Cas 41.

——S. 537 — **Failure to record memorandum of inspection — Irregularity is covered by S. 537.**

There is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings, irrespective of any question of prejudice Court ought to be careful to comply with the provisions of S. 539-B. Failure by Magistrate to make a record of any relevant facts that he observed at the inspection under S. 539-B is an irregularity falling within S. 537. AIR 1924 Cal 1035; 52 Cal 148, Not foll. AIR (Vol 13) 1926 Bom 534 : 50 Bom 680 : 28 Bom LR 1026 : 27 Cr LJ 1151 : 97 Ind Cas 671 (DB).

——S. 537 — Where one of two accused is discharged and the other is subsequently acquitted and on the latter occasion the complainant is ordered to show cause and pay compensation to both accused, procedure is illegal under S. 250 of the Code as amended — The defect is incurable under S. 537. AIR (Vol 12) 1925 Cal 264 : 29 CWN 127 : 26 Cr LJ 449 : 85 Ind Cas 129 (DB).

——S. 537 — **Infringement of statute is not covered by S. 537.**

Section 537 of the Code does not apply to an infringement of statutory requirement. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. Where two cross cases were tried together and the accused in each case replied that the prosecution evidence in one be considered as defence evidence in the other and it was so considered.

Held, that the procedure was illegal and this is not curable by S. 537. AIR (Vol 11) 1924 Lah 104 : 4 Lah 376 : 25 Cr LJ 68 : 6 Lah LJ 103 : 75 Ind Cas 980 (DB).

——S. 537 — The simultaneous trial of two separate cases is an illegality not curable under S. 537. Case-law Ref. to. AIR (Vol 8) 1921 LB 51 : 11 LBR 73 : 23 Cr LJ 49 : 64 Ind Cas 833.

——S. 537 — **Defective complaint — Complaint by unauthorised person — If the defect cured by section.**

Section 537, Criminal P. C., only covers errors, omissions or irregularities in a complaint but does not refer to a total absence of complaint. A complaint by an unauthorised person is no complaint at all. Conviction if based on such complaint is bad and defect is not curable under S. 537, Cr. P. Code. AIR (Vol 4) 1917 Lah 233 : 4 PR Cr 1917 : 18 Cr LJ 511 : 39 Ind Cas 479.

——Ss. 537 and 233 — **Mode of trial — Joint trial —Separate calendar cases — Illegality.**

Where the Magistrate framed separate charges and also numbered them as distinct cases, but when the witnesses came to be cross-examined he lost sight of the necessity of keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. Held, that the trial was illegal and the illegality was not cured by S. 537, Cr. P. C. AIR (Vol 3) 1916 Mad 110 : 39 Mad 527 : 29 MLJ 101 : 18 MLT 95 : (1915) MWN 504 : 16 Cr LJ 593 : 30 Ind Cas 145 (FB).

——S. 537 — **Defective charge.**

The addition of a second charge by a Sessions Court in respect of a matter not covered by the indictment is not a mere irregularity but an illegality and is not covered by S. 537, Cr. P. Code. 20 PWR 1909 Cr: 11 Cr LJ 131: 4 Ind Cas 993.

## 10. Omissions.

(a) **Sanction to prosecute.**
See also Cr. P. C., Ss. 195 & 476.
(b) **Examination of accused.**
(c) **Non-compliance with S. 145, Criminal P. C.**
(d) **Examination of complainant.**
See also Criminal P. C., S. 200.
(e) **To summon required number of jurors or assessors.**
(f) **Particulars in charge.**
(g) **To write judgment before pronouncing.**
(h) **Search warrants.**
(i) **Other instances.**
(a) **Sanction to prosecute.**
See also Cr. P. C., Ss. 195 and 476.
(i) **Offences under I. P. C.**
(ii) **Offences under other Acts.**
(i) **Offences under I. P. C.**

——S. 537 — **Scope — Contravention of S. 197 — Prosecution charge under S. 295-A, I. P. Code — Failure to obtain sanction of Provincial Government — Effect on proceedings — Conviction under S. 298, I. P. Code — Defect, if cured.**

A prosecution under S. 295-A, I. P. Code, cannot be instituted without the sanction of the Provincial Government, as required by S. 197, Cr. P. Code, which is a condition precedent to the institution of the same. When there is no such sanction there is a defect in jurisdiction of the Court which can never be cured under S. 537, Cr. P. Code. The proceedings are wholly illegal from the start for want of sanction, and the fact that the accused is convicted not of an offence under S. 295-A, but under S. 298, I. P. Code (which does not require sanction) does not affect the question; and the conviction is therefore illegal. AIR (Vol 38) 1951 Pat 513.

——S. 537 — **Certificate under S. 188 — Absence of.**

The question of certificate under S. 188 goes to the root of the case and S. 537 cannot be used to cure a clear illegality or a clear transgression of the mandatory provisions of law.

The absence of the certificate of the Political Agent or the British envoy by S. 188 is an absolute bar to the trial of a case and the defect cannot be cured under S. 537. AIR (Vol 32) 1945 Oudh 231 : 1945 OWN (CC) 115 : 1945 AWR (CC) 74 : 20 Luck 370 : 46 Cr LJ 650 : 220 Ind Cas 38.

——S. 537 — The want of a sanction to prosecute is not a reason for reversing a conviction. AIR (Vol 10) 1923 Oudh 4 : 9 OLJ 342 : 23 Cr LJ 641 : 26 OC 44 : 69 Ind Cas 81.

——S. 537 — Where there is no separate order as contemplated by S. 476 for sanction to prosecute, but the order is embodied in the complaint, it is a trifling irregularity which may be overlooked under

S. 537. AIR (Vol 14) 1927 Lah 379 : 28 Cr LJ 410 : 101 Ind Cas 186.

——S. 537 — The provisions of S. 195 (c) read with S. 476 are imperative and non-compliance with them is an illegality not curable by S. 537. AIR (Vol 14) 1927 Nag 184: 7 AI Cr R 521: 21 Cr LJ 388 : 100 Ind Cas 1044.

——S. 537 — A sanction under S. 195 omitting to specify the particulars such as the Court or other place in which, and the occasion on which the offence was committed, is liable to be set aside in revision. The defect cannot be cured by S. 537. AIR (Vol 12) 1925 Lah 139 : 25 Cr LJ 721 : 81 Ind Cas 209.

——S. 537 — Conviction under S. 474 at a trial in which the charge was framed under S. 471 is irregular for want of sanction and the trial is vitiated as want of sanction is not a mere technical irregularity curable under S. 537, Cr. P. Code. AIR (Vol 12) 1925 Oudh 158 : 25 Cr LJ 1162 : 11 OLJ 640 : 81 Ind Cas 986 (DB).

——S. 537 — Sanction of the trying Magistrate or of the District Magistrate must be obtained before launching a prosecution under S. 182, I. P. C., in cases where a Police enquiry is followed by a trial in Court, but the want of sanction is an irregularity under S. 537 and does not vitiate the trial unless it has occasioned a failure of justice. AIR (Vol 10) 1923 Rang 135 : 24 Cr LJ 755 : 1 Bur LJ 258 : 74 Ind Cas 259.

——S. 537 — Want of sanction under S. 195 does not bar interference by High Court under S. 537. AIR (Vol 9) 1922 Bom 368 : 24 Bom LR 484 : 47 Bom 31 : 25 Cr LJ 315 : 76 Ind Cas 1035 (DB).

**——S. 537 — Lapse of sanction under S. 195 — S. 537 (b) applies.**

Section 537 (b) applies just as much to a case in which sanction has been granted under S. 195 and the sanction has lapsed owing to the period of six months having expired before the commencement of the proceedings as it does to a case in which no sanction has been granted at all. Consequently where a person has been sentenced upon a conviction for an offence mentioned in S. 195 the sentence is not liable to be reversed or altered on appeal, or revision, on the ground that the sanction required by S. 195 was not in force at the time when the prosecution was instituted unless it is established that this has in fact occasioned a failure of justice within the meaning of S. 537. 22 Cal 176, Overruled. AIR (Vol 8) 1921 Cal 38 : 23 Cr LJ 310 : 48 Cal 867 : 66 Ind Cas 662 (FB).

——S. 537 — An order of commitment to the Sessions Court cannot be quashed on the ground that the Magistrate took cognisance of the complaint without the sanction required by Ss. 195 and 197 of the Cr. P. C. Sections 531 and 537 of the Cr. P. C., apply to such cases and their applicability is not affected by the fact that objection to want of sanction was taken at the earliest possible opportunity. 37 All 383 and 35 I C 826, Diss.

Semble. — A Sessions Court has power to acquit the accused in a case committed to it on the ground of want of sanction. AIR (Vol 6) 1919 Mad 190 : 35 MLJ 259 : 20 Cr LJ 514 : 51 Ind Cas 674 (DB).

——S. 537 — A Sessions Judge should not, on appeal, set aside a conviction for an offence under S. 182, I. P. C., on the ground that the facts alleged disclosed an offence under S. 211, I. P. C., for which no sanction as required by the Code was taken. AIR (Vol 2) 1915 All 119 : 37 All 110 : 13 ALJ 53 : 16 Cr LJ 159 : 27 Ind Cas 223 (DB).

**——S. 537 (b) — Defective sanction — S. 471, I. P. C. — Criminal Court proceeding without sanction of Civil Court — Effect.**

Per Hayward, J. — A Court proceeding to try an offence under S. 471, I. P. C., without the necessary sanction of Civil Court under S. 195 Cr. P. C., would act illegally and without jurisdiction even though a superior Court might condone such illegality subsequently under S. 537 (b), Cr. P. C. Per Batchelor J. (Obiter.) — If the trial of an offence under S. 471, I. P. C., had proceeded without a sanction under S. 195, Cr. P. C., and resulted in a conviction, S. 537 (b), Cr. P. C., comes to the aid and cures the irregularity in procedure and the conviction is rendered valid notwithstanding want of sanction. A I R (Vol 2) 1915 Bom 203 : 40 Bom 97 : 17 Bom LR 881 : 16 Cr LJ 761 : 31 Ind Cas 361 (DB).

——S. 537 — Where a person was convicted under S. 211 of the Penal Code without any sanction under S. 195, Cr. P. C., and the accused took no objection as to want of sanction before the convicting Magistrate the conviction cannot be set aside for want of sanction as the objection was not raised in the early stages and the case is covered by S. 537 which applies not only to irregularities but errors and omissions as well. (1913) 11 ALJ 809 : 14 Cr LJ 607 : 21 Ind Cas 479.

——S. 537 — The absence of sanction, even when objection was taken before the first Court, does not vitiate a conviction under S. 211 of the I. P. C., unless it has occasioned a failure of justice. (1911) 10 MLT 82 : 21 MLJ 753 : 12 Cr LJ 406 : 11 Ind Cas 590 (DB).

**——Ss. 537 (b), 195 — Irregularity — Want of sanction — Cure.**

Want of sanction under S. 195, Cr. P. C., is no ground for setting aside a conviction after trial. Secus : — With regard to want of sanction under Ss. 132, 196, 197, Cr. P. C., the words "subject to the provisions hereinbefore contained" in S. 537 cannot be construed in such a way as to nullify the express provisions contained in the latter part of the section that no sentence passed by a Court of competent jurisdiction shall be reversed on appeal "for want of any sanction required by S. 195". (1907) 17 M L J 533 : 31 Mad 80 (81) (DB).

**——Ss. 537, 195 (4) — Complaint — Absence of complaint or sanction — Defect of jurisdiction — Penal Code, S. 186.**

One M. S. was sent for trial before a Deputy Magistrate charged with offences under Ss. 353 and 147, I. P. C. The case had been taken up by the Police in consequence of a letter addressed to them by a civil Court making certain allegations against the accused. The result of the trial was that M. S. was convicted of an offence under S. 116, I. P. C. Held, that the conviction was illegal inasmuch as the complaint or sanction required by S. 195, Cr. P. C., was wanting and the defect was not cured by S. 537 of the Code. (1904) AWN 266 (266).

**——Ss. 537, 195 (6) — Proceedings initiated more than six months after date of sanction.**

Section 537 of the Code of Criminal Procedure applies as much to a case in which a sanction has been granted and has become ineffective under cl. (6) of S. 195 as to a case in which no sanction has been graned at all, that is to say, where a conviction has been arrived at, and a sentence passed at a trial :

Held, in virtue of a sanction more than six months old, such conviction and sentence will not be set aside unless it is shown that there has been a failure of justice. (1901) AWN 151 (153).

——S. 537 — **Want of sanction — Irregularity.**

Want of sanction for prosecution is only an irregularity, and unless it has in fact occasioned a failure of justice, a conviction should not be set aside merely on account of such want of sanction. (1900) 5 CWN 291 (293) : 28 Cal 217 (DB).

(ii) **Offences under other Acts.**

——S. 537 — **Government of India Act, S. 270.**

Governor's 'consent' under S. 270, Government of India Act, 1935, is an essential pre-requisite to the competency of the Court to entertain proceedings. It is the very foundation of the Court's jurisdiction and its absence renders the entire proceedings void ab initio. Such an illegality cannot be cured under S. 537, Criminal P. C., even when no prejudice has been shown to have been caused. Where, therefore, the initiation of proceedings was illegal, subsequent production of the consent, even though it was before the commencement of the trial de novo, in another Court, of the case cannot validate what was invalid at its inception. AIR (Vol 26) 1939 Lah 479 (483) : 41 Cr LJ 65 : 42 PLR 51 : ILR (1940) Lah 102 : 184 Ind Cas 680 (DB).

——S. 537 — Prosecution under S. 83, Registration Act, without previous sanction is illegal — Subsequent sanction will not cure the illegality — Neither S. 532 nor S. 537 will cure such defect. AIR (Vol 21) 1934 All 963 : 57 All 412 : 1934 ALJ 965 : 36 Cr LJ 137 : 4 AWR 524 : 152 Ind Cas 667 (FB).

——S. 537 — **Prosecution under Stamp Act.**

For a prosecution for an offence under Ss. 30 and 65 of the Stamp Act, the sanction of the Collector is indispensable and subsequent according of sanction cannot validate institution of such proceedings without sanction nor is the defect curable by S. 537, Cr. P. Code. AIR (Vol 14) 1927 Nag 202 : 10 NLJ 21 : 9 AI Cr R 2 : 28 Cr LJ 780 : 104 Ind Cas 108.

——S. 537 — The irregularity in the sanction as required by S. 314, U. P. Municipalities Act, cannot be cured by S. 537, Cr. P. Code, which is not applicable to the sanction under this section. AIR (Vol 8) 1921 All 162 : 19 ALJ 942 : 23 Cr LJ 95 : 65 Ind Cas 447.

——S. 537 — **Subsequent obtaining.**

A conviction under S. 19 (f) of the Arms Act without the sanction of the District Magistrate is not validated by the subsequent obtaining of the sanction. (1909) 5 MLT 162 : 11 Cr LJ 190 : 4 Ind Cas 1107 (DB).

(b) **Examination of accused.**

——S. 537 — Curability under — Failure to question accused after examination of Court witness — No failure of justice. AIR (Vol 37) 1950 Mad 453 : (1950) 1 MLJ 329.

——S. 537 — Where the accused plead guilty and petitions are presented on their behalf embodying the plea, the action of the Magistrate in questioning them as to whether the plea was voluntary and taking the opinion of the assessors, is not illegal; and even if there is an irregularity, it was cured by S. 537, Criminal P. C., as there was no failure of justice.

There is no implication that when an accused, in the course of the trial, withdraws his claim to be tried and pleads guilty, the Court is not entitled to record the plea and either accept it or continue the trial. AIR (Vol 21) 1934 Pat 330 : 16 PLT 256 : 35 Cr LJ 1322 : 151 Ind Cas 393 (DB).

——S. 537 — Where an accused person's statement is taken after the prosecution witnesses are examined and before their cross-examination and no further examination of the accused is made under S. 342, Criminal P. C., the omission cannot be cured under S. 537, and although no prejudice may have been caused to the accused by such an omission, nevertheless such an omission vitiates the trial. (1931) 32 Cr LJ 623 (623) : 130 Ind Cas 845 (1) (Cal).

——S. 537 — The non-compliance with the mandatory provisions of S. 342 is an illegality vitiating the trial and not a mere irregularity that can be cured by S. 537. AIR (Vol 18) 1931 Mad 241 : 1930 MWN 914.

——S. 537 — **Non-compliance with S. 256 — Trial vitiated.**

The provision that the accused should be asked whether he wishes to cross-examine the prosecution witnesses on a date subsequent to that upon which he is called upon to plead to the charge, inserted in S. 256 by the amending Act of 1923 by words "at the commencement of the next hearing", is obviously intended to give the accused an interval of time to think out the lines of his defence before he is called upon to inform the Court how he intends to proceed and an omission of this new procedure is an irregularity which vitiates the whole trial. AIR (Vol 17) 1930 Nag 255 : 31 Cr LJ 705 : 1930 Cr C 831 : 124 Ind Cas 619.

——S. 537 — A number of witnesses for the prosecution were examined and then the accused himself was examined. At the next hearing two witnesses for the Crown, who had not previously been examined, were examined and after that, a considerable number of the other prosecution witnesses were recalled and cross-examined. Subsequently the defence witnesses were examined but the accused was not examined again and a judgment was passed against him.

Held, that the provisions of S. 342 were not obeyed as that section would require the accused to be re-examined when the prosecution witnesses had been recalled and cross-examined and to be further examined after two fresh Crown witnesses had been examined.

Held further, that such violation if it did not lead to a failure of justice would not vitiate the proceedings and is a mere irregularity which could be cured under S. 537. AIR 1922 Mad 512; AIR 1923 Cal 196; AIR 1923 Cal 668; AIR 1923 Cal 470 and AIR 1924 Cal 975, Diss. from. AIR (Vol 16) 1929 Rang 331 : 7 Rang 470 : 1929 Cr C 507 : 30 Cr LJ 1164 : 120 Ind Cas 230.

——S. 537 — The accused should be examined just before he enters on to his defence and produces his witnesses, i.e., after all the prosecution witnesses have been completely done with and any irregularity in omitting to examine him at proper time will come within the purview of S. 537 and will call for interference, if it has occasioned a failure of justice. AIR (Vol 14) 1927 All 475 : 25 ALJ 379 : 8 LRA Cr 51 : 28 Cr LJ 399 : 7 AI Cr R 343 : 49 All 551 : 100 Ind Cas 1055.

——S. 537 — In a warrant case tried summarily, a failure to examine accused under S. 342 does not vitiate the trial, if prejudice is not caused. AIR (Vol 13) 1926 Oudh 424 : 3 OWN 534 : 27 Cr LJ 852 : 95 Ind Cas 932.

——S. 537 — **S. 342 applies to summons cases — Provisions are mandatory — Non-compliance is not curable.**

Section 342 applies even in summons cases. The initial statement of the accused in such cases under S. 242 when he is called upon to show cause under S. 243 before evidence is led does not dispense with the necessity for the examination by the Court and the statement by the accused under S. 342 at the close of the evidence

for the prosecution, in explanation of the circumstances appearing in the evidence against him. The omission is a violation of the express procedure ensuring an essential right of the accused person and is not an irregularity curable under S. 537. AIR (Vol 13) 1926 Sind 281 : 19 SLR 121 : 27 Cr LJ 1290 : 98 Ind Cas 186 (DB).

——S. 537 — The entire omission to question an accused generally on the case after the prosecution witnesses have been examined and before the accused enters on his defence renders the trial from that point onwards and not ab initio improper or illegal. Section 537 cannot condone the error but the defect must be rectified in a fresh trial commencing from the point at which the error was committed. AIR (Vol 12) 1925 Nag 147 : 25 Cr LJ 1152 : 81 Ind Cas 976.

**——S. 537 — Accused has right to be examined after further cross-examination of the prosecution witnesses — Omission vitiates the conviction.**

An accused person has a right to be examined and to state his case after the further cross-examination of prosecution witnesses, even though he has already been examined before the charge was framed and he was called on for his defence. That right is fundamental and the omission to so examine him cannot be regarded as a mere error or irregularity, which can be cured by S. 537, Cr. P. Code, but vitiates the conviction. AIR (V 12) 1925 Rang 363 : 92 Ind Cas 752 : 4 Bur LJ 143 : 27 Cr L J 336.

**——S. 537 — Contravention of S. 342 does not vitiate decision in absence of prejudice.**

The failure to apply correctly the provisions of S. 342 is an error and not an irregularity, and an error, which has not in any way prejudiced a person convicted, may be condoned under the provisions of S. 537, if it is not fatal to the validity of the decision, and is concerned with the proceedings rather than the mode of trial. AIR (V 10) 1923 All 81 : 71 Ind Cas 115 : 45 All 124 : 20 ALJ 874: 24 Cr L J 67.

——S. 537 — The procedure of examining the accused in a warrant case only before charge is framed and not also after the prosecution witnesses have been recalled for further cross-examination under S. 256(1), Cr. P. Code, is not correct. It is an illegality vitiating the trial. The words, "if any" and "as he thinks necessary" does not make the obligatory examination referred to in S. 342 after further cross-examination of prosecution witnesses unnecessary. The accused's right to state his case, at whatever stage the law permits him to do so, is fundamental and cannot be regarded as a mere error, omission or irregularity such as is contemplated in S. 537. AIR (V 9) 1922 Mad 512 : 43 MLJ 402 : 71 Ind Cas 252 : 16 MLW 420 : 45 Mad 820 : 1922 MWN 601 : 24 Cr L J 124 (DB).

——S. 537 — It is a fatal defect to examine the accused, before all the prosecution witnesses are examined and it is not curable by S. 537. (1921) 62 Ind Cas 870 : 22 Cr LJ 598 (Pat).

### (c) Non-compliance with S. 145, Criminal P. C.

——S. 537 — Applicability — Omission to comply with direction in S. 145 to record finding as to existence of dispute likely to occasion breach of the peace — Irregularity is not curable. See AIR (V 38) 1951 Pat 412.

——S. 537 — When can be availed of in cases of irregularity in proceedings under S. 145, Cr. P. Code. See AIR (V 37) 1950 All 734.

——S. 537 — Applicability — Non-compliance with S. 145 (3) — Defect curable. AIR (V 37) 1950 Pat 372.

——S. 537 — Curability under — Failure to record formel order under S. 145 (1), Cr. P. Code—Sufficient materials to justify order — Irregularity can be cured — If no material irregularity cannot be cured. See AIR (V 36) 1949 All 402 : 1948 OWN 424.

——S. 537— Magistrate passing order under S. 145, Criminal P. C., relying on police report which is on record — Not recording the source of information, held mere irregularity curable under S. 537, Criminal P. C. AIR (V 27) 1940 Nag 265 : 1940 N LJ 375 : 41 Cr LJ 799 : 189 Ind Cas 774.

——S. 537 — Failure of Magistrate to make order under S. 145 (1) or failure to serve notice on opposite party or to affix copy or order to conspicuous place near land or to record finding in final order that danger of breach of peace exists are all defects which S. 537 can cure. AIR (V 26) 1939 Lah 233 : 41 PLR 188 : 40 Cr LJ 784 : 183 Ind Cas 351.

——S. 537— Omission to record preliminary order under S. 145 (1), Criminal P. C., is curable under S. 537. AIR (V 20) 1933 Pesh 83 : 34 Cr LJ 1138: 145 Ind Cas 868 (DB).

——S. 537 — The defect of not serving on the accused a copy of the preliminary order is cured by S. 537. AIR (V 12) 1925 Nag 33 : 81 Ind Cas 170: 25 Cr L J 682.

——S. 537 — Where the magistrate failed to serve a copy of the preliminary order under S. 145, clause 1 and to post the order on the land,

Held, that these were irregularities curable by S. 537. AIR (V 12) 1925 Rang 270 : 94 Ind Cas 708 : 3 Rang 169 : 27 Cr LJ 660.

——S. 537 — Where the Magistrate did not make an order in writing as required by S. 145 (1),

Held, that S. 537, Cr. P. Code, is sufficient to cure this defect. AIR (V 12) 1925 Rang 111 : 84 Ind Cas 548 : 26 Cr LJ 324 : 3 Bur LJ 256.

**——Ss. 537, 145, Cl. (3) — Applicability of notice under S. 145.**

Section 537 is made expressly subject to the provisions before contained in the Code and cannot, therefore, override them. The object of the section is to remedy mere irregularities, and not to excuse total disregard of the plain commands of the law. So, where the publication of a notice as is required by S. 145 Cl. (3), is not complied with the non-publication cannot be cured by S. 537. But if the notice had been published, any defect in such publication will be covered by S. 537. (1905) 9 CWN 909 (910) (DB).

### (d) Examination of complainant.

See also Criminal P. C. S. 200.

——S. 537 — Curability under — Failure to take fresh sworn statement on re-entertainment of a fresh complaint after discharge of accused owing to absence of complainant, is mere irregularity curable under S. 537. See AIR (V 36) 1949 Mad 76 : (1948) 1 MLJ 301.

——S. 537 — Curability under — Non-examination of complainant on oath before postponement of the issue of process and directing inquiry by police. AIR (V 35) 1948 Mad 424 : (1948) 1 MLJ 295.

——S. 537 — The irregularity of failing to take the statement of the complainant on oath before the sending of the case to the police for investigation is cured by S. 537, Criminal P. C. AIR (V 32) 1945 Oudh 102 : 1944 OWN 275 : 1944 AWR (CC) 188 : 46 Cr LJ 587 : 219 Ind Cas 304.

——S. 537 — An omission by a Magistrate to record the statement of the complainant on oath as required by the proviso to S. 202 (1), Criminal P. C., before he sends a complaint for enquiry under S. 202 (1), is an illegality and not mere irregularity curable under S. 537, Criminal P. C. AIR (V 29) 1942 Pesh 61 : 43 Cr LJ 803 : 202 Ind Cas 210.

——S. 537 — The failure to examine the complainant on the back of the complaint under S. 200, Criminal P. C., is a mere irregularity, cured under S. 537, Criminal P. C., as the accused is not prejudiced thereby. AIR (V 20) 1933 All 816 : 1933 AL J 1418 : 35 Cr LJ 347 : 56 All 33 : 147 Ind Cas 119.

——S. 537 — The fact that a complainant is not examined on oath is no illegality but a mere irregularity under the law in Madras Presidency. AIR (V 15) 1928 Mad 1235 : 55 MLJ 715 : 115 Ind Cas 242 : 52 Mad 79 : 28 MLW 621 : 1 M Cr C 317 : 30 Cr L J 482.

——S. 537 — A conviction by a Court of Sessions cannot be set aside on revision simply to the ground that there is a defect in the initiation of proceedings in the commitment Court or some irregularity in the commitment proceedings. Magistrates are entitled to take cognizance of non-cognizable offences upon a report made in writing by a police officer without examining the officer on oath. AIR (V 14) 1927 Lah 702 : 104 Ind Cas 437 : 28 Cr L J 821.

——S. 537 — Failure to examine the complainant is an error of procedure and where it has caused no injury to applicant and no failure of justice under S. 537 it is curable. AIR (V 11) 1924 Rang 87 : 1 Rang 517 : 76 Ind Cas 865 : 25 Cr L J 273.

——S. 537 — Where a Magistrate issued a complaint process before examining the complainant on oath under S. 200 Cr. P. C.

Held, that though the procedure was irregular, the conviction of the accused should not be set aside in revision, as the irregularity in procedure was curable by S. 537 of the Code. AIR (V 3) 1916 Pat 129 : 1 Pat LJ 592 : 18 Cr LJ 366 : 3 PLW 29: 38 Ind Cas 750.

### (e) To summon required number of jurors or assessors.

——S. 537 — Where in a trial for murder by jury, the Judge empanelled only seven jurors out of nine who were present where it was not impracticable for the Judge to empanel all the nine:

Held, there was a disobedience of the provisions of S. 274, Criminal P. C., and the defect could not be cured by S. 537, Criminal P. C. AIR (V 30) 1943 Cal 515 : ILR (1943) 1 Cal 522 : 44 Cr LJ 483 : 206 Ind Cas 26 (DB).

——S. 537 — If a defect which would prima facie entitle the accused to challenge the array of jurors could be cured, the irregularity of summoning not less than double the number of jurors required for a particular trial may also be cured, provided it does not occasion any failure of justice. AIR (V 20) 1933 All 941 : 1933 ALJ 1446 : 35 Cr LJ 668 : 56 All 210 : 148 Ind Cas 339 (DB).

——S. 537 — A neglect of strict provisions of S. 326, Criminal P. C., will not make the constitution of jury illegal or render the trial a nullity if no failure of justice is caused thereby. Section 537 applies to such a case. AIR (V 20) 1933 All 941 : 1933 ALJ 1446 : 35 Cr LJ 668 : 56 All 210 : 148 Ind Cas 339 (DB).

——S. 537 — Where the Judge never applies his mind to the question whether it is practicable to have nine jurors, there is an illegality which vitiates the whole trial even in respect of persons not charged under S. 302, but who are jointly tried with the person charged under S. 302. AIR (V 18) 1931 Cal 793 : 58 Cal 1272 : 35 CWN 711 : 54 CLJ 307 : 33 Cr LJ 129 : 135 Ind Cas 435 (DB).

——S. 537 — Assuming that it is incumbent on the Judge under S. 326, Criminal P. C., to summon a minimum of 18 jurors for a murder trial, mere failure on the part of the Judge to summon the full number will not by itself, vitiate the trial. It is a mere irregularity which would generally be condoned under S. 537, Criminal P. C., and a re-trial would not be ordered unless it has occasioned a failure of justice. AIR (V 18) 1931 Pat 152 : 10 Pat 107 : 32 Cr LJ 797 : 12 PLT 798 : 131 Ind Cas 801 (DB).

——S. 537 — Where accused are tried jointly under Ss. 302 and 304 and some other sections of the Penal Code, and the jury is constituted only of seven persons, the Judge speaking of nine as the required number, and never considering the question whether it was not practicable to have a jury of 9 persons, the jury is illegally constituted, and the illegality cannot be cured by S. 537, Cr. P. Code. The fact that no appeal was preferred against acquittal under Ss. 302 and 304 makes no difference. All the accused are affected by the illegality. AIR (Vol 17) 1930 Cal 716: 34 CWN 735: 51 CLJ 578: 1930 Cr C 1116.

——S. 537 — Where a Sessions Judge is trying a case with the aid of assessors it is the Judge plus the assessors who constitute the Court, not the Judge alone and where therefore the Sessions Judge has tried a case with the aid of a number of assessors less than that fixed by law there has been no trial at all. This wrong procedure cannot be cured by S. 537 for that section refers only to errors of procedure and not to substantive errors of law. AIR (Vol 11) 1924 Nag 287 : 20 NLR 129 : 25 Cr LJ 459 : 77 Ind Cas 811 (DB).

### (f) Particulars in charge.

——S. 537 — Curability under — Illegality in joinder of charges — Contraventions of S. 234 — Cannot be cured — Omission to mention particulars of offence can be cured if no failure of justice. See AIR (Vol 37) 1950 All 167.

**——Ss. 537, 225 — Conviction under S. 147, Penal Code — Omission to specify common object in charge.**

Failure to specify the common object in a charge under S. 147, I.P.C., is only an irregularity covered by S. 537, Criminal P. C., and moreover, under S 225, Criminal P. C., the omission complained of can be regarded as material if it is shown not only that the accused were in fact misled by the omission but also that the omission occasioned a failure of justice. AIR (Vol 22) 1935 Oudh 488 : 36 Cr LJ 1198 : 1935 OWN 922 : 11 Luck 343 : 157 Ind Cas 378.

——S. 537 — Omission to specify in the charge the persons who were parties to the conspiracy is an irregularity curable by S. 537, Cr. P. Code. AIR (Vol 14) 1927 Sind 161 : 28 Cr LJ 426 : 8 AI Cr R 11 : 101 Ind Cas 458 (DB).

——S. 537 — Where a charge of cheating gives the month in which the offence was committed, but the exact date is not given, the irregularity is curable. AIR (Vol 13) 1926 Pat 347 : 1926 PHCC 207 : 27 Cr LJ 909 : 96 Ind Cas 221.

——S. 537 — Where it was intended to allege one general conspiracy to commit an offence or offences under S. 420 of the I. P. C., by cheating the Govt. of India of large sums of money and the transactions in linseed oil, turpentine and water soluble oil, were overt acts from which the conspiracy might be inferred & this was explained to the Counsel who appeared for the accused fully understood the charge.

Held, that although the allegations amounted to charges of three different conspiracies it was not a bad charge as the accused knew what the charge was. The mere fact of there being three letters in respect of the three articles is not inconsistent with the existence of one general conspiracy. The fact that there were many transactions

intervening between the dates of the three matters alleged as overt acts by the prosecution, and that it was proved that such transactions were fraudulent or dishonest is not inconsistent with the existence of one general conspiracy. Although the charge should have contained an allegation of the person or persons who were alleged to have been deceived and induced to issue the cheque the omission should not be regarded as a fatal defect in the charge, where the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge. Where objection was taken to the charge of cheating the Government of India by inducing them to deliver a cheque for Rs. 59,265 in payment of five bills that the five bills therein referred to were presented at different dates, and that if any offence was committed by the appellants in respect of the bills, there were five separate offences of cheating and five separate offences could not be included in one charge.

Held, the offence charged under S. 420, Indian Penal Code, would not be complete until the Government of India, being induced thereto by the alleged fraudulent bills, delivered the cheque for Rs. 59,265. Until the last of the five bills was delivered the inducement was not complete, and until the cheque was issued the offence under S. 420, Indian Penal Code was not complete. Therefore, the charge did not include five separate offences as alleged, but one offence only. AIR (V 11) 1924 Cal 18 : 27 CWN 821 : 25 Cr LJ 1313 : 82 Ind Cas 545 (DB).

——S. 537 — If there is ample evidence of the common intention of an assembly, the irregularity caused by mere omission to mention it in the charge is coverable by the section. AIR (V 4) 1917 Pat 456 : 18 Cr LJ 382 : 38 Ind Cas 766.

——S. 537 — Where a charge of sedition is defective in that it does not give the dates of the alleged seditious speeches or the passages of the speeches, it does not vitiate the charge where no objection is taken till a late stage of the proceedings and the accused is not misled and no failure of justice has been occasioned. (1909) 32 Mad 3 : 5 MLT 1 : 9 Cr LJ 108 : 1 Ind Cas 22 (DB).

**(g) To write judgment before pronouncing.**

——S. 537 — Though it is desirable that Magistrates should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily vitiate the trial, unless such omission has in fact occasioned a failure of justice. 14 All 242 and 27 Mad 237, Not Foll. AIR (Vol 17) 1930 Rang 77 : 7 Rang 370 : 1930 Cr C 203 : 30 Cr LJ 1166 : 120 Ind Cas 225.

——S. 537 — Pronouncing sentence before writing judgment is an irregularity covered by S. 537 and is curable except in case of failure of justice. (14 All 242, Diss.). AIR (Vol 12) 1925 Lah 137 : 25 Cr LJ 705 : 81 Ind Cas 193.

**——S. 537 — Irregularity in judgment.**

The legality or illegality of a judgment delivered after sentence passed, depends on the circumstances of each case & if no material prejudice & injustice have been caused the omission to write a judgment at the time of the passing of sentence is not an illegality but mere irregularity curable by S. 537. (1911) 13 Bom LR 635 : 12 Cr LJ 457 : 11 Ind Cas 993 (DB).

**(h) Search warrants.**

——S. 537 — Scope — Search warrant under S. 5, Public Gambling Act not mentioning particular police officer or word "common" before "gaming house" — Defect, if curable. AIR (Vol 35) 1948 All 428.

——S. 537 — A warrant that is not a legal warrant, is no warrant for the purposes of the Gambling Act. Omission to affix the seal of the Court on a search warrant issued under the Gambling Act is a mere irregularity curable by S. 537, Cr. P. C. A search warrant assigned by the Magistrate at a place outside the limits of the jurisdiction is illegal. (1910) 85 PLR 1910 : 23 PR 1910 Cr : 11 Cr LJ 570 : 8 Ind Cas 137.

——S. 537 — The effect of S. 537, Cr. P. C., is to validate a finding, sentence or order which is defective for an antecedent defect in procedure. It cannot cure a defective search warrant. (1908) 35 Cal 1076 (1082) (DB).

**(i) Other instances.**

——S. 537 — Where a Magistrate discharges the accused on account of the absence of the complainant when the case is called on for hearing, but sets aside the order on the same day, a little later on an application made by the complainant, without however, issuing notice to the complainant, it is only an irregularity in procedure which does not vitiate the subsequent proceedings after revival of the case. AIR (Vol 37) 1950 Bom 10 : ILR (1949) Bom 372 : 51 Bom LR 578 : 51 Cr LJ 213 (DB).

——S. 537 — Dispute between two persons — Complaint by agent of one of them — Notice to agent of other — Master not called upon to file written statement — Case proceeding between agents — Magistrate ordering possession to be given from one master to another — Order, held invalid and that S. 537 does not cure omission to implead master of the opposite party. AIR (Vol 21) 1934 All 853 : 1934 ALJ 650 : 36 Cr LJ 114 : 4 AWR 896 : 152 Ind Cas 500.

——S. 537 — Omission to enter the first information report in the Station diary as required by S. 154, Criminal P. C., would have an important bearing if the date of the report is in question but is not an illegality which vitiates the trial. AIR (Vol 18) 1931 Pat 150 : 32 Cr LJ 638 : 10 PLT 393 : 131 Ind Cas 17 (DB).

——S. 537 — Cantonment Board lodging a complaint signed by execution officer filing no authority but having power to file such complaint — Affidavit filed in the revision Court showing that he had an authority to do so — Omission to file is curable. AIR (Vol 15) 1928 Lah 946 : 11 AI Cr R 13 : 29 Cr LJ 822 : 111 Ind Cas 326.

——S. 537 — The omission to comply with the provisions of S. 242 is nothing more than a curable irregularity where a failure of justice has not been caused. AIR (Vol 14) 1927 Nag 210 : 28 Cr LJ 511 : 8 AI Cr R 175 : 101 Ind Cas 895.

——S. 537 — Where, after the close of the defence evidence the Court examined the police Sub-Inspector as a witness,

Held, that the omission to give accused an opportunity to rebut the evidence was an illegality not curable by S. 537. AIR (Vol 12) 1925 Lah 531 : 26 Cr LJ 1035 : 26 PLR 312 : 87 Ind Cas 923.

——S. 537 — The proceedings under S. 195, Cr. P. C., are of a judicial character and no order can be passed under it without a notice to the party against whom the order is to be passed, want of notice results in failure of justice and the defect is not curable under S. 537 of the Code. AIR (Vol 7) 1920 Oudh 58 : 23 OC 222 : 21 Cr LJ 642 : 7 OLJ 371 : 57 Ind Cas 658.

**——Ss. 537, 191 — Omission to comply with the provisions of S. 191.**

Section 537 was never intended to apply to a case where the Magistrate has neglected to comply with the provisions of S. 191. (1905) AWN 258 : 2 ALJ 745 (746).

**11. Misdirection or non-direction to jurors.**
See also Criminal P. C., S. 297.

——S. 537 (d) — **Verdict of jury — Interference in appeal — Admission of inadmissible evidence — When a ground.**

In cases of trial by jury the appellate Court has power in the event of any misdirection or admission of inadmissible evidence to deal with the whole case on merits and dispose of the case finally. A re-trial need not necessarily follow. AIR (Vol 33) 1946 Sind 132 : ILR (1946) Kar 69.

——S. 537 — Section 297 must be read with S. 537. (Failure of the Judge to explain to the jury all essential elements of offence charged against accused, when vitiates trial indicated). AIR (V 26) 1939 Bom 457 : 41 Bom LR 965 : ILR (1939) Bom 648 : 41 Cr LJ 176 : 185 Ind Cas 382.

——S. 537 — **Letters Patent (Bombay), Cl. 26 — Scope — Power of Court under — Proof of misdirection — Verdict of Jury, if to be disregarded — S. 537, if applies — Irregularity not causing miscarriage of justice nor prejudicing accused — Verdict, if to be set aside — Duty of Court — Cl. 26, if contemplates re-trial.**

Clause 26, Letters Patent (Bombay) does not entail that whenever any misdirection is found to exist, the Court has no option but to set aside the verdict. Section 537, Criminal P. C., does not apply to a case dealt with under Cl. 26. But the High Court ought to apply to such a case the principle which underlies that section, that is, that where there has been no illegality in the mode of trial, but some irregularity in the process of trial, the High Court is not entitled to set aside the verdict or judgment unless it is satisfied that that irregularity has led to a miscarriage of justice, or has prejudiced the accused. Clause 26, contemplates a final disposal of the case by the High Court and there can be no new trial.

It is open to the High Court, in a case under Cl. 26 to consider, not so much what effect the misdirection has upon the minds of this Court sitting in place of a jury, but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case and in so doing the Court assumes that the jury was a reasonably competent jury, though the Court must remember that a jury consists of laymen, and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge. In order to determine that question, it is, of course, necessary to consider the evidence on the record :

Held, that although there was a failure to comply with S. 297, Criminal P. C., and that failure did amount to an error in law, that failure had not led to any miscarriage of justice, and had not, in any way, prejudiced the accused. AIR (Vol 23) 1936 Bom 52 : 38 Bom LR 19 : 37 Cr LJ 366 : 60 Bom 599 : 160 Ind Cas 1060 (FB).

——S. 537 — Held, that there was no reason for holding that the jury were in any way misdirected, or insufficiently directed, and even if it were held that there was any slight misdirection or insufficiency of direction, no failure of justice had been occasioned, and having regard to the provisions of S. 537 (d), Criminal P. C., the High Court would not interfere. AIR (Vol 23) 1936 Oulh 108 (110) : 8 RO 135 : 1935 OWN 1153 : 36 Cr LJ 1467 : 158 Ind Cas 913 (DB).

——S. 537 — By the provisions of S. 537 (d), Criminal P. C., the Appellate Court cannot set aside the verdict of the jury merely because there was a misdirection unless it finds that the misdirection had, in fact, occasioned a failure of justice. AIR (Vol 23) 1936 Pat 46 : 37 Cr LJ 320 : 2 BR 233 : 160 Ind Cas 675 (DB).

——S. 537—Before any verdict of the jury can be set aside on the ground of a mistake in the charge, the Court has to be satisfied that such verdict is erroneous owing to a misdirection by the Judge. The error in the verdict must be direct result of the misdirection. AIR (Vol 22) 1935 All 103 : 36 Cr LJ 612 : 4 AWR 1419 : 154 Ind Cas 1019 (DB).

——S. 537 — Misdirection by the Judge to the jury prejudicing the interest of the accused vitiates the trial. (1935) 1935 MWN 1288.

——S. 537 — In a trial for offence under S. 395, Penal Code, the omission by a Judge in his charge to the jury to lay down the law by which the jury is to be guided is something more than a misdirection. It is a failure to comply with the express provisions of the law and hence S. 537 cannot apply to cure such an illegality. In such cases, a retrial should be ordered. AIR (Vol 22) 1935 Oudh 175 : 35 Cr LJ 507 : 11 OWN 202 : 147 Ind Cas 976.

——S. 537 — Misdirection and non-direction may affect the verdict of the jury and are prejudicial to the accused. 1934 MWN 1313.

——S. 537 — The conviction based on a unanimous verdict of the jury cannot be disturbed unless there was material misdirection or other material irregularity at the trial which would vitiate the verdict and judgment. AIR (Vol 18) 1931 Mad 775 : 34 LW 380 : 1931 MWN 857 : 32 Cr LJ 1276 : 61 MLJ 915 : 134 Ind Cas 986 (DB).

——S. 537 — It is only when the non-direction is such that there are grounds for thinking that the jury by reason of it may have been put on the wrong track and made to arrive at a wrong conclusion that such non-direction can amount to a misdirection. AIR (Vol 15) 1928 Pat 120 : 6 Pat 317: 29 Cr LJ 81: 9 AI Cr R 221 : 9 PLT 191 : 106 Ind Cas 673 (DB).

——S. 537 — The omission of a Judge to lay down the law by which the jury are to be guided as required by S. 267, Cr. P. C., is something more than misdirection. It is a failure to comply with an express provisions of the law and S. 537 of the Criminal P. C., is not applicable in such a case. AIR (Vol 11) 1924 Oudh 411 : 11 OLJ 315 : 25 Cr LJ 1129 : 81 Ind Cas 953.

——S. 537 — A Sessions Judge is not required to comment on every point that could be possibly argued in favour of the accused. It is sufficient if the Judge deals with the more important points and does not unduly press on the jury his own views on questions of fact. In deciding whether there has been misdirection on the facts, the charge of the jury should be considered as a whole. AIR (Vol 9) 1922 Cal 107 : 49 Cal 573 : 35 CLJ 279 : 23 Cr LJ 657 : 26 CWN 680 : 99 Ind Cas 145 (DB).

——S. 537 — Where the Local Government appealed against the acquittal of the accused, on the unanimous verdict of the jury on the ground of misdirection in the Judge's charge to the jury,

Held, though there is a misdirection this does not justify a reversal of the verdict of the jury unless the misdirection in fact occasioned a failure of justice. If the High Court does not think that the verdict of the jury was due to the misdirection of the jury and that apart from it they would not have come to same conclusion,

the acquittal will be maintained. AIR (Vol 9) 1922 Cal 106 : 26 CWN 558 : 24 Cr LJ 143 : 71 Ind Cas 367 (DB).

——S. 537 — If there is no failure of justice a conviction is not bad for misdirection of charge and S. 537 (d) of the Cr. P. C., covers the case. (1913) 14 Cr LJ 638 : 12 ALJ 149 : 21 Ind Cas 686.

——S. 537 — Absence of direction by the presiding Judge as to the law cannot be cured under S. 537. (1910) 3 Bur LT 69 : 5 LBR 149 : 11 Cr LJ 340 : 5 Ind Cas 981 (FB).

——S. 537 (d) — Where a Judge charged the jury to the effect that they would be justified in finding the accused guilty of having received stolen property by reason of the fact that they were found in possession of it two months after the commission of dacoity without saying that it was for them to find if the interval of two months was recent enough to warrant a conviction :

Held, it was a misdirection. (1902) 26 Mad 467 (468) (DB).

**12. Error or omission in summons.**

——S. 537 — Omission in summons to enter full particulars of offence — Trial is not vitiated unless accused is thereby prejudiced — Defect is curable under S. 537. AIR (Vol 27) 1940 Oudh 77 : 1939 AWR 248 : 41 Cr LJ 92 (2) : 1939 OWN 960 : 184 Ind Cas 742 (DB).

**——S. 537 — Non-compliance with S. 15, U. P. Prevention of Adulteration Act.**

Though S. 15, U. P. Prevention of Adulteration Act, is mandatory, the omission to give particulars of offence or name of prosecutors in the summons would not be fatal to prosecution unless it has occasioned failure of justice. (Accused, held was not prejudiced. A I R (Vol 22) 1935 All 219 : 36 Cr LJ 68 (2) : 1934 ALJ 1152 : 4 AWR 940 : 57 All 400 : 152 Ind Cas 367 (DB).

——S. 537 — Summons not containing particulars of offence — Prosecution responsible for the irregularities — Accused incurring large expenses for the defence,

Held, that a re-trial is not to be ordered in such cases. AIR (Vol 21) 1934 Oudh 370 : 11 OWN 828 : 35 Cr LJ 1161 (2) : 150 Ind Cas 941.

**——S. 537 — S. 15, U. P. Prevention of Adulteration Act.**

Under S. 15 of the U. P. Prevention of Adulteration Act, every summons issued in a prosecution under S. 4 of the same Act must specify particulars of offence and the name of the prosecutors and the omission to so specify is fatal to the prosecution. AIR (Vol 18) 1931 All 705 : 1931 ALJ 690 : 32 Cr LJ 1031 : 133 Ind Cas 418.

——S. 537 — Where in the summons by mistake a wrong section is mentioned as the provision of law under which the accused was prosecuted, but where the Magistrate told the accused when he appeared in answer to the summons, the correct section under which he was being prosecuted, the accused is aware of the case he has to meet and there is no such material irregularity as to justify the quashing of conviction. AIR (Vol 16) 1929 Lah 867 : 30 Cr LJ 702 : 13 AI Cr R 115 : 1929 Cr C 601 : 116 Ind Cas 889.

——S. 537 — Where the Magistrate wrote the order under S. 107 on the back of a Police report and instead of sending a copy of his order with the summons he gave the substance of the information in the summons itself,

Held, that irregularity is covered by the provision of S. 537. AIR (Vol 13) 1926 All 767 : 25 ALJ 44 : 27 Cr LJ 1132 : 7 LRA Cr 174 : 97 Ind Cas 652.

**13. Errors or omissions in judgments or orders.**

——S. 537 — Scope — Irregular orders under S. 528 (2) and (5)—Defect — If curable. See, AIR (V 34) 1947 Pat 339: 25 Pat 571.

——S. 537 — Trial with aid of assessors — Omission by Judge to make reference to opinion of assessors in judgment does not vitiate the trial and can be cured by S. 537, Criminal P. C., unless it has occasioned a failure of justice. AIR (V 20) 1933 Lah 910: 35 Cr LJ 168: 146 Ind Cas 677 (DB).

——S. 537 — A mistake in the order of a Magistrate, in that reference is made to one section instead of to another, does not affect the legality of a conviction. AIR (V 19) 1932 Nag 116: 33 Cr LJ 859: 139 Ind Cas 496.

**14. Court of competent jurisdiction.**

——S. 537 — Magistrate having jurisdiction to try case committing the accused to Sessions Court — Trial by Sessions Judge — Validity.

In disregard to the provisions of S. 254, the Magistrate duly empowered to commit cases to the Sessions Court, committed the accused even though he himself was competent to try him. The accused was tried and convicted by the Sessions Judge:

Held, there had been no such irregularity as could render the Sessions Court a court incompetent in respect of jurisdiction to try the case and so S. 537 applied. AIR (V 32) 1945 All 340: ILR (1945) All 422: 1945 OWN (HC) 148: 1945 AWR (HC) 142: 221 Ind Cas 289.

——Ss. 537 and 529(f) — Order under S. 133 by Sub-Divisional Magistrate — Appearance of party — Transfer of case — Irregularity, if curable.

If a Sub-Divisional Magistrate makes a conditional order under S. 133, and on appearance of the party, the Sub-Divisional Magistrate transfers the case to another Magistrate it cannot be said that he acts without jurisdiction. At the most, it will be an irregularity which can be cured by Ss. 529(f) and S. 537. AIR (V 32) 1945 Pat 334: 24 Pat 16: 47 Cr LJ 29: 221 Ind Cas 183 (DB).

——S. 537 — Conditional order under S. 133 by Sub-Divisional Magistrate — Appearance of non-applicant — Case transferred to competent subordinate Magistrate — Irregularity, if curable.

Where the conditional order is made under S. 133, Criminal P. C., by a Sub-Divisional Magistrate and on appearance of the person, the case is transferred to a competent subordinate Magistrate, the transfer order would be a mere irregulaity curable under S. 529 (f) and S. 537. AIR (V 32) 1945 Pat 316: 24 Pat 23: 12 BR 134: 47 Cr LJ 179: 221 Ind Cas 418 (DB).

——S. 537 — Irregularity in constitution of jury.

In certain cases the failure to choose a jury is not fatal. Assessors may be chosen instead of a jury and vice versa, and a failure to take objection at the time is an answer to a subsequent objection that a case triable by a jury was tried with assessors, but this is the result of special statutory provisions, and S. 536, Criminal P. C., presumably contemplates a jury lawfully empanelled. Section 537 also makes provision for errors in the jury list, but an irregularity in the constitution of the jury is not an irregularity in the proceedings before or during the trial within the meaning of S. 537, for the words "other proceedings" must be read ejusdem generis with the words which precede these. Section 537

refers to a Court of competent jurisdiction. It does not refer to anything done in the matter of the constitution of the trial Court and in a trial by Judge and jury, the Court is the Judge and jury. Any material irregularity in the constitution of the jury affects the constitution of the Court and its competence. It must be in the public interest that a body of persons in whom lies the power to give a verdict of guilty or not guilty should be constituted strictly according to law. AIR (V 26) 1939 Sind 209: 41 Cr LJ 28: ILR (1940) Kar 249: 184 Ind Cas 474 (DB).

——S. 537 — A Magistrate trying a case beyond his power — Conviction in such cases must be set aside. (1935) 1935 MWN 473.

——S. 537 — **Penal Code, Ss. 417, 420 — Offence under S. 420 triable by First Class Magistrate — Trial by Magistrate holding only Second Class powers.**

Where the accused has obtained a sum of money from the complainant by cheating, the offence falls under S. 420, Penal Code, and not merely one under S. 417 and the case is triable by a Magistrate of the First Class. If the case is tried by a Magistrate holding only Second Class powers and hence having no jurisdiction to try it, the irregularity so committed is not covered by S. 537, Criminal P. C. AIR (Vol 20) 1933 Lah 1009: 35 Cr LJ 514: 35 PLR 289: 147 Ind Cas 737.

——S. 537 — Case triable with assessors — Trial substantially held with aid of assessors but assessors not chosen according to law — Trial must be held to be illegal and defect is not cured by S. 537, Criminal P. C. AIR (V 20) 1933 Oudh 351: 10 OWN 619: 34 Cr LJ 1093: 145 Ind Cas 803.

——S. 537 — Where a case, which under the new Code was made triable by Court of Sessions, was pending before a Magistrate when the new Code came into force and the Magistrate instead of committing the accused to Sessions Court concluded it himself and passed sentence against the accused.

Held, the trial was illegal and the illegality was not curable under S. 537. AIR (V 12) 1925 Lah 378: 85 Ind Cas 645: 26 Cr LJ 549.

——S. 537 — S. 205, Cr. P. Code, applies only to cases in which the Magistrate has issued a summons in the first instance. It does not apply to a case where accused has been arrested without or after the issue of a warrant. Where the Magistrate allowed the accused to be present through pleader at his request.

Held, the defect in jurisdiction would not have been cured even if there had been an express request on his part; for jurisdiction could not be conferred by any consent, and the defect is not curable under S. 537. AIR (Vol 11) 1924 Pat 46: 75 Ind Cas 72: 2 Pat 793: 4 PLT 648: 1923 PHCC 239: 2 Pat LR Cr 1: 24 Cr LJ 872 (DB).

—— S. 537 — A Court, which is otherwise competent to try the case is a Court of competent jurisdiction, to try an offence under S. 188, Penal Code, although no sanction had been obtained. 40 Bom 97, Diss. from. AIR (Vol 8) 1921 Sind 137: 16 SLR 1: 66 Ind Cas 657: 23 Cr LJ 305 (DB).

——**S. 537 — Irregular procedure.**

Where an accused failed to object to the illegal procedure at the proper stage, and to take steps to its being quashed, he is precluded from assailing it in appeal after conviction. He must show, to make them void ab initio that the Court had no jurisdiction and no other course open to it but a refusal to issue process. (1912) 15 CLJ 517: 13 Cr LJ 609: 16 CWN 105: 16 Ind Cas 257 (FB).

——**S. 537 — Irregularity — Prisoner committed to wrong jail — Want of jurisdiction or irregularity — Quaere :**

Whether a court committing a prisoner to the wrong jail is acting without jurisdiction or only irregularly. (1901) 6 CWN 254 (262) (FB).

**15. Failure of justice — General.**

**(a) Tests.**
**(a-1) Instances of failure.**
**(b) Instances of non-failure.**
**(c) Burden of proof.**

**(a) Tests.**

——S. 537 — A failure of justice within the meaning of S. 537, Criminal P. C., does not merely mean an erroneous decision or conclusion. It means that that procedure has not been followed which, in the ordinary course, would give the accused person or the persons with regard to whom proceedings under S. 87 are taken, a fair opportunity to appear and clear his position. There are three requirements of S. 87 and all of them must be fulfilled. The failure to fulfil any one of these three requirements amounts to failure of justice within the meaning of S. 537. AIR (Vol 29) 1942 Lah 214: 44 PLR 300: 43 Cr LJ 791:202 Ind Cas 15.

——S. 537 — Provisions of S. 537 are mandatory and there can be no revision unless substantial error of justice due to the irregularities has been caused. 1941 OWN (HC) 546 (1) (546): 1941 ALJ 229: 1941 AWR (HC) 134.

——**S. 537 — Tests.**

A breach of a provision, even though mandatory, cannot be said to be an illegality necessarily vitiating the proceedings. If the judgment has been passed by a Court of competent jurisdiction, the sole criterion in every case is whether there has been a failure of justice. The test to be applied is to ascertain whether the accused had a fair trial in spite of the transgression of the prescribed rule of procedure. AIR (Vol 27) 1940 Nag 375: 1940 NLJ 224: ILR (1940) Nag 488: 42 Cr LJ 37: 190 Ind Cas 838.

—— **S. 537 — Criterion.**

No distinction can be introduced between an illegality and an irregularity and the sole criterion given by S. 537, Criminal P. C., is whether the accused person had been prejudiced or not. Where the accused are not prejudiced by the joint trial (though not legal), no retrial should be ordered. AIR (Vol 23) 1936 All 253: 1935 AWR 1308: 37 Cr LJ 496: 161 Ind Cas 869.

——**S. 537 — Errors or omissions in charge.**

Section 537 protects errors, omissions or irregularities in a charge from interference on appeal or revision unless such error, omission or irregularity has, in fact, occasioned a failure of justice. AIR (Vol 22) 1935 Sind 34: 28 SLR 304: 36 Cr LJ 598: 154 Ind Cas 915 (DB).

——S. 537 — Whether an irregularity can be cured by S. 537, Criminal P. C., depends on whether the Court can hold that there had or had not been a

failure of justice owing to the irregularity. AIR (Vol 20) 1933 All 660: 34 Cr LJ 1036: 1933 ALJ 1244: 55 All 886: 145 Ind Cas 664.

——**S. 537 — Imperative rule of procedure, breaking of — Trial, if vitiated.**

It is no longer open to the Courts in India to hold that a trial is vitiated by the mere fact that an imperative statutory rule of procedure has been broken. The Court must also consider whether such failure has, in fact, occasioned a failure of justice. AIR (Vol 19) 1932 Sind 145: 26 SLR 353: 34 Cr LJ 216: 141 Ind Cas 628 (DB).

——S. 537 — It cannot be assumed that if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real ground for any such assumption. The impugned procedure must be one that is not only prohibited by the Code but also works actual injustice to the accused. AIR (Vol 17) 1930 Mad 857: 53 Mad 937: 1930 MWN 377: 1930 Cr C 1033: 127 Ind Cas 654 (DB).

——S. 537 — There is very serious prejudice caused to the accused amounting to a failure of justice by the trying Magistrate rushing through and completing the trial of the accused on a Sunday without his consent and without affording him an opportunity of properly defending himself by appointing a pleader and so the whole trial is void. AIR (Vol 17) 1930 Nag 255: 31 Cr LJ 705: 1930 Cr C 831: 124 Ind Cas 619.

——S. 537 — Any irregularity or illegality in the search can neither vitiate the trial nor affect the conviction of the accused where the accused has not been prejudiced by the defect. AIR (Vol 16) 1929 All 937: 31 Cr LJ 35: 1930 ALJ 229: 13 AI Cr R 138: 11 LRA Cr 21: 1929 Cr C 665: 120 Ind Cas 266.

**(a-1) Instances of failure.**

——Ss. 537 and 278 — Trial by jury — Two of jurors being Anglo-Indians not understanding Bengali— Public Prosecutor handing written addresses in English to them— Trial conducted in Bengali — Accused prejudiced—S. 537 could not apply. (1949) 53 CWN (1 DR) 144.

——S. 537 — Curability under — Non-compliance with the provisions of S. 139-A. Material prejudice — Defect cannot be cured. AIR (V 35) 1948 Oudh 19: 1947 OWN 229.

——**S. 537 — Trial for offence under S. 408, Penal Code— Admission of inadmissible evidence to prove dishonest intention — Absence of any other evidence — Accused is prejudiced.**

Where in a trial for an offence under S. 408, Penal Code, the evidence admitted to prove dishonest intention is inadmissible, and apart from it, there is no other evidence on the point, the evidence clearly works to the prejudice of the accused and the conviction based thereon cannot be maintained. AIR (V 33) 1946 Cal 440.

——S. 537 — Cross cases heard by same set of assessors and decided by same judgment — Procedure is not illegal — Danger of this method, however, pointed out — The procedure is irregular and the irregularity cannot be condoned since, in such a case, there must be prejudice to the accused. AIR (V 27) 1940 Lah 466: 42 PLR 809: ILR (1941) Lah 66: 42 Cr LJ 151: 191 Ind Cas 332 (DB).

——**Ss. 537, 225 — Charge under S. 304, Penal Code— Trial and conviction under S. 302.**

In order to come within the purview of S. 537, Criminal P.C., it has to be established that a failure of justice has in fact been occasioned. The mere argument that there might have been a failure of justice or that the accused might have been prejudiced is quite clearly not sufficient.

The accused was charged under S. 304, I.P.C., but the whole trial was conducted as if it was a trial under S. 302, I.P.C., and ultimately, he was convicted under S. 302:

Held, that the conviction could not be upheld. The trial was not a mere irregularity but an illegality not curable by S. 537, Criminal P.C. The mere mention of S. 302, I.P.C., in the charge did not cure the defect. AIR (V 22) 1935 Pat 431: 16 PLT 526: 2 BR 42: 36 Cr LJ 1506: 158 Ind Cas 1129 (DB).

——**S. 537 — Failure to record statement of accused under S. 342.**

To cure an irregularity in procedure, it is necessary for the Court to be satisfied that the irregularity has not occasioned a failure of justice.

Where the accused himself has made no statement and his pleader has disclaimed all knowledge of the facts of the case, it is impossible to hold that there has been no failure of justice. In such a case, the defect of failure to record the statement of the accused is not cured by S. 537, Criminal P.C. AIR (V 21) 1934 All 389: 35 Cr LJ 784: 148 Ind Cas 885 (DB).

——**S. 537 — Assistant Collector ordering Mukhtiarkar to take action under Penal Code, S. 188 — Tapedar filing complaint — Irregularity, if cured.**

The accused was served with an order under S. 141 (B), Bombay Land Revenue Code, restraining them from removing their produce without the written permission of the mukhtiarkar. A part of the produce was removed in disobedience of the order. The Assistant Collector then passed the following order. "If the man will be able to pay the fine under S. 142, Land Revenue Code, sanction is hereby accorded for such prosecution; but if the mukhtiarkar thinks that he will not be able to pay the fine, it is better to prosecute him under S. 188, I.P.C.," But mukhtiarkar did nothing in the matter while the tapedar took action under S. 188, I.P.C., even though the land revenue due by the accused could have been recovered from the amount deposited by him before prosecution:

Held, that the accused was seriously prejudiced by the irregularity in that the tapedar acted and that the irregularity was not cured by S. 537, Criminal P.C. AIR (V 20) 1933 Sind 276: 35 Cr LJ 26: 146 Ind Cas 407 (DB).

——S. 537 — Passing an order of forfeiture without notice to the party whose bond is forfeited amounts itself to a failure of justice even if the same order would eventually have been passed if the case had been heard. AIR (Vol 12) 1925 Oudh 51: 77 Ind Cas 733: 25 Cr LJ 445.

**(b) Instances of non-failure.**

——**S. 537 — Irregular commitment in disregard to S. 193.**

Where the Magistrate duly empowered to commit commits, disregarding the provisions of S. 193, the accused whom he was competent to try, to the Sessions Court, and the Sessions Court tries and convicts the accused, the irregularity is curable under S. 537 since there cannot be failure of justice by change in method of trial. On the contrary, there is a benefit of a trial by Sessions Judge. AIR (V 32) 1945 All. 340: ILR (1945) All. 422: 1945 OWN (HC) 148: 1945 AWR (HC) 142: 221 Ind Cas 289.

——S. 537 — Summary trial — Mere failure to enter the value of the property alleged to have been stolen, in the form, does not suffice to raise any question of possible or probable prejudice or failure

of justice, the governing factor in S. 537, Criminal P.C. AIR (V 27) 1940 Pat 272: 41 Cr. LJ 283: 6 BR 337: 186 Ind Cas 312 (DB).

——S. 537 — S. 197 — Where, in a case, requiring sanction only under S. 197, Criminal P.C., all that the Magistrate does before the sanction is received is to issue process against the accused and secure their attendance, his acts may well have been void for want of jurisdiction but it cannot be said that his omission to issue fresh process to the accused after the sanction had been received which enables him to take valid cognisance of the offence, has caused any failure of justice. Hence the cognisance taken after the sanction had been received is perfectly valid and the omission of the Magistrate to go back and issue fresh process is merely an irregularity curable under S. 537, Criminal P.C., AIR (V 26) 1939 Lah 479: 41 Cr. LJ 65: 42 PLR 51: ILR 1940 Lah 102: 184 Ind Cas 680 (DB).

——S. 537 — **Joint trial.**

In most cases of improper clubbing together of cases, it would be undoubtedly held that the accused had suffered prejudice by being called upon to meet three cases at the same time, but where it was only necessary to produce a few documents and to examine one witness, it could not be said that the accused were prejudiced in their defence by such irregular procedure. AIR (V 25) 1938 Mad 910: 1938 MWN 865: 48 MLW 350: (1938) 2 MLJ 382: 39 Cr LJ 935: 177 Ind Cas 737.

——S. 537 — **Number of charges extending over three months gathered together in same trial.**

In a trial under the U.P. Sugarcane Rules, each of the prosecution witnesses gave evidence about the particular instances with which he himself was concerned and a number of charges which extended over a period of three months were gathered together in one case.

Held, that it could not be said that the accused found it difficult to meet the various charges and that no real failure of justice had occurred although there might have been irregularities in the trial. AIR (V 23) 1936 All 370: 1936 ALJ 60: 1936 AWR 163: 37 Cr LJ 782: 163 Ind Cas 250.

——S. 537 — **Cross-cases — Separate trials and one judgment.**

Two trials before Magistrate and two appeals before Sessions Judge — One judgment — Decisions however quite separate and distinct — Findings in one not based on evidence in other — Judgment before High Court, a self-contained document, based upon oral and documentary evidence:

Held, that the procedure was not illegal and that the accused was not prejudiced. AIR (V 23) 1936 Lah 294: 37 Cr LJ 1033: 164 Ind Cas 809.

——S. 537 — Where the telegram to police was put in by prosecution without objection and was available to the defence to contradict witnesses:

Held, that no prejudice was caused to the accused and the conviction should not be set aside on this ground. AIR (V 22) 1935 Cal 403: 39 CWN 403: 36 Cr LJ 919: 156 Ind Cas 400 (DB).

——S. 537—Where in a certain village there were two separate riots intimately connected with one another and two cross cases were started, the magistrate heard them together, the pleaders were the same who freely referred to the evidence in the other case and the Court found difficulty to decide one case without depending on the evidence in the other.

Held, that a Court has no right, technically speaking to consider at all the evidence given in one case for the purpose of reaching his conclusion in another. But if the reception of the evidence required to enable the point to be decided in the second case is merely a formal repetition of evidence, which has already been given and heard by the same tribunal and it is directed to the same issue or issues of fact, its vain repetition may be reasonably waived. If the parties for their own convenience and other obvious motives, consent to treat the evidence in the former case as though it had been repeated in the latter case, such evidence is by implication and for all practical purposes brought on to the record of the second case, although not actually recorded. Therefore, although technically it might have been better to keep the evidence of the two cases entirely distinct and to have delivered two separate judgments, no injustice followed from its not keeping so: AIR (V 15) 1928 All 593: 50 All 457: 26 ALJ 176: 9 LRA Cr 16: 9 AI Cr R 122: 30 Cr LJ 337: 114 Ind Cas 721 (DB).

—— **Ss. 537 and 540 — Irregular procedure — Prosecution evidence — Recording of —After close of defence evidence.**

In a criminal trial after the defence evidence was closed the Magistrate examined certain witnesses for the prosecution giving a full opportunity to the accused to cross-examine them. It was held that the accused was not prejudiced thereby and the High Court could not revise the order of the Magistrate simply on that ground. AIR (V 5) 1918 Oudh 142: 21 OC 95: 19 Cr LJ 630: 45 Ind Cas 678.

——**S. 537 — Contravention of S. 495 (4) — How far trial vitiated:— Per Fulton J.:**

A contravention of Cl. (4) of S. 495 of the Criminal Procedure Code does not by itself invalidate a trial altogether when no failure of justice has occurred within the meaning of S. 537 of the Code. (1902) 4 Bom LR 271: 26 B 533 (536) (DB).

**(c) Burden of proof.**

——**S. 537 Sanction under S. 197 wrongly given.**

There was an irregularity in the proceedings before the trial as the sanction of the Provincial Government under S. 197, Criminal P.C., was wrongly given. There was also an irregularity in consequence thereof during the trial as the Magistrate refused to stay proceedings pending an application to the High Court:

Held, that it was necessary for the accused to show that as a consequence of these irregularities, there had, in fact been a failure of justice and in the circumstances of the case there had been no actual miscarriage of justice. AIR (V 27) 1940 Pesh 41: 42 Cr LJ 68: 191 Ind Cas 91.

——S. 537 — **Question of prejudice is one of fact.**

The question of prejudice is always a question of fact to be proved by the person raising the question, and where there is no prejudice even if there is an irregularity, the matter is completely covered by the provisions of S. 537 Criminal P.C. AIR (V 26) 1939 Lah 475: ILR (1939) Lah 243: 41 PLR 731: 41 Cr LJ 55: 184 Ind Cas 549.

——S. 537 — Where proceedings bristle with irregularity, it is for the prosecution to show that the accused was not prejudiced thereby. AIR (V 6) 1919 Pat 452: 20 Cr LJ 742: 53 Ind Cas 150.

**16. Duty of Appellate Court.**

——S. 537 — Where the trial is by jury appeal is limited to questions of law and the Appellate Court is also limited by the provisions of Ss. 423 (2) and 537. AIR (V 21) 1934 Pat 309: 15 PLT 264: 13 Pat 529: 35 Cr LJ 1104: 150 Ind Cas 687 (DB).

——**S. 537 — Order under S. 145.**

A Court of Revision is absolutely prohibited from setting aside an order under S. 145, Criminal P.C., on account of any omission or irregularity in proceedings unless such omission or irregularity has occasioned a failure of justice. AIR (V 19) 1932 All

681: 1932 ALJ 865: 54 All 102: 34 Cr LJ 425: 142 Ind Cas 532 (DB).

——**S. 537 — Court should look to substance rather than to form.**

Per Page, J.—When the decision of a Criminal Court in substance appears to be correct, an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure by which the trial is to be regulated have been transgressed; except where the breach of the prescribed rules is of so grave a nature, where the form of trial was substantially different from that provided by law for the offence charged, or where, although the violation of the rules was not so profound as to radically alter the mode of trial, it is proved that thereby in the event a failure of justice has in fact been occasioned. AIR (V 17) 1930 Cal 212: 57 Cal 1228: 123 Ind Cas 664: 1930 Cr C 212: 34 CWN 296: 51 CLJ 171: 31 Cr LJ 536. (FB).

——S. 537 — Section 537 may be taken to cover any irregularity in the widest sense of that term, provided there has been no failure of justice. The appellate Court ought not to order a re-trial in a case where provisions of S. 361 are overlooked without satisfying itself whether or not a failure of justice has been occasioned. AIR (V 17) 1930 Mad 186: 1930 Cr C 186: 31 MLW 386: 1929 MWN 898: 125 Ind Cas 253: 31 Cr LJ 827: 2 M Cr C 252.

——**S. 537 — Jury returning verdict of guilty in respect of minor offence — Verdict of jury is right and is covered by S. 537 (a).**

An accused was convicted by a jury of an offence under S. 325, I.P.C., and the verdict of the jury was accepted by the Sessions Judge. It was contended that the Judge used the jury as assessors in accepting the verdict for an offence with which the accused was not specifically charged and that therefore the High Court could go into the facts as if the verdict amounted to an opinion of the assessors.

Held, that the effect of S. 238, Cr P. Code, was to invest a jury trying an offence under S. 307, I.P.C., with authority to find that the facts proved only constitute a minor offence and to return a verdict of guilty of such an offence. It cannot be disputed that in view of the charge under S.307, IPC., the fact that no charge under S. 325 was framed is not even a defect or irregularity and, as such, curable under S. 537 (a) Cr. P. Code, for the simple reason that, under S. 238 (1), Cr. P. Code, the accused was liable without separate charge, to be convicted incidentally of the minor offence under S. 325, I. P. C. The High Court could not interfere and go into the question of facts on which the jury delivered the verdict they did. AIR (V 16) 1929 Nag 295: 123 Ind Cas 477: 31 Cr LJ 557: 1929 Cr C 410.

——S. 537 — Before a verdict can be set aside under S. 537 (d), there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict. AIR (V 13) 1926 All 429: 24 ALJ 506: 7 LRA Cr 123: 27 Cr LJ 785: 95 Ind Cas 385.

——**S. 537 — Evidence Act, S. 167 — Inadmissible evidence let in.**

What a Court of appeal has to consider is whether the reception of inadmissible evidence influenced the minds of the jury so seriously as to lead them to a conclusion which might have been different but for its reception. Hence where inadmissible evidence has been admitted, there are two points for consideration firstly whether the reception of the inadmissible evidence has in fact occasioned a failure of justice, and secondly whether if it is excluded there was sufficient evidence to justify the verdict of the jury. AIR (V 12) 1925 Cal 161: 84 Ind Cas 451: 40 CLJ 313: 26 Cr LJ 307 (DB).

——S. 537 — If the Court has power to try the offence for which the accused was convicted, the conviction ought not to be quashed merely because a more serious offence is manifested unless the accused was prejudiced or the sentence was inadequate. (1913) 25 MLJ 484: 14 Cr LJ 640: 21 Ind Cas 688.

——**S. 537 — Irregularity in judgment — Evidence in appeal.**

Sessions Judge should not in appeal refer to documents and evidence, which was not on record in the Lower Court. (1910) 8 MLT 81: 11 Cr LJ 221: 6 Ind Cas 12 (DB).

——**S. 537 — Assessors — One of two absent during part of trial — His opinion expressed and recorded — Legality of trial — Cr. P. C., S. 285.**

A court of appeal under the Indian law is enjoined not to reverse or alter the decision of a court of competent jurisdiction on account of any error, omission or irregularity or improper admission or rejection of evidence, unless it has in fact occasioned any failure of justice. 11 MLJ 241 (250, 251)

——S. 539.

——**S. 539 — Local verification — Absence of memorandum.**

The absence of a memorandum of a local inspection did not render a trial or inquiry illegal. AIR (V 18) 1931 All 14: 32 Cr LJ 309: 129 Ind Cas 441: 1930 ALJ 1437: 1931 Cr C 14.

——S. 539— An affidavit supporting application under S. 526 must be sworn before High Court or the clerk of the Crown or any Commissioner or other person appointed by the High Court for that purpose. AIR (V 18) 1931 Cal 710 (1): 33 Cr LJ 61: 134 Ind Cas 1278 (1) (DB).

——S. 539 — **Bench Magistrate.**

An affidavit sworn before a Bench Magistrate in Sind is one sworn before a proper person under S. 539 according to the rules of the Sind Judicial Commissioner's Court. AIR (V 14) 1927 Sind 128: 7 AI Cr R 336: 28 Cr LJ 168: 99 Ind Cas 600 (DB).

——**S. 539 — Validity of affidavits.**

An affidavit made before a Magistrate in a case over which he has no seisin is not valid and cannot be used in High Court. AIR (V 13) 1926 Pat 214: 5 Pat 110: 7 PLT 304: 27 Cr LJ 499: 93 Ind Cas 963 (DB).

——S. 539 — Affidavits sworn before Presidency Magistrates of Calcutta are not admissible in the Patna High Court. AIR (V 12) 1925 Pat 755: 92 Ind Cas 697: 7 PLT 343: 27 Cr LJ 313: 1926 PHCC 74.

——**S. 539A.**

——S. 539A—One of the purposes of S. 539-A is to discourage the making of false and scandalous statements. AIR (V 31) 1944 Sind 155: ILR (1944) Kar 133: 46 Cr LJ 223: 217 Ind Cas 182.

——**S. 539A — Accused falsely stating in affidavit that the statement by Magistrate that he was previously convicted is wrong — Accused can be convicted under Ss. 199 and 193, Penal Code.**

Where an accused in his affidavit states falsely that the statement by the Magistrate that the accused was convicted previously for a certain offence was wrong, he can be convicted under Ss. 199 and 193. Penal Code, inasmuch as the affidavit was required to be sworn under the law. Section 539-A, Criminal P.C., applies to an accused as well. AIR (V 28) 1941 All 337: 1941 ALJ 374: 42 Cr LJ 883: ILR (1941) All 635: 1941 AWRHC 247: 196 Ind Cas 480.

——**Ss. 539-A, 539, 526 — "Commissioner" meaning of — Affidavit sworn before Commissioner of Oaths appointed under S. 139, Civil Procedure Code, whether sworn before person authorised to administer**

**oaths — Affidavit not sworn before High Court, filed along with transfer application.**

The expression in S. 539, Criminal P.C., "any Commissioner for taking affidavits in any Court of Record in British India," does not mean any Commissioner for taking affidavits for use in any Court of Record in British India. The Commissioner referred to in S. 539, Criminal P.C., is a person who is actually sitting in the Court precincts where he is entitled to sit and who has been authorised to administer oaths within the Court precincts. Where an affidavit is sworn before a Commissioner of Oaths appointed under S. 139, Civil P.C., it cannot be said to have been sworn before a person who is authorised to administer the oath.

Where such an affidavit which has been sworn before an officer of the District Judge's Court and not before the High Court as required by S. 539, Criminal P. C., is filed along with an application for transfer under S. 526, the affidavit not being sufficient for the purposes of S. 526 (4), the transfer application cannot be entertained. AIR (V 26) 1939 Pesh 38: 40 Cr LJ 847: 184 Ind Cas 10.

——S. 539A—**False allegation in affidavit of accused person in support of application for transfer—Liability for prosecution.**

Section 539-A, Criminal P.C., applies to any person including an accused person who chooses to make false allegations respecting a public servant & in support of those allegations swears an affidavit, and an accused person who does so in an affidavit supporting his application for transfer of a case is liable to punishment for the offence. AIR (V 20) 1933 All 47: 1932 ALJ 1076. 55 All 114: 34 Cr LJ 457: 142 Ind Cas 900 (DB).

——S. 539-A — Nazir.

A nazir of civil Court has no authority to administer oath for the purposes of an affidavit or statement to be used in a criminal Court and a person making such statement cannot be convicted under S. 199. AIR (V 16) 1929 Bom 136: 116 Ind Cas 248: 31 Bom LR 144: 30 Cr LJ 593: 13 AI Cr R 14 (DB).

——S. 539-A — **False statements.**

Where a deponent while swearing an affidavit under S. 539-A swears of his personal knowledge of the truth of allegations and the allegations are ultimately found to be false he is guilty under S. 199, I.P.C., although he has not separately stated what facts he had reasonable grounds to believe to be true as required by third clause of the section. AIR (V 16) 1929 Pat 156: 116 Ind Cas 755: 30 Cr LJ 645: 13 AI Cr R 91 (DB).

——S. 539-A — A person renders himself liable to prosecution for false statements made in an affidavit in support of an application under S. 439 as required by S. 539-A. AIR (V 14) 1927 Sind 128: 7 AI Cr R 336: 28 Cr LJ 168: 99 Ind Cas 600 (DB).

——S. 539-B.

1. 'Due notice'.
2. Purpose and use of.
3. Record of memorandum.
   See also N. 2.
4. Non-compliance.
   See also Criminal P. C., S. 537.
5. Evidence or information from persons on spot.

### 1. 'Due notice'.

——S. 539-B — **Local inspection — Conditions to be observed — Inspection without notice to and in the absence of accused — Effect on proceedings — Memorandum incorporating ex parte statement of complainant — Effect.**

Under S. 539-B of the Cr. P. Code, before a judge or a magistrate inspects a place, three conditions have to be satisfied: (1) the inspection must be necessary to appreciate the evidence given at such inquiry or trial; (2) due notice of the inspection should be given to the parties; and (3) a memorandum of relevant facts observed at the inspection must be recorded by the judge or magistrate without unnecessary delay. For the judge or magistrate to go to the spot and to inspect the spot without notice to the accused and in his absence is not a mere irregularity but a serious illegality. Further when the Magistrate or judge prepares the memorandum of his inspection incorporating in it statements made by the complainant, which are not legally admissible in evidence, the illegality becomes all the more serious, and the procedure necessarily must prejudice the accused, so that it affords sufficient grounds for transfer of the case from that Court or magistrate to another. (1947) 229 Ind Cas 606 : 48 Cr LJ 428.

——S. 539-B — Where no notice was served as required by S. 539-B, but the Magistrate went to the spot and asked the accused to execute a bond under S. 91 and on his failure to do so and in the absence of witnesses, proceeded to try the case on the spot:

Held, that the procedure followed was altogether illegal and void.

(Case was transferred under S. 526 to another Court.) (1936) 163 Ind Cas 413 : 18 NLJ 320 : 37 Cr LJ 837.

——S. 539-B — **Using knowledge derived from local inspection — Accused not given opportunity to explain — Material irregularity.**

If a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. AIR (Vol 14) 1927 All 350 : 49 All 475 : 25 ALJ 377 : 28 Cr LJ 291 : 7 AI Cr R 391 : 100 Ind Cas 371.

——S. 539-B — **Inspection without parties' knowledge.**

In a case under S. 486, Penal Code, the Magistrate, after some witnesses were examined for the defence, himself visited the markets in order to make personal enquiries regarding the case without giving any notice to the parties. After this enquiry he summoned some witnesses on his own initiative.

Held, that the course adopted was illegal. By making personal enquiries the Magistrate made himself an important witness in the case and incapacitated himself to proceed with the trial. AIR (Vol 13) 1926 Rang 180 : 97 Ind Cas 60 : 4 Rang 106 : 27 Cr LJ 1084.

### 2. Purpose and use of.

——S. 539-B — **Local inspection — Magistrate basing his decision on what he sees — Propriety.**

A Judge or a Magistrate may view a locality to enable him to appreciate the evidence. But he can decide nothing as a result of what he himself sees. In short what he himself sees is not evidence in the case and for a very good reason; the Judge or Magistrate cannot be cross-examined. A Magistrate is, therefore, not entitled to make any deductions whatsoever from what he himself sees and which was not referred to by any other witness. (1950) 54 CWN 186 : 85 CLJ 100.

——S. 539-B — **Duty of Magistrate under to make a memorandum of inspection — Decision of Magistrate based on evidence and not on impressions of inspection — Failure to record memorandum — No failure of justice by reason of the irregularity — Interference in revision not necessary.**

In a case where the accused was charged with an offence under S. 354, I. P. Code, the Magistrate inspected the alleged scene of occurrence after the entire evidence was recorded, but he made no notes of the inspection. In coming, however, to the conclusion that the prosecution evidence was highly interested and thoroughly unreliable, he took account of several circumstances all of which were based only on the evidence. On a contention that the Magistrate had allowed his decision to be influenced by the inspection and the impressions which he received from such inspection.

Held, though under S. 539-B of the Code, the Magistrate should have recorded a memorandum of his inspection which should form part of the record, there has been no failure of justice on account of this irregularity and so the order need not be interfered with in revision. AIR (Vol 35) 1948 Mad 119 : 49 Cr LJ 102 : 1947 MWN 596 : (1947) 2 MLJ 306.

**——S. 539-B — Local inspection by Sessions Judge and jury — Objection petition by accused that he was prejudiced by jurors mixing with people gathering on spot and by their travelling with police officer — Sessions Judge not recording memorandum of inspection — Held accused were prejudiced.**

After a local inspection by a Sessions Judge and the jury, the accused filed an objection petition alleging that they were prejudiced by the facts that the jury freely mixed and talked with crowd gathered on the spot, that the jury travelled in the same bus with the officer in charge of the Police and that the Sessions Judge did not record the memorandum of inspection :

Held, that (1) S. 539-B, Criminal P. C., clearly requires the Judge to record the memorandum of the local inspection without unnecessary delay.

(2) In the absence of the memorandum of inspection which might have helped in assessing the value to be placed on these allegations, it could not be held that there was no substance in the allegations and that the accused were not prejudiced. AIR (Vol 33) 1946 Cal 537 : 47 Cr LJ 737 (DB).

**——S. 539-B — Local inspection — Purpose of.**

Local inspection is really meant for the purpose of understanding the evidence in a case. The Magistrate can utilise the results of his local inspection in coming to his conclusion from the evidence. AIR (Vol 29) 1942 Pat 150 : 22 PLT 976 : 8 BR 531 : 43 Cr LJ 537 : 199 Ind Cas 218.

**——S. 539-B — Map prepared by Magistrate cannot be used as evidence unless it is proved in witness-box.**

Unless a sketch map prepared by a Magistrate at the time of making local inspection is proved in the witness-box, it is impossible to use it as evidence or to say what value should be attached to it. AIR (Vol 26) 1939 Cal 487 : 43 CWN 896 : 40 Cr LJ 795 : 183 Ind Cas 431 (DB).

**——S. 539-B — Scope — Whether contemplates that presiding officer should put himself in position of witness.**

Section 539-B, Criminal P. C., which empowers the Court to make a local inspection does not contemplate a procedure by which the presiding officer would, to all intents and purposes, put himself in the position of a witness in the case. AIR (Vol 25) 1938 Pat 185 : 39 Cr LJ 442 : 19 PLT 375 : 4 BR 466 : 174 Ind Cas 635 (DB).

**——S. 539-B — Inspection note by Magistrate — Evidentiary value.**

An inspection note by a Magistrate is not evidence and is nothing more than a record made by the Magistrate to enable him to understand better the evidence to be recorded. He is entitled to embody in his note only facts observed by himself on the spot and not the result of statements made to him there. AIR (Vol 24) 1937 Nag 274 : 172 Ind Cas 204 : 39 Cr LJ 92.

**——S. 539-B — Local inspection — Notice to parties.**

Under S. 539-B, Criminal P. C., it is necessary to give due notice to the parties before embarking on local inspection. The object of local inspection is to enable the Magistrate to understand and test the evidence of witnesses examined in the Court and not to obtain additional information or to extract admission from the accused. (1936) 163 Ind Cas 413 : 18 NLJ 320 : 37 Cr LJ 837.

**——S. 539-B — Non-recording of inspection note.**

Where the Appellate Court has not relied on anything it saw or heard at the time of the inspection, the non-recording of the inspection notes by the Court does not cause any prejudice to the accused. Such an irregularity is curable. AIR (Vol 22) 1935 Nag 23 (DB).

**——S. 539-B — Purpose of inquiry.**

Where a Magistrate holds local inquiry and uses that not for the purpose of understanding the evidence but for the purpose of obtaining information which did not appear from the evidence of other witnesses, he commits material irregularity which vitiates the whole trial. 115 Ind Cas 556 : 12 AI Cr R 432 : 30 Cr LJ 491.

**——S. 539-B — Local inquiry made not to understand evidence but to obtain further information — Procedure irregular and ultra vires.**

From the judgment of a Magistrate it appeared that he used the local enquiry made in the case not for the purpose of understanding the evidence only, but for the purpose of obtaining information which did not appear from the evidence of the witnesses. There were other matters in the judgment which clearly showed that in a sense the Magistrate made himself a witness in the case.

Held, that the procedure was quite irregular and in adopting it the Magistrate went beyond the powers granted to him by the Cr. P. Code. AIR (Vol 15) 1928 Pat 567 : 10 AI Cr R 455 : 29 Cr LJ 656 : 10 PLT 279 : 110 Ind Cas 112 (DB).

**——S. 539-B — Local inspection cannot take the place of evidence itself.**

A local inspection by a Magistrate is only permitted by S. 539-B, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself. AIR (Vol 14) 1927 All 350 : 100 Ind Cas 371 : 49 All 475 : 25 ALJ 377 : 28 Cr LJ 291 : 8 LRA Cr 59 : 7 AI Cr R 391.

——S. 539-B — Section 539-B does not introduce any new principle; for the Calcutta High Court had often laid down that a memorandum should be prepared, so that both sides to an enquiry or trial might know what the Magistrate during his enquiry had noticed or failed to notice. Where the local enquiry was made in the presence of the petitioner's pleader who did not however, ask the Magistrate to record a memorandum or to attach a memorandum to the record or to give him a copy.

Held, he could not be allowed to say that for this formal defect the proceedings should be set aside, unless he could show that the Magistrate's omission had caused prejudice. AIR (Vol 12) 1925 Cal 1246 : 90 Ind Cas 308 : 42 CLJ 131 : 26 Cr LJ 1524 : 53 Cal 46 (DB).

——S. 539-B — **Parties and pleaders present — Purpose, to understand evidence already given — Procedure legitimate.**

The Magistrate viewed the locus in quo at the request of both parties and in presence of pleaders who were representing the respective parties. The Magistrate made and used inspection solely for the purpose of enabling him to understand the evidence which had been already given.

Held, it was legitimate for him to do so, and there was no ground for suspecting that the judgment was influenced by the local inspection. AIR (Vol 10) 1923 Cal 320 : 68 Ind Cas 38 : 23 Cr LJ 502 (DB).

——S. 539-B — **Note of inspection if necessary.**

It is open to Magistrate to use the evidence of his own eyes i.e., the local inspection to test the truth of what the witnesses have deposed to. AIR (Vol 10) 1923 Mad 694 : 75 Ind Cas 695 : 18 MLW 113 : 1923 MWN 860 : 25 Cr LJ 7 : 45 MLJ 279 (DB).

——S. 539-B — **No evidence taken — Reliance on personal knowledge — Admissibility of.**

Certain accused were charged under S. 457, I. P.C. In defence they put forth a certain incident as having taken place at a certain spot. The Magistrate in order to test the truth of the defence, made each of the accused point out the spot. No evidence was taken by the Magistrate as to what took place at the spot when he went there but he relied solely on his own personal knowledge.

Held, the conduct of the Magistrate in acting as he did, verged dangerously near upon cross-examining the accused. In the absence of any evidence regarding this episode it must be totally ignored. AIR (V 9) 1922 Lah 456: 67 Ind Cas 591: 23 Cr LJ 431.

——S. 539-B — **Magistrate — New point discovered not known to accused — Judgment based on — Conviction bad.**

Where a Magistrate is influenced in his judgment towards accepting the prosecution evidence, by a fact noted by him in his local inspection but which is an entirely new point and one which the accused had no notice of and no opportunity to explain, the conviction cannot stand as the Magistrate's procedure is wrong. AIR (V 8) 1921 Pat 471.

——S. 539-B — The use of the result of local observation is pertinent and allowable only for the purpose of understanding the evidence adduced. It cannot be used for the purpose of deciding the main issue in the case. AIR (V 8) 1921 Pat 415: 61 Ind Cas 794: 2 PLT 455: 22 Cr LJ 442.

——S. 539-B — **Local inquiry — View of the place of occurrence — Power of Magistrate.**

Held, (Per Woodroffe and Chatterjee JJ.; Stephen J. dissenting) A Magistrate cannot hold a local inquiry for the purpose of testing the credibility of the witnesses examined on either side, and for coming to a decision on the facts on the evidence of his own senses.

Per Stephen J. contra:— Though there is no express provision in the code authorising him so to do, a Magistrate has undoubted jurisdiction to make a local inspection and to act on the opinion formed by him from what he saw.

Per Curiam:— A Magistrate may hold a local inspection in order to enable him to understand the evidence that is laid before him. (1910) 11 CLJ 335: 37 Cal 340 (344, 347, 356): 14 CWN 422: 5 Ind Cas 365 (DB).

### 3. Record of memorandum.

See also N. 2.

——S. 539-B — **Memorandum of inspection — Duty of Judge to record.**

Under S. 539-B (1), Cr. P. Code, a judge making an inspection of the locality must record a memorandum of his inspection. AIR (V 33) 1946 Cal 537: 81 CLJ 413: 225 Ind Cas 426: 47 Cr LJ 737: 50 CWN 799.

——S. 539-B — **Local inspection — Memorandum of observation should be recorded immediately.**

The Magistrate had to determine whether he was prepared to accept the evidence of identification, the defence being that the case was one of mistaken identity. He visited the spot one evening and came to the conclusion that there was sufficient light to enable anybody to mark closely the features of a stranger. He assumed that the condition of the light and atmosphere were the same on the night that he went to the spot as they were at the time of the occurrence. The Magistrate did not, however record a memorandum of his observations upon which he based his decision:

Held, that the Magistrate had gone beyond the scope of S. 539B. Human memory being what it is, it was very difficult to place any reliance upon what the Magistrate found, unless a memorandum had been made almost immediately. Such local inspection could not therefore, be made the basis of conviction. AIR (V 26) 1939 Cal 304: 43 CWN 392: 40 Cr LJ 624: 181 Ind Cas 990 (DB).

——S. 539-B—**Local inspection by Magistrate — Whether irregularity.**

The right of a Magistrate to make a local inspection has now been declared and recognised by S. 539B, Criminal P.C. Where in an inquiry under S. 145, the Magistrate finds difficulty in following the plans put in by the parties and, therefore, he after notice to the parties, makes a local inspection in order better to understand the evidence and the topographical conditions, and the inspection note is made in the presence of the parties and no objection is taken, there is no irregularity in procedure followed by the Magistrate. AIR (V 26) 1939 108: 41 PLR 217: ILR (1938) Lah 611: 40 Cr LJ 519: 181 Ind Cas 59.

——S. 539-B—Notes of inspection of proceedings by Magistrate can not be disregarded — They form part of record. 1936 MWN 639 (641).

——S. 539-B — Where the Judge alone inspects the spot under S. 539B, the inspection note must be ruled out and when it has been utilised by the Sessions Judge, all reference to it must be excluded from consideration. AIR (V 21) 1934 Oudh 499: 11 OWN 1309: 35 Cr LJ 1496: 152 Ind Cas 103 (DB).

——S. 539B— **Memorandum to be drawn up without delay.**

Under S. 539B Criminal P.C. a memorandum of local inspection should be drawn without unnecessary delay AIR (V 19) 1932 Mad 676: 1932 MWN 645 : 37 MLW 149: 33 Cr LJ 655.

——S. 539-B —**Separate record of inspection, necessity of.**

A local inspection must be held sparingly and the danger of such an inspection is intensified when one or both of the parties are absent at the time of the local inspection. There is no compliance with the imperative provisions of S. 539B, Criminal P.C., where there is no separate record made by the Sessions Judge concerning the inspection he made of the locality and the facts that he found which would be helpful to him in appreciating the evidence given at the trial. AIR (V 18) 1931 Oudh 388: 8 OWN 857: 33 Cr LJ 225: 7 Luck 208: 136 Ind Cas 218.

——S. 539-B — It is very desirable that a judicial officer conducting a local investigation should place upon record the result of his inspection at once so that the parties may have an opportunity of seeing

what the facts are which the judicial officer considered to be established by the local investigation and he should never deliver his judgment relying upon that investigation without giving an opportunity to the parties to rebut his opinion. AIR (V 15) 1928 Lah 479: 10 Lah 138: 10 AI Cr R 435: 29 Cr LJ 719: 110 Ind Cas 463.

**——S. 539B — Recording of facts.**

The Magistrate under S. 539-B should record a memorandum of any relevant facts observed by him at the time of inspection. AIR (V 14) 1927 All 350: 49 All 475: 25 ALJ 377: 28 Cr LJ 291: 8 LR A Cr 59: 7 AI Cr R 391: 100 Ind Cas 371.

——S. 539-B — Though there is no provision in the Code of Criminal Procedure for making local inspection or for keeping a note of the inspection if made, it has been settled by authorities that a Magistrate must invariably put on record a note of his inspection. AIR (V 9) 1922 Pat 51: 71 Ind Cas 698: 1922 PHCC 27: 24 Cr LJ 234.

**4. Non-compliance.**

See also Criminal P.C. S. 537.

**——S. 539-B — Neglecting to record memorandum at once is dangerous.**

Human memory being what it is, unless a memorandum is recorded at once there is no certainty that the Magistrate's material will be, in any way, reliable. It is, therefore, dangerous to neglect to record memorandum when making local inspection. AIR (Vol 26) 1939 Cal 487: 43 CWN 896: 40 Cr LJ 795: 183 Ind Cas 431 (DB).

**——S. 539-B — Omission to make memorandum of local inspection — Effect.**

Held, that the omission to make inspection note as required by S. 539B, Criminal P.C., was not fatal to the case. The local inspection had not much bearing on the case at all, and the omission to record the note could have had no practical effect on the decision. AIR (V 25) 1938 Nag 325: 39 Cr LJ 427 (2): ILR (1940) Nag 188: 174 Ind Cas 523.

**——S. 539-B — No memorandum of local inspection — Conviction, if should be set aside.**

Non-compliance with the direction in S. 539B, Criminal P. C., to make a memorandum of local inspection does not vitiate the trial; such an omission is an irregularity, unless it is proved that the accused is prejudiced, and where the conviction is not based on the local inspection, it cannot be set aside. AIR (V 25) 1938 Oudh 182: 39 Cr LJ 630 (1): 1938 OWN 595: 175 Ind Cas 259.

**——S. 539-B — Non-compliance — Applicability of S. 537.**

A Magistrate made inspection of a site without giving notice to the parties. The accused was, however, present by chance. The Magistrate made a compensation order in favour of the accused and it appeared that the Magistrate has been largely influenced in his judgment not only by personal inspection of the site but by local inquiries made by him. No memorandum of facts observed was recorded:

Held, that the Magistrate had so neglected the provisions of S. 539B, Criminal P.C., that he could not be said to have acted under the section at all as far as the order for compensation was concerned, and the irregularities disclosed could not be cured under S. 537. Failure of justice had been occasioned as far as the order for compensation was concerned, and the order should hence be set aside. AIR (Vol 24) 1937 Sind 125: 31 SLR 51: 38 Cr LJ 783: 169 Ind Cas 431 (DB).

**——S. 539-B — Local inspection — Utaras received in evidence not placed on record — Judgment based on spot inspection note and utaras.**

Where the Magistrate received in evidence at the time of the local inspection certain utaras which he did not place on the record and the judgment acquitting the non-applicant was based mostly on the spot inspection note and these utaras:

Held, that the judgment cannot be said to be a legal one. AIR (V 22) 1935 Nag 77: 17 NLJ 269.

——S. 539-B — Local inspection by one of Magistrates — Other Magistrate not joining in such proceedings — Trial, if proper.

When a case is tried by a Bench of Magistrates, the local inspection under S. 539B, Criminal P.C., must be made by all the Magistrates. The memorandum drawn up by some of the Magistrates would be of no use to a Magistrate who has not seen the spot. Consequently, he cannot be in a position to state whether the description therein is correct. The local inspection is an essential part of the proceedings of the Court and if one of the two Magistrates who preside over a Court does not join in any of the proceedings the trial cannot be said to be proper. AIR (V 22) 1935 Nag 77: 17 NLJ 269.

**——S. 539-B — Omission to make note of local inspection, effect of.**

An omission on the part of the Magistrate who has made a local inspection to make a note of his observation and to place it on the record would vitiate the trial if the omission has, in fact, occasioned a failure of justice; otherwise, the omission is condoned. AIR (V 19) 1932 All 28: 33 Cr LJ 124: 1932 ALJ 523: 135 Ind Cas 226.

——S. 539-B — Where a conviction by a Bench of Magistrates was based on a report of local inspection signed by four Magistrates of whom one did not take part in the judgment and one of the Magistrates who took part in the judgment did not sign in the memorandum:

Held, that the conviction was invalid. AIR (V 19) 1932 Mad 676: 1932 MWN 645: 37 MLW 149: 33 Cr LJ 655 (2): 138 Ind Cas 608.

**——S. 539-B — Omission to make memorandum.**

Omission to make a memorandum of local inspection as provided by S. 539B, Criminal P.C., will not vitiate the whole proceedings unless it has occasioned a failure of justice. AIR (V 18) 1931 All 433: 1931 ALJ 912: 53 All 706: 33 Cr LJ 331: 136 Ind Cas 621.

**——S. 539-B — Omission to make memorandum — Effect of.**

Omission to make a memorandum of a local inspection as required by S. 539-B, Criminal P.C., will not vitiate the trial where the order of the Magistrate is based on the evidence in the case and not on what he saw on his local inspection. AIR (V 18) 1931 All 14: 1930 ALJ 1437: 32 Cr LJ 309: 53 All 215: 129 Ind Cas 441.

——S. 539-B — Omission to place on record the memorandum of a local inspection is an irregularity which may result in vitiating the conviction if there was any prejudice resulting from the default. AIR (V 16) 1929 Nag 233: 114 Ind Cas 609: 30 Cr LJ 333: 1929 Cr C 257 (DB).

——S. 539-B — Mere omission to record a memorandum under S. 539 (b) is not an illegality vitiating the proceedings. AIR (V 15) 1928 Bom 433: 11 AI Cr R 260: 30 Bom LR 954: 29 Cr LJ 1005: 112 Ind Cas 221 (DB).

**——S. 539-B — Revision.**

When an order of discharge was challenged on the ground that S. 539-B was not complied with, but was in reality obeyed, the High Court declined to interfere. AIR (V 14) 1927 Nag 397: 28 Cr LJ 180: 99 Ind Cas 852.

——S. 539-B — There is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings, irrespective of any question of prejudice. Court ought to be careful to comply with the provisions of S. 539-B. Failure by Magistrate to make a record

of any relevant facts that he observed at the inspection under S. 539-B is an irregularity falling within S. 537. AIR 1924 Cal 1035: 52 Cal 148, Not. Foll. AIR (V 13) 1926 Bom 534: 50 Bom 680: 28 Bom LR 1026: 27 Cr LJ 1151: 97 Ind Cas 671 (DB).

**——S. 539-B — Absence of memorandum is not necessarily prejudicial.**

Where the Magistrate did not prepare memorandum of the facts observed and place it on the record, as required by S. 539-B but in his judgment, after referring to the evidence of certain witnesses as to the place where the bottles of opium were found he said: "This consideration combined with my own personal observation of the spot has led me to the conclusion that the exhibit bottles could not have been 'planted' in the place where they were found without the knowledge and assent of the persons selling in the shop."

Held, that the 'Magistrate's failure to record a memorandum has not been prejudicial to the accused and has not occasioned a failure of justice. AIR (V 13) 1926 Rang 193: 5 Bur LJ 100: 27 Cr LJ 1281: 98 Ind Cas 177.

**——S. 539-B — Non-compliance.**

The provision in S. 539-B, cl. (2) is mandatory and the failure to comply with this express direction of law is an illegality and not an irregularity which could be cured if it is held that there was no prejudice to the accused. AIR (V 11) 1924 Cal 1035: 82 Ind Cas 767: 52 Cal 148: 25 Cr LJ 1375: 40 CLJ 149 (DB).

——S. 539-B — The omission to make a memorandum of the local inspection is highly irregular. AIR (V 8) 1921 Pat 415: 61 Ind Cas 794: 2 PLT 455: 22 Cr LJ 442.

**5. Evidence or information from persons on spot.**

——S. 539-B — Spot inspection by Judge — Statements made there are inadmissible. AIR (V 22) 1935 Nag 69: 17 NLJ 189 (DB).

**——S. 539-B — Question whether a cesspool is a nuisance — Inspection of locality by Magistrate — If sufficient — Examination of at least the complainant — Necessity of.**

The question whether a cesspool is a public nuisance depends, generally speaking upon the circumstances which can best be ascertained by an inspection of the locality. Inspection by a Magistrate must be conducted and used in the manner laid down by S. 539B, Criminal P.C., under which the Magistrate must record a memorandum of relevant facts observed at the inspection. But the Court is not expected to base its judgment on its own inspection note which may however necessitate no more than technical compliance with law that there should be substantive evidence apart from the inspection note which is merely to aid it in appreciating the evidence before the Court. In such cases, the Magistrate should examine at least the complainant. AIR (V 21) 1934 All 325: 35 Cr LJ 708: 1934 ALJ 1179: 4 AWR 1608: 148 Ind Cas 615.

——S. 539-B — Inquiries from spectators are irregular. AIR (V 16) 1929 Lah 120: 122 Ind Cas 95: 31 Cr LJ 346: 10 Lah 790: 31 PLR 39.

**——S. 539-B — Opportunity to explain.**

A Magistrate is entitled to inspect a place in order to understand the evidence. But if he receives an impression which is in favour of one side or the other, he should give an opportunity to the side against which he forms an impression to explain away, if possible, the impression created in his mind by the inspection. AIR (V 15) 1928 Mad 494: 54 MLJ 442: 1928 MWN 69: 27 MLW 654: 29 Cr LJ 539: 109 Ind Cas 363: 1 M Cr C 28.

**——S. 539-B — Evidence without oath.**

It is irregular, on local inspections, to take into account the evidence of witnesses not recorded on oath and the irregularity is not curable. AIR (V 14) 1927 Nag 250: 28 Cr LJ 495: 101 Ind Cas 671: 8 AI Cr R 296.

**——S. 540.**

1. Effect of non-compliance.
2. Material witness.
3. Power and duty of Court.
4. Procedure.
5. Rights of parties.

See also N. 4.

6. Scope.

**1. Effect of non-compliance.**

**——S. 540— Important witness on whose evidence prosecution and Judge rely not examined by prosecution in committal proceedings.**

Conviction is not justified, where the prosecution has failed to call important witnesses in the committing Magistrate's Court on whose evidence the prosecution and the Judge largely rely and with whose evidence the evidence of other witnesses is closely connected. AIR (V 25) 1938 Sind 97: 39 Cr LJ 618: 32 SLR 709: 175 Ind Cas 324 (DB).

**2. Material witness.**

**——S. 540 — Trial for murder — Evidence of eye-witnesses not called.**

Where in a murder trial, the evidence of certain persons who were present and were eye-witnesses of what actually happened, had not been given, and if the accused is to be convicted and hanged on the evidence, it really means that he has to be convicted and hanged in circumstances in which, on the face of the matters on the record, the whole story has not been given. Where it is of value or it is of no value, about what happened it is not safe to convict him upon the evidence as it stands:

Held, that the accused should be re-tried.

Held, also, that if the prosecution failed to call such witnesses, they should be examined as witnesses called by the Court under S. 540. AIR (Vol 24) 1937 Rang 139: 38 Cr LJ 1040: 171 Ind Cas 129 (DB).

**——S. 540 — Duty of Court to examine person likely to throw light on occurrence.**

It is the duty of the trial Court to examine any witness that might throw light on the occurrence.

Where some of the prosecution witnesses depose that a certain person was present at the scene of the offence, there is no irregularity in the Magistrate's procedure in examining him as a Court witness though it is unlikely that his evidence would be of any value. (1936) 163 Ind Cas 702: 18 NLJ 289: 37 Cr LJ 858.

——S. 540 — The Court is not bound to examine any person as a Court witness, unless the evidence of such person appeared to be essential to the just decision of the case. AIR (Vol 22) 1935 Pat 95: 1 BR 196: 36 Cr LJ 348: 163 Ind Cas 466 (DB).

**——Ss. 540, 161 — Examination of witnesses examined during Police investigation — Legality of.**

A committing Magistrate is perfectly justified in acting strictly in accordance with law when he examines under S. 540, Criminal P. C., the witnesses whom the investigating Police Officer had examined in the course of his Police investigation, and it is not correct to say that the committing Magistrate was merely "fishing for witnesses" in the case. AIR (Vol 21) 1934 Oudh 362: 11 OWN 581: 35 Cr LJ 1042: 9 Luck 636: 150 Ind Cas 205 (DB).

**——S. 540 — Statement of people coming forward as eye-witnesses — Necessity of examining them, whether tendered by prosecution or not.**

Although statements of people coming forward alleging themselves to be eye-witnesses and supporting the case against the original suspects, may not be evidence in a case of dacoity, where persons allege themselves to be eye-witnesses in a case of this nature, they should be examined by the trial Court, whether tendered by the prosecution or not. AIR (Vol 21) 1934 Pesh 53: 35 Cr LJ 860: 148 Ind Cas 760 (DB).

——S. 540 — It is the duty of the Magistrate in a case of dacoity to summon and examine the persons who, according to complainant saw the dacoity, and whom the Police did not call as witnesses. AIR (Vol 21) 1934 Rang 105: 35 Cr LJ 1362: 151 Ind Cas 615.

**——S. 540 — New witness by prosecution in Sessions Court — Whether should be examined as Court witness.**

It is no doubt the well-recognized duty of the prosecution to put forward all the evidence of which they have any knowledge at the earliest possible moment. Section 540, Criminal P. C., is not merely permissive; it has also a part which is peremptory. Any Court may, at any stage, examine any person in attendance; and the Court shall examine any such person if his evidence appears essential to the just decision of the case.

If the Public Prosecutor produces such a witness at the Sessions trial, and if he is not allowed to examine him as his own witness, then it would be the duty of the Court to examine him as a Court witness. If this were done, then an opportunity of cross-examining must be allowed both to the prosecutor and to the accused. It will be therefore, rather to the advantage of the prosecution that such a witness should be examined as a Court witness and to the advantage of the accused that he should be examined in the ordinary way as a witness for the prosecution. AIR (Vol 21) 1934 Sind 78: 35 Cr LJ 1170: 150 Ind Cas 917.

**——S. 540 — Murder case — Eye-witnesses related to accused — Examination not to be dispensed with.**

The fact that certain witnesses who were present at the time of the murder are related to the accused is not a ground for regarding their evidence as worthless dispensing with their examination in the Sessions Court. If neither the prosecution nor the defence examine such witnesses the Court might exercise its powers under S. 540, Criminal P. C. and examine them. AIR (Vol 18) 1931 Rang 163: 32 Cr LJ 1067: 133 Ind Cas 488.

**——S. 540 — Rebutting evidence.**

Under S. 540, Court has power to admit rebutting evidence for the purpose of contradicting evidence adduced on behalf of the defence, if the Court thinks it to be essential to the just decision of the case. AIR (Vol 17) 1930 Cal 134: 31 Cr LJ 918: 34 CWN 170: 1930 Cr C 134: 125 Ind Cas 746 (DB).

**——S. 540 — Bias against accused.**

Court has power to summon any person as witness if his evidence appears essential for the just decision of the case. And no question of bias against the accused can arise unless it is shown that the Court was guiding or assisting the prosecution. AIR (Vol 16) 1929 Nag 172: 30 Cr LJ 728: 1929 Cr C 47: 117 Ind Cas 213.

**——S. 540 — Examination when case closed.**

Even after both parties have closed their cases Court may summon any person as a witness, if his evidence appears to it, essential to the just decision of the case. AIR (Vol 11) 1924 Mad 587: 46 MLJ 325: 19 MLW 272: 34 MLT 165: 1924 MWN 303: 25 Cr LJ 354: 77 Ind Cas 290.

### 3. Power and duty of Court.

**——S. 540 — Important witness not tendered by prosecution on ground that he had turned hostile — Duty of Court.**

It is undoubtedly the duty of the Public Prosecutor to place before the trial Court the testimony of all available eye-witnesses and leave it to the jury the matter. Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. A good deal, no doubt, will depend on the circumstances of each case.

But whatever view may be held on the question of the power of the Public Prosecutor to produce or withhold evidence, the power of the Court is neither circumscribed nor fettered in any way to arrive at the truth in a criminal trial. Section 540, Criminal P. C., gives ample powers, to the Court to examine any person as a witness, whose evidence appears to it essential to the just decision of the case.

A prosecution witness who was examined in committing Court but was not tendered in Sessions Court, must be in attendance in Court unless discharged by the order of the Court. Where such a witness is important, the Sessions Judge should exercise his powers under this section and examine the witness himself, even if the Public Prosecutor was unwilling to examine him as a witness in the Court of Session on the ground that he had turned hostile.

The Public Prosecutor must have satisfied himself as to the reliability of the witness before he was produced in the committing Magistrate's Court, and the mere fact that he stated in that Court that nothing was recovered from the possession of the accused at the time of his arrest, is not sufficient to characterise the witness as untruthful and hostile. AIR (Vol 28) 1941 Oudh 599: 1941 AWR CC 303: 1941 OWN 1034: 42 Cr LJ 845: 17 Luck 20: 193 Ind Cas 319 (DB).

**——S. 540 — Prosecution witnesses knowing facts likely to turn hostile — Duty of Public Prosecutor — Either party not prepared to call witnesses knowing important relevant facts — Court's duty — On failure of trial Court, Appellate Court should avail of power under S. 428.**

There may be some doubt as to the duty of the Public Prosecutor to call prosecution witnesses who know facts but are likely to turn hostile, but there is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons, neither party is prepared to call witnesses who are known to be in a position to speak to important relevant facts. When the trial Court fails to do this, the Appellate Court should avail itself of the power conferred by S. 428, Criminal P. C. AIR (Vol 25) 1938 Mad 900: 1938 MWN 817: 48 LW 363: 40 Cr LJ 35: 178 Ind Cas 341.

——S. 540 — Power to examine at the instance of complainant.

If the Magistrate thinks that certain evidence is necessary for a proper decision of the case, he is bound to bring that evidence upon the record under the provisions of S. 540, Criminal P. C., whether the suggestion emanates from the complainant or not. He should not, of course, examine any witness under S. 540, Criminal P. C., merely because the complainant chooses to suggest the witness; but if he himself thinks that the evidence of the witness is essential, he is not only allowed to examine the witness but is by law bound to do so. AIR (Vol 23) 1936 All 269: 1936 ALJ 303: 1936 AWR 71: 37 Cr LJ 522: 162 Ind Cas 47.

——S. 540 — The Crown cannot be accused of unfairness if it declines to call as its own witnesses, cited by the prosecution. AIR (Vol 22) 1935 Rang 506: 37 Cr LJ 234: 160 Ind Cas 113.

——S. 540 — Section 257, Criminal P. C., has no bearing on the question of examining a witness who is present though not summoned. But under S. 540, Criminal P. C., the Magistrate can examine a witness if he thinks it fit to do so. 1934 MWN 97.

——S. 540 — Under S. 540, Criminal P. C., the "Magistrate may admit evidence on behalf of either side at the trial" and once such evidence has been admitted on the record, the Magistrate is bound to consider it while deciding whether a charge should not be framed. AIR (Vol 20) 1933 Lah 561: 34 Cr LJ 735: 34 PLR 719: 144 Ind Cas 331.

——S. 540 — Section 540 is not controlled by S. 342 and therefore where the accused is once examined as required by S. 342 and then a witness is examined under S. 540, Cr. P. C., a Court is not bound to examine the accused again after recording the statement of that witness. AIR (Vol 13) 1926 Lah 154: 26 Cr LJ 1418: 89 Ind Cas 842.

**——S. 540 — Discovery of witnesses.**

The power to summon a witness does not by any means imply a power to discover such witness by personal inquiry out of Court. AIR (Vol 13) 1926 Rang 180: 4 Rang 106: 27 Cr LJ 1084: 97 Ind Cas 60.

**——S. 540 — Examination of witnesses — Practice.**

Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties, which witnesses should be examined. AIR (Vol 2) 1915 Mad 825: 28 MLJ 134: 16 Cr LJ 156: 27 Ind Cas 220.

**——S. 540 — Summoning fresh witnesses — Order can be passed only by trying Magistrate.**

An accused person who has exhausted his right of summoning witnesses for the defence, should, if he wants to call in fresh witnesses move the trying Magistrate to exercise the powers vested in him under S. 540 of the Cr. P. Code; an order for summoning such witnesses can be passed only by the Magistrate trying the case. AIR (Vol 1) 1914 All 197: 11 ALJ 986: 36 All 13: 15 Cr LJ 164: 22 Ind Cas 740.

**——S. 540 — Witnesses recalled after case for prosecution was closed at the order of Asst. Collector — Jurisdiction.**

Where after the close of the case for prosecution, the Magistrate at the discretion of the Asst. Collector who prosecuted the case, recalled and re-examined two witnesses, the Magistrate was held to have abdicated his Magisterial functions and acted as a mere delegate of the Asst. Collector and his trial was without jurisdiction. AIR (Vol 1) 1914 Sind 89: 7 SLR 82: 15 Cr LJ 375: 23 Ind Cas 743.

**——Ss. 540 and 428 — Powers of appellate Court to admit additional evidence.**

Under S. 428 powers of a Criminal Appellate Court, are not analogous to those conferred on a Civil Appellate Court under the Cr. P. C. A court of criminal appeal can take additional evidence at any time on recording reasons for doing so. (1910) 8 MLT 418: (1910) MWN 819: 11 Cr LJ 511: 8 Ind Cas 145.

**4. Procedure.**

**——S. 540 — 'Trial' — Meaning of.**

Because the word 'trial' has been used in certain sections of the Cr. P. Code, to refer to the proceedings upto a certain stage, it does not follow, necessarily that the word "trial" in S. 540 of the Cr. P. Code, has also been used to refer to the proceedings to that very stage only. In the context in which it is used in the section it cannot be said that it excludes a proceeding relating to the delivery of judgment. AIR (Vol 37) 1950 A 369: 51 Cr LJ 1013: 1950 AWR 245: 1950 ALJ 127.

**——S. 540 — Order for examination of Court-witness after closing of the evidence and posting of case for judgment — 'Trial' — When terminates.**

A Court is competent to order the examination of a Court-witness after the closing of the evidence in the case and posting of the case for judgment. The trial is terminated only by the pronouncement of the judgment and so long as a judgment has not been pronounced a trial is not terminated, even though the judgment itself may not be a part of the trial. AIR (Vol 37) 1950 A 369: 51 Cr LJ 1013: 1950 AWR 245: 1950 ALJ 127 (DB).

**——S. 540 — Power of Court — Examination of witness after arguments and before judgment.**

Under S. 540, Cr. P. Code, the Court is empowered "at any stage of any enquiry or trial" to summon or examine or re-examine any witness. The mere fact that judgment is not included in the word "trial" does not mean that the trial finally concludes once the arguments are heard and that no witnesses can be examined after that point of time, even though the judgment has not been pronounced. The Code does not lay down the point of time when a trial is to be deemed to be concluded. A trial continues till the judgment is delivered.

Even though at one stage the evidence of the parties is concluded and arguments have been heard, the Court before delivering judgment is entitled in the interest of justice to examine of its own motion any witness, provided, of course, the interests of the accused are not prejudiced thereby. S. 540 empowers a Court to take such evidence.

If the Court decides to take such evidence, it would be proper for the Court to re-examine the accused with reference to the new evidence recorded and to give an opportunity to the accused to give such further evidence in defence as he may be advised to do. AIR (V 36) 1949 All 692: 1950 A Cr C 56: 51 Cr LJ 199: 1950 AWR 147 (DB).

**——S. 540 — Procedure — Case closed after examining only some prosecution witnesses — Accused complaining in arguments that evidence of prosecution witnesses was deliberately withheld — Magistrate summoning those witnesses on date fixed for judgment — Legality.**

Where some prosecution witnesses are given up and not examined and the case is closed, but owing to a complaint by the defence in the argument stage that the prosecution had deliberately withheld the evidence of prosecution witnesses who had been summoned originally, the Magistrate on the date fixed for judgment issues process for the attendance of those witnesses, it cannot be said that the Magistrate acts illegally. The Magistrate is legally entitled to act so under S. 540, Cr. P. Code. AIR (V 35) 1948 Nag 209: 1948 NLJ 509: ILR (1948) Nag 308: 49 Cr LJ 242.

**——Ss. 540, 342 — Prosecution witnesses examined — Accused should be again examined under S. 342 subsequently.**

No doubt the provisions of S. 540, Criminal P. C., are very wide and a witness can be summoned and examined by the Court at any stage of an enquiry or trial, still it is not proper to examine witnesses under that section after a case is practically finished and without examining the accused again under S. 342, Criminal P. C.

The first portion of S. 342(1) gives the Court power to examine the accused at any stage of an inquiry or trial for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him and where the witnesses under S. 540 are examined at the end of the case, the Magistrate should record the statements of the accused again after examining those witnesses. AIR (V 28) 1941 Oudh 20: 41 Cr LJ 816: 1940 OWN 923: 16 Luck 353: 1940 AWR CC 370: 190 Ind Cas 71.

**——S. 540 — Court taking additional evidence after defence evidence — Accused, if should be re-examined.**

Section 540, Criminal P. C., is expressed in the widest possible terms and the intention is not to limit the discretion of the trying Court in any way. At the same time, the Courts ought to remember that the purpose of S. 540 is not to enable one party or the other to fill up the gaps in his case and to improve it by new matter at a stage, but to enable the Court to act in the interest of justice when it considers such action necessary. Where the accused has already been examined at the proper time after the prosecution case had closed, and the Court takes additional evidence after the close of the defence evidence under S. 540, it is not necessary to re-examine him under S. 342. AIR (V 24) 1937 Pat 246: 38 Cr LJ 657: 3 BR 508: 18 PLT 483: 168 Ind Cas 979.

**——Ss. 540, 510, 309 — Examination of Chemical Examiner after recording of opinions of assessors — Legality of procedure — Assessors not altering opinion.**

Where, after a trial was concluded and the opinions of the assessors recorded, the Judge called the Chemical Examiner as a Court witness under S. 540, Criminal P. C., and the assessors on being asked after his examination if they wanted to modify their opinion, stuck to their old opinion and judgment was announced:

Held, that the procedure adopted by the trial Court was not justified by S. 309, Criminal P. C., but inasmuch as the evidence that was already on the record, before the Chemical Examiner was called to make a statement in Court, was sufficient for the decision of the case of each accused and it was not necessary to make any use of the statement made by the Chemical Examiner and the assessors did not change their opinion in any way, in consequence of any further or fresh evidence, the accused were not prejudiced. (1934) 149 Ind Cas 442: 35 PLR 390: 35 Cr LJ 1002 (DB).

——S. 540 — Section 540 cannot justify and cure the irregularity of a procedure whereby a Magistrate, long after closing the case examines a witness under S. 540 but does not further examine the accused under S. 342. Non-compliance with S. 342 vitiates the trial. AIR (V 20) 1933 Cal 347: 56 CLJ 583: 34 Cr LJ 549: 143 Ind Cas 285.

**——S. 540 — Disclosure of names.**

Under S. 540 a Magistrate may summon any person as Court witness at any stage of the proceedings, but in fairness to the parties and with view to afford them an opportunity of proper cross-examination he should (save under exceptional circumstances) inform them beforehand of the names etc. of these witnesses. AIR (Vol 16) 1929 Lah 120: 31 Cr LJ 346: 122 Ind Cas 95: 10 Lah 790: 31 PLR 39.

**——S. 540 — Power when exercised.**

Per Walter, J. — The power of the Magistrate to call a person as a Court witness is wide but it ought not to be exercised when the prosecution has wantonly failed to examine the witness and when the application to have the person examined as a Court witness is made after the whole case had closed. 1929 MWN 395 (DB).

——S. 540 — Where a witness is examined as a prosecution witness after the whole of the defence evidence has been recorded, the procedure is contrary to the provisions of S. 252. Such a procedure though not objected to, causes injustice to the accused and the whole trial is vitiated. AIR (V 15) 1928 Lah 953: 111 Ind Cas 396: 29 PLR 613: 11 A I Cr R 182: 29 Cr LJ 844.

**——S. 540 — Exercise of discretion — Discretion should be exercised by the Magistrate with a great deal of caution.**

The discretion given to Magistrate under S. 540 has to be exercised with a great deal of caution. Where after the defence was closed and arguments were heard the Magistrate felt on the records as they stood that some points had been left obscure and in order to elucidate them it was necessary to recall certain witnesses and to examine a new witness, and when this evidence had been recorded, he took the precaution of asking the accused if he wanted to add anything to his previous statement and on his replying in the negative he heard further arguments and then proceeded to decide the case.

Held, that there was no illegality in the procedure adopted nor had the petitioner been prejudiced in any way by it. AIR (V 15) 1928 Lah 647: 110 Ind Cas 676: 10 LLJ 262: 29 PLR 703: 10 A I Cr R 519: 29 Cr LJ 740.

**——S. 540 — Absence of parties — Court going to the parties' village and examining witnesses without notice to parties and deciding case on such evidence — Procedure is bad.**

Section 540 confers very wide powers upon a Court, but the wider the powers the greater the exercise of discretion required of a Magistrate.

Where in a case under S. 488, Cr. P. Code, witnesses were examined on both sides, but the Sub-Divisional Magistrate finding himself unable to arrive at any definite conclusions from their evidence as to the legitimacy of the child took the course of going to the village and examining without previous notice four of its residents as Court witnesses and based his decision on their evidence.

Held, that the Court in pursuing this course went beyond the reasonable discretion afforded by S. 540. AIR (V 14) 1927 Mad 361: 52 MLJ 118: 100 Ind Cas 123: 38 MLT 39: 25 MLW 251: 28 Cr LJ 251: 7 A I Cr R 351.

——S. 540 — After both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate, the Magistrate having exercised this power under Section 540, Cr. P. Code.

Held, that the procedure adopted by the Magistrate was entirely unjustifiable. Sentence was set aside and retrial ordered. AIR (V 10) 1923 Cal 690: 75 Ind Cas 541: 27 CWN 675: 37 CLJ 415: 24 Cr LJ 957 (DB).

**——S. 540 — Court witness.**

A Court witness means one whom the Judge acting on his own initiative caused to be produced. But where the Public Prosecutor put in a petition requesting the Court to examine a witness as a Court witness, so that both parties may cross-examine him, the witness so called is not a Court witness and his testimony thus obtained should be rejected in toto. AIR (V 10) 1923 Cal 463: 71 Ind Cas 657: 37 CLJ 173: 24 Cr LJ 193 (DB).

**——S. 540 — Defence closed — Rebutting evidence by prosecution is admissible if it could not have been produced earlier.**

Where after the case for the defence is closed, the prosecution offers to give rebutting evidence to falsify the case for the defence, and it is found that the prosecution could not possibly offer that evidence at any earlier stage, fresh rebutting evidence should be admitted. The second part of the section is imperative. If the new evidence appears to the Court essential to the just decision of the case, the Court has no choice but is bound to take the evidence. AIR (V 10) 1923 Rang 216: 76 Ind Cas 649: 1 Rang 308: 2 Bur LJ 127: 25 Cr LJ 217.

——S. 540 — The recording of evidence on behalf of the prosecution after the defence evidence is an irregularity which ought to be avoided. AIR (V 7) 1920 Bom 339: 59 Ind Cas 202: 22 Cr LJ 58: 22 Bom LR 1224 (DB).

**——S. 540 — Local investigation after close of defence.**

Deputation of a Sub-Magistrate after the close of the defence for local investigation is not illegal in as much as the Court has the right under S. 540 to summon and examine any witness before judgment. (1911) 15 CWN 414: 12 Cr LJ 7: 9 Ind Cas 46 (DB).

### 5. Right of parties.

See also N. 4.

**——S. 540 — Notice to other party, if essential.**

In order to examine a witness under S. 540, at the instance of a party, notice to the other party is not legally necessary, but if the other party is suddenly called upon to meet evidence which he does not know is going to be adduced, he may well be prejudiced. AIR (V 29) 1942 Mad 223: 54 LW 556: 1941 MWN 1032: (1941) 2 MLJ 787: ILR (1942) Mad 494: 43 Cr LJ 557: 199 Ind Cas 406.

**——S. 540 — Accused, if entitled to further opportunity to produce more evidence.**

There is nothing in the Criminal P.C., which says that if a witness examined under S. 540 gives evidence which is against the accused, the accused thereupon must be given a further opportunity to produce more evidence to rebut his statement. There may be cases undoubtedly where in the interest of justice a Court would normally give the accused such an opportunity. AIR (V 23) 1936 All 269: 1936 ALJ 303: 1936 AWR 71: 37 Cr LJ 522: 162 Ind Cas 47.

**——S. 540 — Sessions Court.**

Prosecution is at liberty to examine witness in Sessions Court which it has not produced in committing Court; only those witnesses so examined in committing Court can be bound down to attend in Sessions Court. In other cases, the prosecution has to rely on the wishes of the witnesses or upon the Court to call them under S. 540. For this, though there is no provision in the Code, the prosecution should submit a list of witnesses which should be given to the Sessions Court and the accused, if these witnesses have not been called in committing Court. AIR (V 23) 1926 Lah 533: 17 Lah 176: 38 PLR 421: 37 Cr LJ 742: 162 Ind Cas 976 (FB).

**——S. 540 — Court witnesses, summoning of — Discretion of Court.**

Summoning of Court witnesses is entirely a matter for the Court to decide and it is not for the accused to insist on. It is open to the accused to summon these witnesses in his defence, if so advised. AIR (V 23) 1936 Nag 250: 38 Cr LJ 482: ILR (1937) Nag 165: 167 Ind Cas 860.

——S. 540 — Crown not calling prosecution witness examined by it in committing Magistrate's Court, in Sessions Court—Court thinking him to be material witness — Court can either draw an adverse inference or examine him as Court witness — But he cannot compel the Crown either to examine him as Crown witness or tender him for cross-examination. AIR (V 22) 1935 Sind 60 : 36 Cr LJ 869 : 29 SLR 422 : 155 Ind Cas 1114 (DB).

**——S. 540 — Opportunity to cross-examine witnesses.**

Where in a criminal trial, the defence alleged that certain statements by certain witnesses before the Judge were not mentioned to the Police, the defence has a right to cross-examine the witnesses as to such statements and seek their explanation. AIR (V 20) 1933 Nag 136 : 29 NLR 251 : 34 Cr LJ 505 : 143 Ind Cas 17 (DB).

**——S. 540 — Cross-examination.**

——If a witness is called under S. 540 both sides have a right to cross-examine that witness freely. It is wholly misleading to describe as a cross-examination that which consists of certain questions being suggested by the defence to the Court and those questions being put by the Court. AIR (V 12) 1925 All 285 : 85 Ind Cas 719 : 47 All 147 : 26 Cr LJ 575 : 6 LR A Cr 17.

### 6. Scope.

**——S. 540 — Presence of accused for examination under S. 342.**

Section 540 does not permit the Court to dispense with the presence of the accused for examination under S. 342 and examine his pleader under that section. AIR (V 32) 1945 Cal 482 : 47 Cr LJ 302 : 49 CWN 537 : 222 Ind Cas 265 (DB).

——S. 540 — When, before the charge is framed, the names of all the prosecution witnesses have been ascertained by the complainant and by the

Magistrate, no fresh witnesses can be examined by the prosecution as of right after the charge is framed except under S. 540. AIR (V 32) 1945 Lah 201 : 47 PLR 321 : 47 Cr LJ 143 : 221 Ind Cas 274 (FB).

**——S. 540 — Section, if limited for benefit of accused only.**

Section 540, Criminal P. C., is extremely wide in its provisions and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and, where it is essential to the just decision of the case he is bound to do so. A Court is not precluded from exercising its discretion under S. 540, Criminal P. C., merely because somebody asks it to do so. Section 540, Criminal P. C., is not intended only for the benefit of the accused.

If the Court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the Court to summon that witness under S. 540, Criminal P. C., merely because the evidence supports the case of the prosecution and not that of the accused. The Court has power under S. 540, to examine a witness even to rebut defence evidence; but those powers should be sparingly invoked for such a purpose;

Held, on facts that the discretion under S. 540 in permitting a person to be called as witness was properly exercised. AIR (V 29) 1942 Mad 223 : 54 LW 556: (1941) 2 MLJ 787: 1941 MWN 1032: ILR (1942) Mad 494 : 43 Cr LJ 557 : 199 Ind Cas 406 (DB).

——S. 540 — The powers given to a Court under S. 540, Criminal P. C., are discretionary and it cannot be forced to exercise them at the bidding of any of the parties. AIR (V 29) 1942 Oudh 130 : 1941 OWN 1290 : 43 Cr LJ 280 : 1941 AWR (CC) 397 : 197 Ind Cas 839.

**——S. 540 — Discretion should be exercised judicially.**

The first portion of S. 540, Criminal P. C., leaves a discretion in the Court to summon any person as a witness, a discretion which should, as a matter of course, be exercised judicially. AIR (V 28) 1941 Mad 324 : 1940 MWN 1164 : 52 LW 790 : 42 Cr LJ 404 : 193 Ind Cas 342 (DB).

——S. 540 — There is nothing in S. 540, Criminal P. C., itself to limit that section to Court witnesses and it could apply also to witnesses for the prosecution as well as to witnesses for the defence. AIR (Vol 27) 1940 Nag 390: 1940 NLJ 449: 42 Cr LJ 208: ILR (1942) Nag 333: 191 Ind Cas 636.

**——S. 540 — Documents overlooked by the defence.**

Section 540, Criminal P. C., is not confined to documents overlooked by the prosecution. It is equally available to the defence and the section is mandatory if the evidence appears to the Court to be essential to a just decision of the case.

For the purpose of S. 540, Criminal P. C., omissions may be contradictions. AIR (V 21) 1934 Mad 735 : 36 Cr LJ 381 : 40 LW 681 : 1934 MWN 993 : 153 Ind Cas 627.

**——S. 540 — 'Discretion', meaning of.**

The word 'discretion' in itself implies vigilant circumspection and care. Where the Legislature conceded wide discretion, it also imposes a heavy responsibility. AIR (V 20) 1933 Sind 49 : 35 Cr LJ 591 : 143 Ind Cas 351 (DB).

**——S. 540 — Summoning of witnesses, when essential.**

Section 540, Criminal P. C., is not wholly discretionary. The last part of the section imposes an obligation that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. If the trying Magistrate was of opinion that the evidence of certain witnesses was essential then S. 540 imposes upon him the obligation of summoning them. Even if the evidence, though not essential, was yet expedient, the Magistrate does not exceed his authority in putting those witnesses into the box. AIR (V 20) 1933 Sind 49 : 34 Cr LJ 591 : 143 Ind Cas 351 (DB).

——S. 540 — There is nothing in S. 139 A, Criminal P. C., which excludes the exercise of the Court's inherent powers under S. 540 of the Code. AIR (V 18) 1931 Cal 527 : 58 C 461 : 32 Cr LJ 1187 : 134 Ind Cas 574 (1) (DB).

**——S. 540 — Scope.**

Section 540 gives a Judge the fullest discretion to recall a witness at any stage of a trial and makes it imperative for him to do so, if he considers further evidence essential to the just decision of the case. Thus where an essential document has been overlooked by the prosecution, it is the Judge's duty to have it admitted in evidence. AIR (V 16) 1929 Mad 837: 1919 Cr C 485: 30 MLW 642: 2 M Cr C 298 : 1929 MWN 901 : 57 MLJ 681 (DB).

**——S. 540A.**

**——Ss. 540A and 342 — Presence of accused cannot be dispensed with at stage of examination under S. 342.**

No doubt the law provides for a trial to proceed in the absence of the accused, but S. 540A does not permit the trial to proceed without the presence of the accused at stages where under the law the presence of the accused is imperative. One of these stages is when the accused is required to be examined in accordance with the provisions of S. 342. The Court cannot dispense with the presence of the accused at this stage. AIR (V 32) 1945 Cal 482: 222 Ind Cas 265: 47 Cr LJ 302: 49 CWN 537.

**——S. 540A — Scope and applicability.**

Section 540A, Criminal P. C., is a general section which will apply to cases of all kinds whether the accused is in jail custody or whether he is on bail or whether he is appearing in obedience to a summons. AIR (Vol 27) 1940 All 178: 1940 ALJ 104: 41 Cr LJ 500: 1940 AWR 79: 187 Ind Cas 682.

**——S. 540A — Trial one and indivisible — One accused remaining absent — Exemption granted illegal — Whole trial, held, vitiated.**

Normally a trial in the absence of the accused is a nullity and it is only by virtue of S. 540A that this consequence of the absence of accused can be avoided; if the requirements of the section are not fulfilled, the trial remains a nullity.

Where certain accused are tried jointly, the trial being one and indivisible, and one of the accused remains absent throughout the trial, being granted an illegal exemption, the illegality vitiates the trial, and the trial being one and indivisible an illegality which vitiates the trial so far as one of the accused is concerned, prevents the trial from holding good in respect of the remaining accused. AIR (Vol 25) 1938 Lah 216: 40 PLR 1: 39 Cr LJ 439: 174 Ind Cas 422 (DB).

**——S. 540A — Trial Magistrate, if authorized to dispense with attendance of accused on ground of illness.**

Section 540-A, Criminal P. C., does not authorize the trial Magistrate to dispense with the attendance of the accused on the ground of illness. AIR (V 23) 1936 Rang 114: 37 Cr LJ 436: 161 Ind Cas 240.

**——S. 540-A — Person not incapacited but wishing to go to another place for private reason — Permission.**

The words "incapable of remaining before the Court', in S. 540-A, Criminal P. C., cannot be

made to include the case of a person who is in no way incapacitated from attending the Court but who wishes to go to a remote place for private reasons. It would create a most dangerous precedent to grant exemption to such a person for reasons which are not covered by S. 540-A, Criminal P. C. AIR (V 19) 1932 All 504: 34 Cr LJ 433(1): 142 Ind Cas 853.

——S. 540-A — **Applicability — Scope — Accused permitted to be absent in order to visit relative — — Validity of order dispensing with presence — Irregularity.**

Where the Judge passed an order under S. 540-A, Cr. P. Code dispensing with the presence of the accused so as to enable the latter to visit his relative and it appeared that the order was made after the sanction of the Government and after taking the necessary undertaking from the accused.

Held, that the order was not correct because the section is applicable only to cases where the accused is "incapable of remaining before the Court".

Held, however that the defect was under the circumstances a mere irregularity curable by S. 537, Cr. P. C. and that the trial could be proceeded with without recalling the witnesses. AIR (V 17) 1930 All 817: 1930 ALJ 1076: 1930 Cr C 1201.

——S. 540-A — **Illness — Court cannot appoint pleader without his consent to expedite enquiry**

Where the accused is not represented by a pleader and is unable to attend personally, being ill, the Court cannot proceed with the case by assigning him a pleader, for such a counsel is neither chosen by him nor given to him with his express or implied consent and in fact does not really represent him and no Court has any authority to force upon a prisoner the services of a counsel if he is unwilling to accept them. The employment of a counsel places him in a confidential position which, of course, will not exist in the case of a pleader, assigned without the accused's consent. Moreover, the pleader might advance a defence which the accused would never have made and yet for which he must be responsible. AIR (V 16) 1929 Lah 705: 126 Ind Cas 72: 11 Lah 220: 31 Cr LJ 977: 31 P LR 824: 1929 Cr C 351 (DB).

——S. 541.

——S. 541 — **Power of Local Government.**

The Government has no power under S. 541 Criminal P. C. to issue a notification which amounts to a discretion that approvers shall be detained in Police custody. AIR (V 18) 1931 Lah 476: 32 PLR 493: 32 Cr LJ 913: 12 L 635: 132 Ind Cas 519.

——S. 541 — **Power of Local Government.**

Where ample provision has been made by law for the detention in jails or judicial lock-up of persons liable to imprisonment or committed to custody the Local Government has no power to issue a direction under S. 541 (1), Criminal P.C., that an approver shall be confined in a particular place in the occupation of the Police. AIR (V 18) 1931 Lah 353: 32 PLR 423: 32 Cr LJ 785: 131 Ind Cas 625 (DB).

——S. 544.

——S. 544 — **S. 544 and Criminal Rules of Practice R. 384 — Summoning of defence witnesses at Government expense — Matter of discretion — Giving of reason for refusal — Necessity.**

The use of the word "may" instead of 'shall' in S. 544, Cr. P. Code, shows that summoning of defence witnesses at Government expense is discretionary and not mandatory. This is further emphasised by the words, "if it thinks fit". R. 384 of the Criminal Rules of Practice not only makes it discretionary for the Magistrate to pay such batta, but lays down the limits within which alone the discretion can be exercised.

Magistrates will do well when refusing to summon defence witnesses at Government expense to give the reason for the order.

Where in a prosecution for non-payment of sales tax, the Magistrate refuses to summon defence witnesses at Government expense, it cannot be said that the Court was wrong in refusing to summon such witnesses at public expense in these days of financial stringency. AIR (V 37) 1950 Mad 283: 51 Cr LJ 738: (1949) 2 MLJ 745: 63 LW 61: 1950 MWN 38.

——S. 544 — **Defence witnesses — Expenses — Warrant case but neither cognizable nor non-bailable — Court's discretion to order payment of expenses by Government.**

Under S. 544, the Magistrate may order payment on the part of the Government of the reasonable expenses of any witness attending a trial subject to any rules which may be framed by Provincial Government. Rule 1 of the High Court Rules and Orders Chap. IX-A of Vol. III (Lahore High Court), lays down four classes of cases in which the payment of such expenses is authorised namely (1) cases which are brought in the public interest (2) non-bailable cases (3) cognizable cases and (4) cases in which Court witnesses are called. Hence the payment of expenses of defence witnesses in a warrant case which is neither non-bailable, nor cognizable and which is not brought in public interest cannot be allowed by Court to be paid by the Government. AIR (V 32) 1945 Lah 63: ILR (1944) Lah 534: 219 Ind Cas 342: 46 Cr LJ 596 (DB).

——S. 544 — Application by complainant to summon certain order passed at costs of applicant and necessary to show that defence witnesses were interested in accused should not be rejected. AIR (V 27) 1940 Mad 746: 1940 MWN 387 (DB).

——S. 544 — The Criminal P.C., gives a Magistrate a discretion to pass an order under S. 257 (2), Criminal P.C., and his discretion is subject to S. 544, Criminal P.C. and the rules passed by Local Government under that section. AIR (V 26) 1939 All 101: 1938 ALJ 1082: 1938 AWR 780: 179 Ind Cas 773: 40 Cr LJ 257: ILR (1939) All 57 (DB).

——S. 544 — **Rules under, by Punjab Govt. R. 1, Vol 3 Chap. 9 — Rule by High Court that ordinarily expenses of defence witnesses are to be paid by Government in every warrant case, if ultra vires.**

Per Blacker, J.—(in Order of Reference) — The only fair interpretation of R. 1, Chap. 9, Vol. 3 of the rules framed by the Punjab Government under S. 544, Criminal P.C. which makes no distinction between prosecution witnesses and defence witnesses is that Government, by exercising its power of restriction, which it is authorized to exercise by S. 544 of the Code has limited the cases in which Magistrates may pay the expenses of witnesses to those mentioned in the rule. If the rule framed by the High Court lays down the contrary, that is to say, that ordinarily the expenses of witnesses are to be paid by Government in every warrant case, it is ultra vires. AIR (V 25) 1938 Lah 693: 40 PLR 944: 40 Cr LJ 68: 178 Ind Cas 468 (DB).

——S. 544 — **Expenses of witnesses — Suit by witness alleging he has not been sufficiently paid — Whether maintainable in Civil Court.**

It is entirely within the discretion of the Court which summons a witness to order how much expenses should be allowed to him and which party

should pay it. In criminal cases, the Court may, within certain limits, order the Government to pay the expenses of the complainant and witnesses. If a Court has ordered a certain sum to be paid to a witness and if he is aggrieved by that order and thinks that he has not been sufficiently paid, it is open to him to approach a higher tribunal for the redress but he cannot appeal to the Civil Court against the order nor can he sue the party or the Government for recovery of any additional amount much less can he claim it from the presiding officer of the Court. Such a suit is not maintainable in the Civil Court because this is in effect, a suit for either compelling the Magistrate to pass an order of payment of costs against the Government under S. 544, Criminal P.C. or on the party to pay more than what he had ordered him to pay or is an appeal to the Civil Court against the order of the Magistrate. In either case, it is not maintainable. AIR (V 24) 1937 Pat 477: 3 BR 361: 18 PLT 434: 167 Ind Cas 938.

**——S. 544 — Expert witness — Fee — Accused if should be burdened with.**

A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The Court therefore, should not hesitate in exercising its powers under the law, however highly placed a witness may be. An accused person should not be burdened with the costs of an expert if his demand is unreasonable, especially when the Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues. AIR (V 23) 1936 Lah 919: 38 Cr LJ 133 (1): 38 PLR 1165: 166 Ind Cas 128 (1).

**——S. 544 — Private complaint in non-cognizable case—Order by Court for prosecution by Court Inspector — Application for expert witnesses — Costs of expert witnesses.**

Where a private complaint was made in a non-cognizable case but the Court ordered the Inspector of the Court to prosecute the case and the complainant applied for a handwriting expert and finger-print expert:

Held, that after the Court's order for prosecution by the Court Inspector, the case ceased to be a private complaint and the Crown should pay the costs of the expert. AIR (V 22) 1935 Pat 455: 16 PLT 511: 2 BR 81: 37 Cr LJ 98: 159 Ind Cas 451.

**——S. 544 — De novo trial.**

Under proviso (a) to S. 350 (1), Criminal P. C. the accused has an absolute statutory right to claim a de novo trial and the Magistrate has no authority to limit that right by imposing any condition on its exercise (i.e, by asking the accused to pay process to witness). Processes issued under such circumstances fall within cl. (2) of sub-r. (1) of R. 18 of the Process Fees Rules (para 1046, Burma Courts Manual) and should be issued free of charge and the Magistrate should order the expenses of the witnesses recalled in the exercise of this statutory right, to be paid by Government under the discretion conferred upon him by S. 544, Criminal P. C. AIR (V 22) 1935 Rang 108: 36 Cr LJ 953: 13 R 297: 156 Ind Cas 441.

**——S. 544 — Writ of habeas corpus — Petition withdrawn — Power to award costs proprio motu.**

Where a petition for the issue of a writ of habeas corpus was withdrawn:

Held, that the High Court had no powers to grant costs proprio motu, and that costs being a creature of statute or statutory rules, in the absence of either, costs could not be awarded. AIR (V 20) 1933 Mad 102: 36 LW 718: 63 MLJ 867: 34 Cr LJ 32 (1): 55 M 1049: 140 Ind Cas 530 (1) (FB).

**——S. 544 —Private prosecutions — Complainant must pay reasonable expenses of witnesses in advance, if not paid, Court has right to refuse to issue process.**

In private prosecution the complainant must pay the reasonable expenses of the witnesses, although it is open to the Local Government to make rules which would permit, in certain cases, the liability to be transferred to the Crown. The payment in respect of diet money and travelling expenses fall under the head of other fees payable and the Court has a perfect right to insist upon those fees being paid in advance before the processes are issued, and to refuse to issue process for the attendance of witnesses unless the travelling expenses and diet money of such witnesses have been deposited by the complainant in advance. AIR (V 15) 1928 Oudh 226: 3 Luck 363: 29 Cr LJ 664: 110 Ind Cas 216: 5 OWN 26: 9 AI Cr. R 431 (DB).

**——S. 544 — Travelling allowances — Amount to be specified.**

A Court ordering a party to deposit the travelling allowance of a witness should state the amount of travelling allowance to be deposited. AIR (V 12) 1925 Pat 553: 87 Ind Cas 421: 6 PLT 215: 3 PLR Cr 127: 26 Cr LJ 965.

**——S. 544 — Costs of summons, etc., — To be borne by the Crown.**

All criminal prosecutions are at the instance of the Crown and the Crown is really the prosecutor in a Criminal case and all costs ought to be paid by the Crown for summoning witnesses for the prosecution. AIR (V 11) 1924 Pat 695: 77 Ind Cas 810: 25 Cr LJ 458: 5 Pat LT 487: 1924 PHCC 196.

**——S. 545.**

1. **Applicability and scope.**
2. **Sub-s. (1) (a).**
3. **Compensation to third person.**
4. **Payment of compensation.**
5. **Power of Court.**
6. **Procedure in appeals.**

**1. Applicability and scope.**

**——S. 545 (1) (b), (a) — Defamatory statement in evidence in civil suit — Applicability.**

K had stated in his evidence in a civil suit where one D had sued him for dismissal as manager of K's mine that he dismissed D because he had been informed that D had arranged to sell his ore to one S and had borrowed money on the strength of this from S. This statement was made in cross-examination and again in re-examination voluntarily. This statement was not true, and not believed in good faith by K to be true; for it was improbable and came from persons whom he had himself described as rascals and thieves, and was not in any way verified by him:

Held, that compensation for such defamation was not recoverable in a Civil Court and the order for compensation under S. 545 (1) (b), Criminal P.C. should be set aside though the case was a fit one under sub-s. (1) (a). AIR (V 24) 1937 Rang 192: 38 Cr LJ 718: 169 Ind Cas 245.

——S. 545 — S. 545 of the Cr. P. Code does not apply to a case under S. 107; consequently an order directing the accused to pay costs of the complainant is ultra vires. AIR (V 11) 1924 All 694: 77 Ind Cas 828: 5LRA Cr 12: 25 Cr LJ 476.

**——S. 545 — No injury — Order is illegal.**

The accused obtained ornaments by cheating the complainant and pledged a portion of the ornaments with one Dalichand. He was convicted

for the offence and ordered to pay a fine. Out of the fine, a certain amount was ordered to be paid to Dalichand.

Held, that the order to pay a certain amount out of the fine as compensation to the pledgee was outside the scope of S. 545 as the section directs compensation to be paid to the person who has suffered an injury by the offence. AIR (V 10) 1923 Bom 22: 66 Ind Cas 997: 46 Bom 893: 24 Bom LR 382: 23 Cr LJ 341 (DB).

——S. 545 — S. 545 (1) (b) and Fatal Accidents Act XIII of 1855.

Section 545 (b) has been framed so as to give compensation in cases where it is recoverable under Act XIII of 1855 by the parent, wife, husband and child of the deceased. (1909) 36 Cal 302: 13 CWN 362: 9 CLJ 204: 9 Cr LJ 393: 1 Ind Cas 814 (DB).

2. Sub-s. (1) (a).

——S. 545 — Expenses incurred in successfully prosecuting defendant for a wrongful act can be recovered by civil suit. AIR (V 13) 1926 Nag 365: 95 Ind Cas 35.

——S. 545 —Compensation — Prosecution under S. 193 I. P. C.

A Court in a prosecution under S. 193 IPC can award under S. 545 of the Cr. P. C. only the expenses properly incurred in the prosecution, and has no power to award compensation under Subsection (b) for perjury. AIR (V 4) 1917 Nag 122: 14 NLR 131: 19 Cr LJ 927: 47 Ind Cas 443.

——S. 545 — Order for paying complainant's expenses out of fine — Court-fees Act, S. 31.

A person was convicted of causing hurt and was ordered to pay a fine of Rs. 15, and also the complainant's costs of the prosecution. The Magistrate issued a warrant for Rs. 12-4-0. Rs. 2-4-0 being levied under S. 31, Court-fees Act, and Rs. 10 under S. 545, Cr. P. C., for the complainant's other expenses.

Held, (1) the levy of court-fees was proper under S. 31, Court Fees Act, which is not modified by S. 545, Cr.P.C. (2) The order to pay expenses was illegal, and such expenses could be awarded only out of the fine levied from the accused and not in addition to it. (1901) 24 Mad 305 (306): 2 Weir 722 (DB).

3. Compensation to third person.

——S. 545 — Order of compensation without fine —Legalitiy.

An accused person who has been convicted under S. 409, I. P. Code, and sentenced to a term of imprisonment, cannot be ordered to pay compensation to the aggrieved party. There is no such procedure as that in the Cr. P. Code. The procedure is to impose fine and to order compensation to be paid out of fine. AIR (V 36) 1949 Kutch. 12: 51 Cr LJ 142.

——S. 545 — Fine imposed on two persons and compensation awarded to third person — Only one paying fine.

Where two persons, A and B were sentenced to fines of Rs. 30 and 80, respectively and it was directed that out of the fine, if recovered, Rs. 40 was to be paid to one C, and one of the accused paid his fine of Rs. 80 while the other went to jail:

Held, that C must get compensation in full when such amount was available in the recovery of the fine. AIR (V 24) 1937 Sind 3: 38 Cr LJ 292: 166 Ind Cas 528 (DB).

——S. 545 (as amended in 1923) — Boy killed by accused — Conviction under S. 304-A, Penal Code — Fine — Compensation — Right of mother of boy to compensation.

The amendment of S. 545, Criminal P. C., in 1923, entitles a person to compensation if he can get damages in Civil Court for any loss or injury caused by the offence. Where, therefore, a boy is killed by the accused who is convicted under S. 304-A, Penal Code and the accused is ordered to pay fine, the mother of the boy is entitled to compensation and the Court should order it to be paid out of the fine. AIR (V 22) 1935 Pesh 102: 36 Cr LJ 1208: 157 Ind Cas 531.

——S. 545 — Award of compensation to family of deceased out of fine.

Where a fight took place between the parties owing to the encroachment made by the deceased and his family on the field of the accused, it is not proper to order a part of the fine to be paid to the family of the deceased as compensation. AIR (V 21) 1934 Lah 519: 35 PLR 370: 36 Cr LJ 389: 153 Ind Cas 277.

——S. 545 — There is no provision in the Code for ordering payment of compensation to the person whose property was stolen by accused and destroyed. AIR (V 13) 1926 Nag 89: 26 Cr LJ 1495: 90 Ind Cas 151.

——S. 545 — Section 545 does not justify compensation to be paid to the complainant where no fine is imposed on the accused. AIR (V 12) 1925 Oudh 110: 81 Ind Cas 940: 25 Cr LJ 1116.

——S. 545 — Compensation ordered to be payable out of fine — Full amount not realised — Compensation if payable.

Where a Court orders compensation from the fine which it imposes the order ought not to be construed as meaning that no compensation ought to be paid if the whole amount of fine was not realised but only as meaning that compensation will have priority over the claims of revenue. AIR (V 2) 1915 Mad 1135 (1): 2 LW 22: 16 Cr LJ 58: 26 Ind Cas 650. (DB).

——S. 545 — Compensation — Measure of.

Compensation exceeding loss incurred by the complainant cannot be awarded under S. 545 Cr. P.C. 40 PWR 1913 Cr: 335 PLR 1913: 14 Cr LJ 659 21 Ind Cas 899.

——S. 545 — Fine imposed for compensation — Murder case.

An imposition of fine on the convicts in a murder case for the purpose of compensation to the nearest heirs of the murdered person is bad if no evidence is let in about the ability of the convicts to pay the fine imposed. An order for compensation to the nearest heirs without specifying them is not a sufficient compliance with the law. 18 PR 1913 Cr: 14 Cr LJ 522: 41 PWR 1913 Cr: 326 PLR 1913: 20 Ind Cas 1002 (DB).

——S. 545 (1) (b)—Compensation to the widow of a person killed by an offence under S. 304-A I.P.C.

Section 545 (I) (b), Cr P.C. has been expressly framed so as to provide for compensation being given in cases where it is recoverable under Act XIII of 1855, and to the persons indicated in that act, namely the wife, husband, parent, and child if any of the deceased. When a person convicted under S. 304A, I.P.C., is sentenced to a fine, the whole or any part of the fine recovered, may be given under S. 545 (1) (b), Cr. P. C., as compensation to the widow of the deceased or such other persons entitled to it. (1909) 13 CWN 362 (367): 9 CLJ 204: 36 C 302 (DB).

——S. 545 — Compensation to innocent purchaser of stolen article whether legal.

Under S. 545 an innocent purchaser of a stolen article cannot be compensated. (1909) 6 MLT 241: 10 Cr LJ 290: 3 Ind Cas 437.

**——S. 545 (2) — Fine — Compensation — Indian Forest Act (VII of 1871), S. 41 — Rules 21, 26 and S. 25.**

When a person is convicted of an offence under Rules 21 and 26 framed under S. 41 of the Indian Forest Act, 1878, compensation cannot be awarded in addition to the imposition of fine. (1902) 5 Bom LR 126 (127) (DB).

**——S. 545 — Stolen property — Innocent purchaser —Fine — Compensation — Condition of return of stolen property.**

A Magistrate has no jurisdiction to direct payment of compensation to an innocent purchaser of stolen property out of the fine imposed upon the thief. The return of the stolen goods to the owner should be ordered unconditionally. It ought not to be made conditional upon the payment of compensation directed to be paid to the purchaser. (1901) 3 Bom LR 449 (450) (DB).

### 4. Payment of compensation

**——S. 545 (1) (b) — Prosecution of midwife under S. 304, Penal Code — Midwife unqualified — Fact known to deceased woman — Consent given for attending on her at delivery — Maxim volenti non fit injuria applies.**

Where the deceased woman with full knowledge and of her own free will consented to being attended by an unqualified midwife during her delivery the maxim volenti non fit injuria applies, and the deceased woman would not have been entitled to damages in a suit against the midwife. Hence the order of compensation out of fine made by the Magistrate in a prosecution under S. 304, Penal Code is illegal and without jurisdiction. AIR (V 22) 1935 Rang 471: 37 Cr LJ 199: 159 Ind Cas 1026.

**——S. 545 — Compensation — Complainant — Right to.**

Where a complainant cannot recover substantial damages in a Civil Court, compensation cannot be given under S. 545, Cl. (b) of the Cr. P.C., but a sum may be awarded under cl. (a) to defray the prosecution expenses. AIR (V 1) 1914 Low Bur 220: 15 Cr LJ 555: 24 Ind Cas 963.

**——S. 545 — Amount of fine thrice the money taken — Whole paid as compensation.**

Order of a Magistrate directing whole of the fine to be paid as compensation to persons from whom the accused had taken money illegally is not supported by Section 545 when the amount of fine is three times the money illegally taken. (1909) 5 LBR 50: 10 Cr LJ 78: 2 Ind Cas 542.

### 5. Power of Court.

——S. 545 — Order for compensation — Competency of appellate Court levying fine for the first time to order payment. See AIR (V 34) 1947 Mad 368: 1947 MWN 342 (2): 1947 MWN Cr 82 (2): (1947) 1 MLJ 238.

**——S. 545 (1) (b) — Compensation for offences which accused may have committed but with which he has not been charged.**

Section 545 cl. (1) (b), Criminal P.C., allows the Court to order the whole or any part of the fine recovered to be applied in the payment to any person of compensation for any loss or injury caused by the offence. The offence must clearly be the offence of which the accused has been convicted. It is not possible for the Court under these rules to award compensation for the other offences which the accused may have committed but with which he has not been charged. AIR (V 22) 1935 Rang. 199: 36 Cr LJ 1030: 156 Ind Cas 957.

**——S. 545 — Public Gambling Act (1867) — Magistrate's powers — Distribution of fine among police and witness.**

A number of persons were charged with gambling in a tent on the banks of the Ganges where they had gone temporarily for bathing. The Magistrate convicted seven of them under S. 3 and one under S. 4 of the Public Gambling Act. He further ordered the fine to be distributed among the prosecution witnesses and a number of the Police force including the prosecuting Inspector.

Held, that the Magistrate has no jurisdiction to distribute among witnesses and police-force, the amount of fine inflicted under Public Gambling Act Ss. 3 and 4. AIR (V 6) 1919 All 374: 20 Cr LJ 302: 50 Ind Cas 351.

**——S. 545 — Compensation in addition to fine — Legality.**

A Magistrate cannot award compensation in addition to fine though part of fine may be ordered to be paid as compensation. AIR (V 6) 1919 Cal 93: 23 CWN 387: 20 Cr LJ 398: 50 Ind Cas 1006.

### 6. Procedure in appeals.

**——S. 545—Compensation awarded to complainant —Whether must be served with notice of appeal or revision — Discretion of Court to hear his Counsel.**

Where a person, whether the complainant or some one else, has been awarded compensation under S. 545, Criminal P.C., he ought to be served with notice of an appeal or revision application which may result in the order of compensation being set aside. If he appears, it will be in the discretion of the Court to hear his Advocate or to decline to do so. But if he is served with notice he can, at any rate, see that his veiw is placed before the Court by the Advocate appearing for Government. AIR (V 29) 1942 Bom 205: 43 Cr LJ 765: 44 Bom LR 438: ILR (1942) Bom 530: 201 Ind Cas 710 (DB).

**——S. 545 — Procedure in appeals.**

Accused convicted and ordered to pay compensation to complainant under S. 545 — Appeal by accused — Notice sent to Crown and not to the complainant — Conviction set aside and with it the order to pay compensation:

Held, that there was no irregularity and much less illegality in not giving notice to the complainant merely because he was awarded compensation under S. 545. AIR (V 29) 1942 Mad 465: 55 LW 176: (1942) 1 MLJ 108: 1942 MWN 125: 43 Cr LJ 743: 201 Ind Cas 521.

**——S. 545 — Procedure in appeals — Appeal from conviction — Notice to complainant.**

Although an Appellate Court cannot be said to be acting without jurisdiction in not sending notice to the complainant, yet neverthless, an Appellate Court should, in the exercise of a proper discretion, give notice of the hearing of the appeal from a conviction to the complainant when an order of compensation has been made in his favour under S. 545, Criminal P. C. This practice is also enjoined on the Criminal Courts of the Central Provinces. AIR (V 23) 1936 Nag 144: 19 NLJ 140: ILR (1936) Nag 147: 38 Cr LJ 76: 165 Ind Cas 641.

**——S. 545 (1) — Convictioin set aside on appeal — Order, if automatically extinguished — Appeal from conviction — Notice to complainant.**

Where upon conviction of the accused, an order under S. 545 (1) (b) is passed against him directing payment of compensation and the conviction is set aside on appeal the necessary consequence of the setting aside of the conviction is the setting aside of the sentence of which the necessary consequence is the extinguishment of the order made under S. 545 (1) (b), Criminal P.C.

There is no provision of law which requires notice of an appeal by the accused to be issued to the complainant in the trial Court. The most that can be said is that inasmuch as the appeal might end in an order of acquittal which would involve the extinguishment of an order under S. 545, Criminal P. C., in favour of the complainant in the original trial, it is desirable that a notice of the appeal should be given to him. But this view of the matter will not justify the statement that, owing to the omission to issue such a notice in such a case, the Court has acted illegally or without jurisdiction. AIR (V 23) 1936 Rang 247: 37 Cr LJ 832: 14 Rang 744: 163 Ind Cas 242 (2).

**——S. 545 — Appeal — Notice should be given to complainant where compensation has been awarded to him.**

Though there is no express provision of law in case of an order under S. 250 or S. 545, Cr P. Code with regard to notice upon the opposite party, one of the fundamental principles of law is that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard in defence, and therefore a Court hearing the appeal would be exercising proper discretion to give notice to the complainant, who has been awarded compensation, of the hearing of the appeal. AIR (V 13) 1926 Cal 1054: 53 Cal 969: 43 CLJ 583: 27 Cr LJ 1086: 7 AI Cr R 94: 97 Ind Cas 62 (DB).

**——S. 546.**

**——S. 546 — Witness fees, if can be included in costs.**

In awarding costs, the Court can take into consideration only the costs set out in S. 546-A (1) (a) and (b), Criminal P. C. Witness fees should not be included in the costs. AIR (Vol 22) 1935 Rang 163: 36 Cr LJ 970: 156 Ind Cas 598.

**——S. 546-A.**

——S. 546-A — On any prosecution mentioned in S. 13 of Merchandise Marks Act, for an offence under relevant sections of Penal Code the Court should award costs under S. 14, Merchandise Marks Act, and not under S. 546-A Criminal P. C. These costs include the Advocate's fees. AIR (Vol 27) 1940 Rang 33: 41 Cr LJ 392: 187 Ind Cas 77.

**——S. 546-A — Process-fee or fee on complaint not paid by complainant—Whether entitled to recover such sums under R. 546-A (1).**

Where the complainant has not paid any process-fees for the issue of process on his witnesses or on the accused or fee on the petition of complaint, he is not entitled to recover such sums under S. 546-A, cl. (1), Criminal P. C. AIR (Vol 22) 1935 Rang 208: 36 Cr LJ 1048 (1): 156 Ind Cas 980.

**——S. 546-A — Costs.**

An order for payment of costs is not competent under S. 546-A when the case is one of a cognizable offence. AIR (Vol 12) 1925 Oudh 109: 81 Ind Cas 985: 25 Cr LJ 1161.

**——S. 546-A — Power of Court to grant — Rule of interpretation.**

Where in specific instances a statute gives a Court power to grant costs and the same statute gives the Court its whole criminal jurisdiction, the proper rule of interpretation is that expressed in the maxim expressio unius est exclusio alterious with the result that, as the Code gives a specific right of granting costs, it excludes any other right of granting costs. AIR (Vol 9) 1922 Mad 502: 31 MLT 342: 43 MLJ 369: 68 Ind Cas 615: 45 Mad 913: 16 MLW 413: 1922 MWN 579: 23 Cr LJ 583 (FB).

**——S. 547.**

——S. 547 — According to the provisions of S. 547, Criminal P. C., money ordered to be paid as compensation under S. 250, Criminal P. C., is recoverable as if it were a fine. AIR (Vol 19) 1932 Pat 301: 13 PLT 536: 33 Cr LJ 958: 140 Ind Cas 72 (FB).

**——S. 547 — Suit for expenses.**

There is no provision in the Code under which the Court can order payment of diet money to a witness. That power is vested in the Court under the general rules of the High Court and therefore a suit for recovery of such money is maintainable in a civil Court. S. 547, Cr. P. Code, does not apply to such a case. AIR (Vol 13) 1926 Cal 289: 29 CWN 1033: 90 Ind Cas 488 (DB).

**——S. 548.**

**——S. 548 — Inspection of record — Rights of party as to, and powers of Court explained.**

Except as controlled by any rule made by the High Court, a Magistrate or Judge of a Subordinate Court has a discretion to allow inspection of the record of his Court, but such discretion must be exercised judicially. In exercising his discretion a Magistrate or a Judge would be bound to have regard to the terms of S. 548, Criminal P. C., and it would be difficult, and generally improper, for him to refuse inspection of any document of which a party was entitled to a certified copy under that section. The right to a certified copy presupposes a right of inspection because a party cannot be expected to make up his mind whether he wants to have a copy of a document, if he is not entitled in the first place to read it, and see what it is about. To require a party to take certified copies of all documents on the record in order to determine, of which documents he really requires a copy, would seem to involve unnecessary expense and trouble. Therefore under S. 548 a party has an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the section. AIR (Vol 29) 1942 Bom 26: 43 Bom LR 961: 43 Cr LJ 306: ILR (1942) Bom 71: 198 Ind Cas 114 (DB).

**——S. 548 — Police statements during investigation, if excluded by S. 548.**

Per Weston, J. — Section 548, Criminal P. C., has no application to Police statements recorded in the course of an investigation, and hence it does not operate to exclude them. AIR (Vol 29) 1942 Sind 122: ILR (1942) Kar 252: 44 Cr LJ 367: 205 Ind Cas 309 (DB).

**——S. 548 — Question to Police witness about statement made to him by witness — No privilege under S. 124, Evidence Act can be claimed.**

A Police witness cannot claim privilege under S. 124, Evidence Act, when asked about a statement made or given to him by one of the witnesses because a statement by a person who afterwards gives evidence as to the facts in that statement cannot be said to have been a statement made in official confidence nor could a Police Officer be heard to say that public interests will suffer if the accused are allowed their right of cross-examination. AIR (Vol 29) 1942 Sind 122: ILR (1942) Kar 252: 44 Cr LJ 367: 205 Ind Cas 309 (DB).

——S. 548 — Copy of first report.

A first report stands more or less on the same footing as a complaint made directly to Magistrate. It is a very valuable document and accused is entitled to copies of it to know what was said in the report to connect him with offence. AIR (Vol 24) 1937 Sind 303: 39 Cr LJ 57: 171 Ind Cas 993 (DB).

——S. 548 — Who can claim.

Under S. 548, Criminal P. C., any member of the public is not entitled to apply for the copy of a judgment so as to proceed in revision. It is only the person affected by the judgment or order, that is entitled to a copy of the judgment or order. AIR (Vol 19) 1932 Bom 636: 34 Bom LR 1445: 34 Cr LJ 141: 141 Ind Cas 338 (1) (DB).

——S. 548 — Right of general public to obtain copies — General principles — Evidence Act, Ss. 74, 76 — Allahabad High Court General Rules (Criminal), Chap. XIV, Rr. 4, 6.

On general principles as well as under the existing statutes and rules prescribed by the High Court, any member of the general public is entitled to inspect and have copies of the judgment of the Subordinate Criminal Courts.

It is the essence of the administration of justice that judgment affectnig the rights, and more particularly the liberties of the people should be made as public as possible, in order that public at large might at leisure consider those judgments, either in their own interest or in the interests, in a criminal cause, of the condemned person. AIR (Vol 18) 1931 All 364: 1931 ALJ 405: 32 Cr LJ 864: 53 All 724: 132 Ind Cas 327.

——S. 548 — Record.

The record intended is the magisterial record. In proceedings under S. 107, it begins usually with the order under S. 112, except in cases falling within cl. (3) of that section. The information which leads to action under S. 107 is often of the most varied kind and of a confidential nature, and it does not form part of the record within the meaning of S. 548 to a copy of which the accused is entitled. AIR (Vol 17) 1930 Mad 975: 1930 MWN 1100: 32 MLW 784: 1930 Cr C 1191.

——S. 548 — Copies.

It is for the litigant, and not for the Magistrate to decide what copies he should have in order to move the superior court and the Magistrate has no jurisdiction to thrust upon the party copies which he does not want and to make him pay for them. When a party applies for the copy of a particular order the Magistrate cannot force him to pay for and take copies of other orders also. AIR (Vol 12) 1925 Lah 361: 6 Lah 396: 7 LLJ 241: 26 PLR 273: 26 Cr LJ 853: 86 Ind Cas 709.

——S. 549.

——S. 549 — Applicability — Trial by Special Tribunal constituted under West Bengal Criminal Law Amendment Ordinance II of 1947.

Section 549, Cr. P. Code, does not apply to a trial held by a Special Tribunal constituted under the West Bengal Criminal Law Amendment Ordinance II of 1947, where a person is charged with an offence for which he is liable to be tried either by a Court to which the Cr. P. Code, applies or by a Court-martial. The section comes into play only when any person is brought before a Magistrate and charged with an offence. Special Tribunals under Ordinance II of 1947 are not Magistrates but they are under S. 5 (2) of that Ordinance Courts of Session. Further, the provisions of S. 549, Cr. P. Code, are inconsistent with S. 7 of the Ordinance and therefore cannot apply to proceedings of a Special Tribunal having regard to S. 5(2) of the Ordinance. AIR (Vol 36) 1949 Cal 641: 51 Cr LJ 10: 53 CWN 887 (DB).

——S. 549 — Nature of provisions — Strict construction.

The provisions of S. 549, Cr. P. Code, are of a very special nature, and have the result of taking away the jurisdiction of ordinary Criminal Courts with respect to a certain class of people. Legal provisions of this nature have to be construed very strictly, and jurisdiction should not be given up, unless the plain meaning of the words of the statute so require. AIR (Vol 36) 1949 Cal 641 : 51 Cr LJ 10: 53 CWN 887 (DB).

——S. 549—Section 549 and R. 105 of the Criminal Rules of Practice — Non-compliance with — Effect. See (1949) 2 MLJ 44: 1949 MWN 349: 1949 MWN Cr 93.

——S. 549 — Government of India Rules (1935) — Procedure to be followed by Magistrate.

When the Magistrate is not of opinion that he should proceed to try the accused without being moved thereto by competent military authority, R. 2 framed by the Government of India and published in Notification No. 4051/2 dated 12th March 1935, will not apply to the case. The only alternative for the military authorities is to move him to proceed to try the accused. If the Magistrate having given an opportunity to the prosecution to obtain the authority or permission of the military authorities receives no communication from the military authorities asking him to proceed with the trial he is right in holding that there is no sufficient ground for proceeding with the trial. AIR (Vol 32) 1945 Bom 176: 46 Cr LJ 99: 46 Bom LR 857: 215 Ind Cas 296: ILR (1945) Bom 149.

——S. 549 — Rules under, not complied with—Trial and conviction — Legality of.

Where the Magistrate did not act in accordance with the provisions of S. 549 or the rules framed thereunder, the trial is illegal and the conviction and sentence must be set aside. AIR (Vol 32) 1945 Mad 289: (1945) 1 MLJ 388: 1945 MWN 262: 58 MLW 208: 47 Cr LJ 192: ILR (1946) Mad 138: 221 Ind Cas 487 (DB).

——S. 550.

——S. 550 — Where an accused is convicted for an offence under R. 121, read with R. 90 (2) (a) of Defence of India Rules for selling rupees and small coins at higher rate, the Court has power to confiscate the coins. AIR (Vol 31) 1944 Nag 366: 1944 NLJ 417: ILR (1945) Nag 413: 218 Ind Cas 12: 46 Cr LJ 366.

——S. 550 — Exercise of powers.

Where a Sub-Inspector of Police on a report made to him of theft and cheating closed a shop in order to be able to show to the Magistrate in the case of cheating that the shop or rather the goods contained in it had been sold to the shop-keeper for an inadequate price, it was unnecessary and undesirable to close the shop and put a stop to the business, but it was not illegal. AIR (Vol 16) 1929 Nag 334: 1929 Cr C 596.

——S. 550 — Order to station master to detain goods — Scope.

An order issued by a Police Sub-Inspector to a Station Master directing him to detain certain goods suspected to be stolen property is irregular; the Sub-Inspector should in such cases act under S. 550 of the Cr. P. Code, and seize the suspected goods. AIR (Vol 1) 1914 Oudh 230: 16 OC 371: 15 Cr LJ 177: 22 Ind Cas 753.

——S. 550 — Seizure of property not suspected to be stolen.

The powers of Police under S. 550, do not extend to the taking away other cattle simply because they are mixed up with the stolen ones. 14 PWR 1909 Cr: 11 Cr LJ 99: 4 Ind Cas 980 (DB).

——S. 551.

——S. 551 — 'May' whether means 'must'.

The word 'may' in S. 551, Criminal P. C., does not mean 'must'. AIR (Vol 19) 1932 Cal 850: 33 Cr LJ 657: 139 Ind Cas 89.

——S. 551 — Search.

Where a search is made actually by a Sub-Inspector of Police who is not in charge of a police station, but it is made under the supervision of a Circle Inspector, the search is not illegal. AIR (Vol 14) 1927 All 516: 8 AI Cr R 7: 8 LRA Cr 92: 26 Cr LJ 652: 103 Ind Cas 108.

——S. 552.

See also Guardians and Wards Act, S 25.

——S. 552 — Meaning of expression "unlawful" — Right of guardian to restoration of custody of child detained by person who was not its guardian.

The expression "unlawful" used in S. 552 Cr. P. Code, has not been defined in the Code but by virtue of the provisions of S. 4 it has the same meaning as the word "illegal" occurring in the I. P. Code. In the I. P. Code the word "illegal" is defined in S. 43 as applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action.

Under S. 552 of the Cr. P. Code what has to be established is that the detention of the child was unlawful and that the purpose of the detention was unlawful. If the detention was one which furnished a ground for civil action it would be illegal within the meaning of that definition. The act of a person, who is not entitled to the custody of a child, of detaining it is one which entitled the natural guardian of the child who is its legal guardian and is entitled to its custody, take civil action. Such detention would be clearly unlawful.

Where a step-mother detains a step-daughter with a view to dispose of her in marriage as she pleases, the detention and the purpose of the detention are both unlawful which entitles the natural mother, as the legal guardian entitled to the custody of the child, to take civil action. In such a case the natural mother is entitled under S. 552 to ask for and obtain restoration of the custody of the child from the step-mother. AIR (Vol 35) 1948 Mad 225: 49 Cr LJ 464: (1947) 2 MLJ 461: 60 LW 767: 1947 MWN 769.

——S. 552 — Magistrate must be satisfied that there was legal marriage.

A person put in an application in the Court of the Chief Presidency Magistrate purporting to be under S. 552, Criminal P. C., alleging that he was lawfully married to the petitioner and that on the following day, her parents took her away against her wishes to her home and detained her there with intention of getting her married to somebody else. The Magistrate issued a notice under S. 552, Criminal P. C., to produce the girl. On the day to which the case had been adjourned, the Advocate appeared on behalf of the petitioners and represented that it would be a great hardship to bring the girl all the way to answer to a petition that could not, in any case, be granted because the girl was more than 16 years of age and no offence had been committed within the jurisdiction of the Magistrate. When he issued his second order he had heard the story of the other side, which was that they had come to Madras to answer an advertisement in which the applicant was seeking for a bride and that finding that he would not make a suitable husband, they took the girl back again. Moreover, there was no complaint of abduction together with the application under S. 552, Criminal P. C.:

Held, that the order of the Chief Presidency Magistrate should be set aside. Before issuing the order, he should have satisfied himself that there was a legal marriage which could have been easily done by production of a certificate under S. 4, Cl. (3), Madras Marumakkathayam Act. AIR (Vol 28) 1941 Mad 625: 1941 MWN 448: (1941) 1 MLJ 828: 42 Cr LJ 688: 195 Ind Cas 177.

——S. 552 — Ex parte warrant should not be issued.

An order of restitution under S. 552, Criminal P. C., can be enforced by warrant if necessary, but in cases where an order only will meet the purpose, the Magistrate should not make an order for the ex parte issue of warrant. AIR (Vol 26) 1939 Sind 152: 40 Cr LJ 698: ILR (1939) Kar 760: 182 Ind Cas 710 (DB).

——S. 552 — Detention not alleged for unlawful purpose —Jurisdiction to grant relief under S. 552.

The main purpose of S. 552, Criminal P. C., is to protect women and girls from detention for immoral purposes, although no doubt the section would be appropriate to cases where the purpose of the detention was clearly unlawful although not necessarily immoral. The powers given to District Magistrate by S. 552, are exceptional powers to be used with caution and only when the conditions of the section are satisfied. Taking the word 'unlawful' in its ordinary meaning of "contrary to or prohitited by law" in particular cases there cannot be much difficulty in determining whether the purpose is or is not unlawful. AIR (Vol 26) 1939 Sind 152: 40 Cr LJ 698: ILR (1939) Kar 760: 182 Ind Cas 710 (DB).

——S. 552 — Complaint by father for delivery of daughter from wrongful confinement — Order accordingly passed — Subsequent discovery that girl was married — Proceedings against father under S. 215 — Special Magistrate handing over girl to husband — Order set aside by District Magistrate:

Held, that in the absence of a complaint before him on oath of the abduction or unlawful detention, the order of the District Magistrate was without jurisdiction. AIR (Vol 23) 1936 All 852: 1936 AWR 920: 1936 ALJ 1097: 38 Cr LJ 301: 166 Ind Cas 847.

——S. 552 — Application not suggesting that Magistrate should take action — Prayer to take woman from husband's custody:

Held, that the application was not a criminal complaint but an application under S. 552. AIR (Vol 23) 1936 All 469: 1935 ALJ 592: 1936 AWR 396: 37 Cr LJ 857: 163 Ind Cas 609.

——S. 552 — Under S. 552, the District Magistrate can pass order for the immediate restoration of the woman unlawfully detained to her liberty, or if she is a female child below 16 years, to her husband, parents, guardian or other person having the lawful charge of such a child. But an order directing the Police to produce the woman before him is not one under S. 552. The section does not require service of the order on any person. But once lawful means to have the woman restored to her liberty, and for that end it may legally issue an appropriate direction to some other person in whose custody the woman may be. When the order is not under S. 552 in substance or form, S. 172 of the Penal Code does not apply. AIR (Vol 23) 1936 All 354: 1936 ALJ 373: 1936 AWR 210: 37 Cr LJ 713: 162 Ind Cas 755.

——S. 552 — Age of girl.

Where a girl was living voluntarily in another man's house but against the will of her mother who was lawfully entitled to have charge of her:

Held, that the question whether an order under S. 552, Criminal P. C., should issue or not depended entirely on the question of the girl's age. AIR (Vol 22) 1935 Rang 494: 37 Cr LJ 278: 160 Ind Cas 282.

——Ss. 552, 202 — Procedure.

Where the applicant clearly makes out a prima facie case under S. 552, by his complaint on oath, the District Magistrate is bound to issue notice to the opposite party immediately. If the District Magistrate directs enquiry and once the discretion in favour of starting an enquiry under S. 202, Criminal P. C., has been exercised it cannot be recalled by the Magistrate, at his sweet will and pleasure until the enquiry is legally concluded which means until all the witnesses whom the complainant desires to examine in support of his case have been examined. He should not abruptly call back the record from the Sub-Divisional Magistrate before the enquiry is finished and pass a final order dismissing the complaint unknown to the applicant. AIR (Vol 20) 1933 Nag 374: 35 Cr LJ 404 (2): 16 NLJ 310: 30 NLR 76: 147 Ind Cas 275.

——S. 552 — Unlawful detention, meaning of.

Section 552, Criminal P. C., does most certainly "apply to cases in which a father refuses to let his daughter go back to her husband and threatens to remarry her." Such a case is prima facie one "of detention for an unlawful purpose." Under the Hindu Law, upon the marriage of his minor daughter, the father ceases to be her legal guardian and her husband becomes her legal guardian. It follows, then, that if the father of a minor married girl keeps her with him against the wishes of her legal guardian, he detains her "unlawfully."

If the "unlawful detention" is for a purpose which is an "offence"or is legally prohibited or which is a civil wrong, it would constitute an "unlawful purpose" under S. 552, Criminal P. C. Since the unlawful detention of his minor wife by his father-in-law prima facie affords a cause of action to the husband to re-cover possession of his wife by a civil action, the purpose of such detention would likewise be "unlawful" within the meaning of S. 552, Criminal P. C. AIR (Vol 20) 1933 Nag 374: 35 Cr LJ 404 (2): 16 NLJ 310: 30 NLR 76: 147 Ind Cas 275.

——S. 552 — Procedure.

When an application under S. 552, Criminal P. C., is filed before the District Magistrate, he has no power to order a preliminary enquiry by the Sub-Divisional Magistrate as the provisions of S. 202, Criminal P. C., do not apply to a case under S. 552. The former section clearly deals with a "complaint of an offence", while the latter does not purport to do so. There is no complaint of any "offence" under S. 552 with a view that the Magistrate to whom it is made, should punish the offender. The section merely authorises a Presidency Magistrate or District Magistrate on proof of the required facts, to restore an abducted female to liberty, or restore an unlawfully detained minor female to the custody of her lawful guardian. A person proceeded against under S. 552 is not an accused and liberty is, therefore, expressly reserved to him to "offer himself as a witness in such proceedings" by S. 340 (2) of the Code. If a preliminary enquiry is at all found necessary, it must be conducted by the District Magistrate himself. All that is necessary to take action under the section, is to examine the applicant on oath in support of his "complaint" of the unlawful detention of a woman or a minor girl, as the case may be, for an unlawful purpose, and issue a notice to the non-applicant to show cause against the complaint and to produce the woman or the girl "before the Court to be dealt with according to law". AIR (Vol 20) 1933 Nag 374: 35 Cr LJ 404 (2): 16 NLJ 310: 30 NLR 76: 147 Ind Cas 275.

——S. 552 — Demand of wife from her father.

Where a Magistrate passed an order under S. 552 upon a complaint preferred by the husband against his father-in-law without making any inquiry into the matter of complaint, it was held on the facts of the case that it was a case to which S. 552 could not be applied and that the remedy of the husband lay in the civil court. AIR (Vol 2) 1915 Cal 686: 15 Cr LJ 712: 26 Ind Cas 160 (DB).

——S. 552 — Applicability of Ss. 200 and 203.

Provisions of Ss. 200 and 203 do not apply to S. 552, where no offence is alleged. (1902) 4 Bom LR 609 (611) (DB).

——S. 552 — Scope of — No offence committed.

The purpose contemplated by S. 552 of the Criminal Procedure Code must be in itself unlawful and must not be construed so as to make it include purposes which, although not unlawful in themselves, might become so when entertained towards a child in opposition to the wishes of its guardian. (1902) 4 Bom LR 609 (610) (DB).

——S. 554.

——S. 554 — Rules by Bombay High Court — Criminal Circular No. 160-A — Words "papers exhibited in the proceedings" explained.

The expression "papers exhibited in the proceedings" in the rules framed by the Bombay High Court under S. 554, Criminal P. C., (Criminal Circular No. 160-A) is intended to cover the whole record. It does not deprive the Court of the right which it previously enjoyed of granting inspection of the whole

record to a party properly entitled thereto; and in revision, the High Court is entitled to consider whether the Magistrate exercised his discretion on the right ground. AIR (Vol 29) 1942 Bom 26: 43 Bom LR 961: ILR (1942) Bom 71: 43 Cr LJ 306: 198 Ind Cas 114 (DB).

——S. 555.

——S. 555 — Forms form part of Code.

(Per Iqbal Ahmad C. J.) — The forms set forth in Sch. 5 must be regarded as part of the Code and the various sections of the Code should be so construed as to harmonise and not to come into conflict with the forms. AIR (Vol 33) 1946 All 333.

——S. 555 — Scope.

Section 555 deals with the form of the warrant itself and nothing more, and the words of S. 555 are not intended to supersede the provisions of S. S. 90. AIR (Vol 11) 1924 Cal 1: 27 CWN 857: 38 CLJ 77: 75 Ind Cas 129: 24 Cr LJ 881 (FB).

——S. 556.

1. Permission of the appellate Court.
2. 'Try or commit for trial'.
3. A party or personally interested.
4. Personal knowledge.
5. Himself a witness in the case.
6. Bar to hearing of appeals.
7. 'Concerned in the official work or local bodies.'
8. Local inspections and inquiries.
9. Summary proceedings.
10. Consent or objection of the accused.

**1. Permission of the appellate Court.**

——S. 556 — Where the Magistrate, who committed the accused, was himself a Magistrate of the first class, but passed an order of commitment on the ground that he was a witness of the identification proceedings in the case,

Held, that the proper course for him, was to have moved the District Magistrate. AIR (Vol 11) 1924 All 185: 81 Ind Cas 153: 21 ALJ 420: 4 LRA Cr 215: 25 Cr LJ 665.

**2. "Try or commit for trial".**

**——S. 566 — 'Try'.**

The word 'try' cannot be applied to proceedings taken by a Sessions Judge under S. 435 or any other section of the code in which he is not empowered to pass any orders, but is merely to report the case for the orders of the High Court. (1904) AWN 154: 27 A 25 (27).

**——S. 556 — Deputy Magistrate authorizing a prosecution not disqualified from trying.**

Where a Deputy Magistrate authorized a Tahsildar to prosecute A on such charges as might be proved in a criminal court:—Held, that he was not disqualified from trying the accused as he did not direct the prosecution of A, but only authorized it. (1900) 24 M 238 (240).

**3. A party or personally interested.**

**——S. 556 — "Personally interested" — Magistrate issuing as Licensing Authority instructions governing distribution of cloth — If competent to try accused for selling cloth contrary to such instructions.**

The question whether a Magistrate is personally interested or not is a question of fact to be decided in each case. An Additional District Magistrate who has as the Licensing Authority under the Assam Cotton Cloth and Yarn Dealers Licensing Order of 1943, issued general instructions governing the distribution of cloths throughout the district, is competent to try an accused person for selling cloth contrary to such instructions, and is not in any way personally interested in the case. AIR (Vol 33) 1946 Cal 303: 222 Ind Cas 520: 47 Cr LJ 305 (DB).

**——S. 556 — Magistrate acting in case in his magisterial capacity, e.g., recording statement of accused — It is highly undesirable that he should take committal proceedings in the case though he is not so barred by S. 556.**

Section 556, Criminal P. C., does not debar a trying Magistrate from taking committal proceedings in a case in connection with which he has acted in his magisterial capacity, viz., he has either recorded the statement of the accused, or conducted an identification parade, or recorded a dying declaration, or done some other such thing. But it is highly undesirable that he should himself preside over the committal proceedings, and where it can be avoided, the Magistrate who acts in his magisterial capacity in connection with a case should not take committal proceedings. Of course nothing can be done in the mofussil where there is only one Magistrate. AIR (Vol 32) 1945 Pesh 1: 46 Cr LJ 585: 1945 Pesh LJ 1: 219 Ind Cas 317.

**——S. 556 — Excise Officer directing prosecution and trying case himself.**

District Excise Officer directing prosecution for a certain offence can himself try the case only obtaining permission under S. 556 from Court to which an appeal lies from his Court. If no such leave is given to him, the trial is vitiated and the conviction is illegal. AIR (Vol 31) 1944 Pesh 47: 46 Cr LJ 173: 216 Ind Cas 309.

**——Ss. 556. 476, 476-B — Complaint by District Munsif under S. 476 — District Judge dismissing appeal holding that there was sufficient material for laying complaint — Same case coming before District Judge as Sessions Judge — District Judge, whether precluded from dealing with case.**

No doubt when the District Judge himself files a complaint under S. 476, he would, by reason of S. 556 have no jurisdiction to try the case as a Sessions Judge and no question of prejudice to and the effect of the consent of the accused would arise at all. The same result would follow where the District Munsif has declined to lay a complaint and the District Judge, by virtue of the authority given to him by S. 476-B, has ordered the District Munsif to lay the complaint. The maxim qui facit per alium facit per se would then apply, and even though the District Munsif would have laid the complaint, he would have done so as the agent of the District Judge who would then be said to have been a party to the case.

But where the District Judge, on an appeal from an order of the District Munsif, directing the filing of a complaint under S. 476, merely considers that there was sufficient material to justify the District Munsif in laying the complaint, and dismisses the appeal, the District Judge cannot be said to be a party to the proceedings under S. 476. Nor can he be said to be personally interested in the case and, therefore, he is not precluded by S. 556 from trying the case as a Sessions Judge. AIR (Vol 29) 1942 Mad 753: 1942 MWN 484: 55 LW 536: 44 Cr LJ 404: (1943) 1 MLJ 482: 205 Ind Cas 384.

——S. 556 — Interest of Magistrate giving rise to real bias disqualifies him.

The accused was an accountant of the District Superintendent of Police's office and as such, his duty was to prepare bills and treasury vouchers for withdrawal of money required for official purposes, submit them to the District Superintendent of Police or in his absence, to the Headquarters Assistant and after they had been passed and approved of, present the bills or vouchers at the treasury and receive payment thereon either in cash or in the shape of cash orders. The offences with which the accused was charged in the eight trials were offences alleged to have been committed in connection with his duties which also included the maintenance of accounts and cash registers including a register known as General Remittance Receipts. In one of the trials, the accused was charged with an offence of cheating under S. 420, Penal Code. In another trial he was charged under S. 468, Penal Code, for forging the signature of the District Superintendent of Police on a treasury voucher. In the third trial, he was charged under S. 477-A for wilful and fraudulent alteration. The alleged falsification of accounts, the embezzlements, the cheating and the forgeries were all alleged to have been perpetrated by the accused in the District Superintendent of Police's office or in connection with the books and papers maintained, or issued from there, and no question whatever with reference to the efficiency of the work of the Treasury Officer or to the discharge of the work of his office was substantially involved in any of the cases. Similarly, the offences when added up, did not involve a very great monetary value :

Held, that the Magistrate who tried the case though functioned as a Treasury Officer had no substantial interest in the case so as to disqualify him from trying the same and the trial, therefore, was not vitiated on that account.

Held, also that the gravity of the offences of dishonesty was to be judged not only by the pecuniary value involved. However, if the number of cases against the accused were not so numerous, the aggregate term of imprisonment that the accused would have been sentenced to suffer would not be very high. While it would not be proper to deal with him leniently, a term of five years' rigorous imprisonment in the aggregate would amply meet the ends of justice. AIR (Vol 26) 1939 Rang 152: 1939 Rang LR 251: 40 Cr LJ 621: 182 Ind Cas 63.

——S. 556 — Trial by Magistrate under S. 19 (f), Arms Act, is illegal if the sanction for prosecution as required by S. 29, Arms Act is granted by him, whether as Additional District Magistrate or as City Magistrate. AIR (Vol 27) 1940 Sind 107: 41 Cr LJ 707: ILR (1940) Kar 296: 189 Ind Cas 29.

——S. 556 — Sessions Judge ordering arrest and production of a witness before him, for trial before City Magistrate — Magistrate committing him to Sessions — Same Judge convicting him:

Held, that if, at the initial stage when Sessions Judge first took up the case himself, he had requested the permission of the High Court to try the case, the disqualification might perhaps have been removed and that there was a technical defect more serious than could be overlooked. AIR (Vol 22) 1935 Sind 1 (2): 28 SLR 347: 36 Cr LJ 824: 155 Ind Cas 448 (DB).



——S. 556 — Pecuniary interest.

Pecuniary interest even to small extent is a sufficient disqualification independently of the question whether the Magistrate is really biassed or likely to be biassed. AIR (Vol 16) 1929 Bom 404: 31 Cr LJ 383: 53 Bom 716: 31 Bom LR 925: 1929 Cr C 433: 122 Ind Cas 141 (DB).

——S. 556 — Disqualification, what is.

Prosecution under S. 282 Companies Act — Magistrate shareholder of Company — Magistrate is disqualified to try case. AIR (Vol 16) 1929 Bom 404: 58 Bom 716: 31 Bom LR 925: 31 Cr LJ 383: 1929 Cr C 433: 122 Ind Cas 141 (DB).

——S. 556 — Business or friendly relations.

If a Magistrate is in close business or friendly relationship with a party it is on the whole undesirable that he should take part in hearing a case in which the interests of such a person are gravely affected. AIR (Vol 16) 1929 Pat 151: 8 Pat 575: 10 PLT 711: 116 Ind Cas 762 (FB).

——S. 556 — Appeal and revision.

The Sessions Judge who files the complaint under S. 476 is disqualified from hearing the applications made to him under Ss. 435 and 437 owing to the complaint under S. 476 having been dismissed, and from making an order directing the persons against whom the complaint was initially made to be committed to the Sessions Court presided over by himself.

Per Fawcett, J.— The Judge or Magistrate who proceeds under the provisions of S. 476 is a party to the case in which he is a complainant, within the meaning of S. 556. AIR (Vol 14) 1927 Bom 35: 28 Bom LR 1302: 7 AI Cr R 227: 28 Cr LJ 53: 99 Ind Cas 85 (DB).

——S. 556 — The mere fact that the Magistrate issued a search warrant prior to the institution of the case does not disqualify him from trying the case within S. 556. Nor is the mere fact, that the accused may possibly object that the warrant was issued on insufficient materials, sufficient to amount to a disqualification. 13 Bur LT 154, Dissented from. AIR (Vol 13) 1926 All 428: 24 ALJ 568: 7 LRA Cr 137: 27 Cr LJ 783: 95 Ind Cas 319.

——S. 556 — Where the complainant applied to the District Magistrate who ruled that as the evidence of the trying Magistrate was only formal, there was no harm in his recording his own evidence and at the same time trying the case, and then the Magistrate recorded his own evidence and was examined and cross-examined as a witness in the case, while the accused took no steps to get the case transferred from his Court, to the Court of any other Magistrate.

Held, that the evidence was only formal evidence and the Magistrate was not personally interested within S. 556. 19 Mad 263, not Foll. AIR (Vol 13) 1926 Oudh 557: 3 OWN Sup 178: 27 Cr LJ 1193: 97 Ind Cas 953.

——S. 556 — Public Gambling Act.

An accused under the Act has the right to examine the Magistrate issuing the warrant as a witness to enquire from him what was the information received by him and how the warrant was filled up and therefore he is materially prejudiced by the trial of the case by the very Magistrate who issued the warrant. AIR (Vol 11) 1924 Lah 247: 5 LLJ 429: 24 Cr LJ 633: 73 Ind Cas 521.

——S. 556—Explanation — Directing prosecution.

A Magistrate who himself has directed the prosecution of the accused cannot try the case, for Magistrate cannot be both a prosecutor and a Judge. AIR (Vol 8) 1921 Bom 365: 23 Bom LR 842: 22 Cr LJ 603: 62 Ind Cas 875 (DB).

**——S. 556 — Power of District Magistrate — Case under Factories Act.**

A District Magistrate who as inspector of factories ordered an enquiry to be made and in the same capacity sanctioned the prosecution, is disqualified by S. 556 Cr. P. C. from trying the case. AIR (Vol 7) 1920 Lah 334: 1 Lah 35: 20 Cr LJ 389: 76 PLR 1920: 55 Ind Cas 997 (DB).

——S. 556 — A Magistrate issuing a warrant under S. 6 of the Gambling Act is disqualified from himself trying the case. AIR (Vol 7) 1920 Low Bur 85 22 Cr LJ 451: 13 Bur LT 154: 61 Ind Cas 835.

**——S. 556 — Magistrate himself ordering prosecution and search.**

Where a Magistrate himself orders the prosecution of an accused in his capacity of Tahsildar and further orders the search of the accused's house not on the complaint or report of Collector or Excise Officer but on that of an opium contractor, he cannot try the offence. 64 PLR 1912: 5 PWR (Cr) 1912: 13 Cr LJ 294: 14 Ind Cas 758.

**——S. 556 — Disqualification of Judge or Magistrate — Excise Officer ordering prosecution — Trial by himself.**

S. 556, Cr. P. C. does not preclude a Magistrate from trying a case under S. 52 of the Excise Act in which the prosecution was ordered by him as an Excise Officer. (1908) 5 ALJ 357: 1908 AWN 95 (96).

### 4. Personal knowledge.

——S. 556 — The existence of a village feud may well be within the knowledge of a Sub-Divisional Officer, as also statements of apprehension that a false case will be brought against a man. But these are not sufficient reasons to cite the officer as witness for defence in a case so as to necessitate a transfer of a case to another Magistrate where such officer is the trying Magistrate. AIR (Vol 14) 1927 Oudh 31: 3 OWN 944: 28 Cr LJ 65: 7 AI Cr R 179: 99 Ind Cas 97.

**——S. 556 — Personal knowledge.**

A Magistrate is not precluded from trying a case of which he has taken cognisance on his own knowledge under S. 190 (c) provided he has complied with the provisions of S. 191. In such a case S. 556 ceases to operate. AIR (Vol 11) 1924 Rang 352: 3 Bur LJ 121: 26 Cr LJ 249: 84 Ind Cas 249.

**——S. 556 — Judge importing his own knowledge into case — Irregularity.**

Where a Judge is a sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the court in the presence of the accused. If he does so, he makes himself incompetent to try it. AIR (Vol 5) 1918 Pat 373: 20 Cr LJ 45: 48 Ind Cas 685 (DB).

——S. 556 — Trial Magistrate importing his own knowledge of the accused in the case — A Magistrate trying an accused person ought not to import his own knowledge of, or, as regards, the accused into the case. (1904) 6 Bom LR 480 (481) (DB).

### 5. Himself a witness in the case.

**——S. 556 — "Interest" — Magistrate giving evidence for complainant — Competency to try the case.**

A magistrate by giving evidence for the complainant in a case before him comes to acquire an interest in the case within the meaning of S. 556, Cr. P. Code, and thereby becomes disqualified to try the case. (1947) 48 Cr LJ 428: 229 Ind Cas 606 (Lah).

**——S. 556 — Magistrate taking dying deposition should not record evidence in committal Court.**

It is wrong for a Magistrate who takes the dying deposition to record the evidence in the committal Court. It means that the accused is in that Court precluded from questioning the Magistrate as to what happened when the dying deposition was taken. AIR (Vol 24) 1937 Rang 467: 39 Cr LJ 117: 172 Ind Cas 197 (DB).

——S. 556 — A commitment is not invalid merely because the committing Magistrate himself had held an identification parade before commencement of proceedings in his Court and is himself an important witness for prosecution as he cannot be called "personally interested" in the case under S. 556, Criminal P. C. AIR (Vol 19) 1932 Lah 196: 135 Ind Cas 675.

**——S. 556 — Committing Magistrate conducting identification proceedings — Procedure irregular.**

Where the committing Magistrate, as part of his duties in connexion with the proceedings, conducted all the jail identifications in person and in order to give the defence a better opportunity of preparing their criticisms on the conduct of the investigation, took the unusual course of going into the witness-box during the committal proceedings.

Held, that though it certainly would appear to be open to objection for a Magistrate to decide on the value of his own evidence, yet where the Magistrate had not to decide but solely to commit, there is nothing objectionable to the course adopted by him, and the action does not vitiate the committal of the trial. AIR (Vol 14) 1927 Oudh 369: 2 Luck 631: 1 LC 339: 8 AI Cr R 449: 106 Ind Cas 721 (DB).

**——S. 556 — Magistrate, a witness.**

The examination of the trying Magistrate as a witness does not in any way prevent him from deciding the case. AIR (Vol 14) 1927 Oudh 296: 2 Luck 503: 1 LC 159: 8 AI Cr R 321: 28 Cr LJ 673: 103 Ind Cas 401.

**——S. 556 — 'Personally interested' meaning of — Magistrate making himself a witness in a case which he is trying.**

On a day when the courts were closed for the Christmas holidays two persons came to a Magistrate's private house and made an oral complaint to him. When the courts re-opened, the same persons filed a written complaint in the Magistrate's court, which resulted in certain persons being put upon their trial before the same Magistrate for an offence under S. 323 of the Indian Penal Code. During the course of the trial the Magistrate considered his duty to record his own evidence as to the circumstances attending the making of the oral complaint at his house, and he was duly cross-examined and re-examined. Held that the Magistrate could not be considered to be 'personally interested' in the case within the meaning of S. 556. (1904) AWN 157: 27 A 33 (36).

**6. Bar to hearing of appeal.**

——S. 556 — A witness made two conflicting statements in a trial before a Sessions Judge who made a complaint to the District Magistrate stating that the second of the two statements was false, the Magistrate framed a charge in respect of the second statement only and convicted the accused. On appeal which was heard by the same Sessions Judge, re-trial was ordered.

Held, that the accused is entitled to a decision from a Judge who approaches his case with an open mind; and that the proceedings should be quashed on the ground that the complainant and the appellate Court were one and the same and it would not be illegal but most inadvisable to submit the accused to a fresh trial because of the initial mistake of the Court in not framing the charge in the alternative and the principle of 'nemo debet bis vexari' applies in the spirit if not in the letter. AIR (Vol 14) 1927 Lah 671: 8 Lah 496: 28 PLR 688: 29 Cr LJ 6: 106 Ind Cas 342.

**——S. 556 — Sanctioning or directing prosecution does not incapacitate.**

A Court which sanctions or directs a prosecution is not thereby rendered incompetent to try the offence or to hear an appeal against a conviction for it. There might of course be special circumstances in a case which render it improper that the Judge or Magistrate who sanctioned or directed the prosecution should hear the appeal against the conviction obtained in that prosecution. AIR (Vol 11) 1924 Nag 23: 25 Cr LJ 171: 26 Cr LJ 1481: 76 Ind Cas 395.

——S. 556 — Where on a complaint by the Dt. Judge preferred against an insolvent under S. 69 of the Provincial Insolvency Act, the insolvent was convicted by the Magistrate and an appeal was preferred against it to the Sessions Judge, held, that he was absolutely disqualified from hearing the appeal. The words "try any case" in S. 556, Cr. P. Code, are comprehensive enough to include the hearing of an appeal.

The consent of a party concerned cannot affect the absolute disqualification imposed by S. 556, Cr. P. Code. AIR (Vol 9) 1922 Lah 30: 4 LLJ 452: 14 PWR Cr 1922: 61 PLR 1922: 23 Cr LJ 446: 67 Ind Cas 622.

**——S. 556 — District Judge sanctioning prosecution — Powers to hear appeal.**

A District Judge who had given sanction to prosecute the accused for an offence under S. 193 I. P. C. is legally competent to hear and decide an appeal on conviction of the accused for the said offence. (1913) 15 Bom LR 104: 14 Cr LJ 190: 19 Ind Cas 190 (DB).

**——S. 556 — Applicability of — Try any case — If concludes appeal — Question of fact.**

The words "try any case" in S. 556 of the Code includes appeal. Whether a given case falls under that section is a question of fact and it is not safe to draw any analogy from the decisions in other cases. (1913) 9 NLR 81: 14 Cr LJ 385: 20 Ind Cas 209.

**——S. 556 — Criminal law — Jurisdiction and competency of Magistrate.**

A Joint Magistrate, who simply summoned the accused to stand their trial, and then transferred the case to another Magistrate for disposal does not become incompetent to hear an appeal from a conviction of the accused by the latter Magistrate. The trying magistrate may convict the accused for assault and mischief though the accused had been summoned to answer a charge of criminal trespass. (1909) 36 Cal 869: 10 Cr LJ 557: 4 Ind Cas 352 (DB).

**7. 'Concerned in the official work or local bodies.**

**——S. 556 — Magistrate presiding over meeting sanctioning prosecution — Disqualified.**

If a prosecution has been directed in pursuance of orders passed by a local body in a meeting presided over or attended by a Magistrate in his capacity as an office bearer or member thereof such Magistrate is 'legally interested' in the matter and is disqualified from trying the matter in his judicial capacity. The explanation covers only those cases in which the Magistrate, though a member, has not taken part in directing or sanctioning the prosecution. AIR (Vol 16) 1929 Lah 718: 30 Cr LJ 698: 10 Lah 718: 1929 Cr C 310: 30 PLR 706: 13 AI Cr R 106: 116 Ind Cas 881.

**——S. 556 — Cantonment cases.**

Cantonment Magistrate can try a complaint lodged by Cantonment Board even though the Magistrate is a member of the Board. AIR (Vol 15) 1928 Lah 946: 11 AI Cr R 13: 29 Cr LJ 822: 111 Ind Cas 326.

——S. 556 — Where a Magistrate, as a member of District Board, presided at a meeting of the Board at which the proposal in the Commissioner's letter to start the prosecutions was adopted, and it was resolved that the police be called in to make an enquiry and to proceed against such of the District Board officials as the result of the enquiry might warrant.

Held, that the Magistrate is debarred from trying the cases. AIR (Vol 15) 1928 Lah 114: 9 LLJ 583: 29 PLR 282: 29 Cr LJ 371: 108 Ind Cas 271.

**——S. 556 — "A party or personally interested" imply direct personal pecuniary interest — The mere fact that a certain order of the Magistrate passed as executive Officer is likely to be challenged is not sufficient ground for transfer.**

A Magistrate is not disqualified by S. 556 from trying a case based on a private complaint and which has not been filed under his direction or sanction merely and solely on the ground that the validity of certain orders passed by him in his capacity as an executive or as a Revenue Officer is directly put in issue in the case and that the innocence or the guilt of the accused considerably depends on the effect of such orders. This section is based on the maxim 'nemo debet esse judex in propria causa'. The expression "a party or personally interested" implies that a direct personal pecuniary interest, however small in the result of the case; disqualifies a Judge, Magistrate or Justice from trying a case, but where such interest is not pecuniary the disqualifying interest should have substantially the same effect so as to create a reasonable suspicion of bias. The mere possibility of a bias is, however, not enough. Where the only interest in the result of a case tried by a Magistrate is that he is concerned in it in his public capacity it may fairly be presumed that his interest is not so substantial as to warrant the inference that he is likely to have a real bias in the matter. If in addition to his being so interested there are other circumstances to suggest the real likelihood of a bias, it is another matter. AIR (Vol

14) 1927 Sind 98: 20 SLR 171: 27 Cr LJ 1333: 98 Ind Cas 405.

——S. 556 — The Magistrate giving formal sanction as President of committee but not directing prosecution is not disqualified.

The mere fact that the trying Magistrate was the President of the Town Committee would clearly give him no personal interest in the proceedings under S. 162 of Burma Municipal Act, the more so, that the offence though punishable under the Municipal Act is not of a peculiarly municipal nature but one against the common safety. Where it was not alleged that the Magistrate as the President of the Committee made any enquiries before sanctioning the prosecution or that he attended any meeting of the Committee in which the subject of the prosecution of the accused was debated, but as the proceedings could not be initiated without formal sanction being obtained.

Held, this sanction which was merely an authorization for prosecution and not an order to prosecute, gave the Magistrate no personal interest in the proceedings. It was not necessary for him to form any opinion on the merits of the case before according formal sanction to the prosecution as president of the Town Committee. It is however extremely undesirable that when other Magistrates are available a Magistrate should try a case in which he has, in a different official capacity given formal sanction to the prosecution. AIR (Vol 11) 1924 Rang 87: 1 Rang 517: 25 Cr LJ 263: 76 Ind Cas 865.

——S. 556 — **District Magistrate — Agent for Court of Wards.**

A District Magistrate who is also the agent of the court of wards is not disqualified from trying a case as between landlord and tenant of the estate under his superintendence. AIR (Vol 6) 1919 Cal 59: 46 Cal 854: 29 CLJ 322: 23 CWN 623: 20 Cr LJ 608: 51 Ind Cas 668 (DB).

——S. 556 — Expl. — **Municipal Committee — Direction to prosecute Magistrate — President of the Committee.**

The accused was tried at the instance of a Municipal Committee for an offence under the C. P. Municipal Act. The case was disposed of by the Tahsildar who was also the President of the complainant committee. Held, that despite the proviso to S. 556 of the Cr. P. Code, the Tahsildar should not have tried the case himself. AIR (Vol 6) 1919 Nag 131: 20 Cr LJ 244: 49 Ind Cas 916

——S. 556 — **Sanction by Magistrate as municipal member — — Disqualification.**

When a Magistrate who as Municipal Commissioner has taken part in promoting a prosecution, as for instance by sanctioning it at a meeting of the Committee or otherwise, he will be disqualified under S. 556 from trying the case, by reason of the existence of a personal interest over and above what may be supposed to be felt by every Municipal Commissioner in the affairs of the Municipality. AIR (V 4) 1917 Nag 64: 14 NLR 14: 18 Cr LJ 1017. 42 Ind Cas 761.

——S. 556 — **Disqualification of Magistrate to hear appeal — Magistrate ordering issue of summons on the ground that investigating Magistrate did not give sufficient reason for discharge.**

A Magistrate who, without expressing any opinion as to the guilt or otherwise of the accused, directed the issue of summons to the accused on the ground that the Magistrate who investigated the case had not given sufficient reasons for his recommendation or dismissal, is not disqualified under S. 556, Cr. P. C., from hearing the appeal. (1909) 36 C 869 (872) (DB).

——Ss. 556, 133 — **Magistrate — Personal interest — Public capacity.**

'X, as a chairman of a Local Board issued notice upon A to remove an obstruction on an alleged public highway, which A claimed as his private property. X, upon facts brought to his knowledge, overruled the objection. X, subsequently, in his capacity as a Sub-Divisional Officer, took proceedings against A under S. 133 of the Criminal Procedure Code and made an order against him. Held that X had acted without jurisdiction in contravention of S. 556 of the Criminal Procedure Code. (1909) 10 CLJ 484 (486) (DB).

——S. 556 — **'Personally interested', meaning of — Sub-committee of Municipal Board advising a prosecution.**

A Magistrate who had been a member of a subcommittee of a Municipal Board which recommended the prosecution of a certain person for an alleged obstruction caused by him in a public thoroughfare was not, by reason only of this fact, 'personally interested' in the case afterwards initiated against such person so as to be debarred under S. 556, Cr. P. C., from trying it. (1904) AWN 154: 27 A 25 (27).

**8. Local inspections and inquiries.**

——S. 556 — Explanation to S. 556 merely means that the local inquiry would not amount to a necessity for transfer, but there may be circumstances under which it would be advisable to direct a transfer from the Court of a Magistrate who has made a local inquiry. AIR (V 17) 1930 All 737: 1930 A LJ 606: 123 Ind Cas 685: 31 Cr LJ 555: 1930 Cr C 993.

——S. 556 — While making local inspection to appreciate evidence Magistrate creating evidence and introducing it into case for his decision — He went beyond his jurisdiction. AIR (V 16) 1929 Pat 160: 116 Ind Cas 767: 30 Cr LJ 652: 13 AI Cr R 89.

——S. 556 — Recording result of local inspection after delivery of judgment is irregular. The Magistrate should record the result of his local inspection and allow the parties to adduce evidence and arguments if they so desire regarding what he has recorded. However where local inspection is used only to confirm the documentary and oral evidence on the record conviction will not be set aside. AIR (V 12) 1925 Cal 353: 81 Ind Cas 193: 25 Cr LJ 705 (DB).

——S. 556 — The Magistrate who tried the case had in his capacity as a Municipal Commissioner, invited the attention of the Executive Officer to the manner in which the bye-law on the subject of the keeping of swine within Municipal limits was apparently being disregarded. The Executive Officer and the Health Officer instituted prosecutions, after satisfying themselves that there were good prima facie grounds for believing that the bye-law was being broken.

Held, that the convictions were not improper. AIR (V 10) 1923 All 483: 71 Ind Cas 359: 24 Cr LJ 135: 4 LRA Cr 9.

——S. 556 — The judgment of a Magistrate is not vitiated by the fact that he inspected the locus in

quo and stated in his judgment what he saw there. AIR (V 10) 1923 Mad 694: 45 MLJ 279: 75 Ind Cas 695: 18 MLW 113: 1923 MWN 860: 25 Cr LJ 7 (DB).

——S. 556 — Magistrate influenced in preliminary enquiries.

Where a Magistrate was influenced by his preliminary local investigation in coming to a finding as to the guilt of an accused person under S. 110 Cr. P. Code, the conviction is bad inasmuch as the Magistrate should not, under the circumstances, have tried the case himself. AIR (V 5) 1918 Pat 98: 4 Pat LJ 7: 19 Cr LJ 899: 47 Ind Cas 95 (DB).

——S. 556 — Magistrate giving information to police and directing further enquiry — Jurisdiction to try case subsequently.

A Magistrate who merely lays before a police Inspector certain information and directs him to make an inquiry on the basis of that information does not lose his jurisdiction under S. 556 of the Code to subsequently try the case. (1913) 11 ALJ 852: 15 Cr LJ 17: 22 Ind Cas 161.

——S. 556 — A Magistrate may hold a local investigation to understand the evidence laid before him; the report of this enquiry should be laid before the parties for their perusal and if he gives his own opinion in the case, he is not qualified to try the case. (1910) 37 Cal 340: 14 CWN 422: 11 CLJ 335: 11 Cr LJ 121: 5 Ind Cas 365 (DB).

——S. 556 — 'Interested' — Interpretation.

The phrase 'interested', as used in S. 556, Cr. P. C., does not imply mere intellectual 'interest' but something of the nature of an expectation of advantage to be gained or of a loss, or of some disadvantage to be avoided by the person who is said to be interested in the case. The mere fact that the inquiry was made by the Magistrate is not to be regarded as a disqualifying ground under the section. (1906) 8 Bom LR 947 (949) (DB).

——S. 556 — Magistrate — Personal disqualification.

A Magistrate is not disqualified under S. 556, Cr. P. C., from trying a case merely by the fact that in the departmental inquiry in the case, he forwarded the papers to the Collector with his opinion that there was apparently sufficient evidence to justify criminal prosecution. (1903) 5 Bom LR 542 (544) (DB).

9. Summary proceedings.

——S. 556 — Section 556, Criminal P. C., has no application to summary proceedings taken for punishing contempt as the provisions of the Code are not applicable. Proceedings for punishing contempt are taken not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public and specially those who either voluntarily or by compulsion, are subject to the jurisdiction of the Court from the mischief they will incur if the authority of the tribunal be undermined or impaired. The gravamen is an endeavour to shake the confidence of the public in the Court. While it is unpleasant for any Judge to have to sit in judgment in a case in which he has been personally attacked, it is his duty to do so where he has been the subject of a malicious and impudent publication containing imputations which are obviously false and of the falsity of which he himself has the best knowledge. In such cases, he has no alternative but to sit as it is impossible to vindicate the reputation of the Court which has been attacked by taking proceedings in any Court for libel or otherwise. AIR (V 29) 1942 Lah 105: 44 PLR 206: ILR (1942) Lah 411: 43 Cr LJ 599: 200 Ind Cas 182 (FB).

10. Consent or objection of the accused.

——S. 556 — Acquiescence or consent.

Where a Magistrate is disqualified to try a case under S. 556, the disqualification is not cured by consent or acquiescence of parties, nor can want of bona fides on the part of the objector to the jurisdiction, affect the question of disqualification. AIR (V 16) 1929 Bom 404: 53 Bom 716: 31 Bom LR 925: 122 Ind Cas 141: 31 Cr LJ 383: 1929 Cr C 433 (DB).

——S. 556 — Applicability of — Try any case — It includes appeal — Question of fact.

S. 556 does not apply where the executive head of a District or department orders a prosecution because the matter before him demands elucidation by judicial enquiry. It does apply where he is satisfied that the accused is guilty and he is therefore disqualified from trying the accused. Such disqualification takes away his jurisdiction and such defect cannot be cured by consent or want of objection on the part of the accused. (1913) 9 NLR 81: 14 Cr LJ 385: 20 Ind Cas 209.

——S. 556 — Magistrate ordering prosecution as President of Octroi Sub-Committee — Trying the accused subsequently as a Magistrate — Consent of accused, if confers jurisdiction.

The Magistrate as president of the Octroi Sub-committee of a certain place, ordered the prosecution of the accused. When the accused was charged before him, the Magistrate informed the counsel for defence that he is entitled to have the case tried by another Magistrate. Accused waived this privilege and was convicted. The accused then appealed. Held, that the Magistrate had under S. 556 no jurisdiction to try the case and the consent of the accused could not confer jurisdiction on him. (1910) ILR 32 All 635: 7 ALJ 749: 11 Cr LJ 447: 7 Ind Cas 291.

——S. 557.

——S. 557 — Scope.

Section 557 does not forbid a pleader to practise in any Court but forbids him to sit as a Magistrate in certain Courts. AIR (V 10) 1923 Rang 119: 76 Ind Cas 1031: 4 UBR 127: 25 Cr LJ 311.

——S. 561-A

1. Scope and applicability —Saving of inherent powers.
2. Inherent powers.
3. Expunging remarks.

See also Criminal P.C., Ss. 367 and 439.

4. Abuse of process.
5. To secure the ends of justice.
6. Section does not override the express provisions of law.
7. Quashing of proceedings.
8. Stay of proceedings.
9. Return of property.
10. Powers to revise.
11. Power of review.
12. Bail.
13. Time-barred appeal.

**1. Scope and applicability — Saving of inherent powers.**

——S. 561-A — **Applicability — Order passed by a Magistrate in his executive capacity.**

Where an order is passed by a Magistrate in his executive capacity and not as a Court, S. 561-A of the Cr P. Code, would have no application and the propriety of the order will not be gone into by the High Court. AIR (V 37) 1950 All 652.

——**S. 561-A — Quashing of proceedings — Complaint not disclosing offence.**

In cases where the complaint does not disclose any onence, criminal Courts should act with the greatest amount of care and caution because unless they are very careful, process of criminal Courts is likely to be abused and many respectable persons may thus become the victims of harassment by complainants who imagine that it is easier to recover dues through criminal Courts than through Civil Courts. The various sections of the Cr. P. Code are meant to be used in favour of the citizen and for furtherance of justice and not as a means of pressure. AIR (V 37) 1950 EP 155: 51 Cr LJ 735.

——**S. 561-A — Scope — Court dismissing petition under S. 491, Cr. P. Code and granting leave to appeal to Federal Court — If can subsequently grant petitioner's application for direction that he should not be transferred from the jail in which he was to another.**

When a Court dismisses a petition under S. 491, Cr. P. Code, and grants leave to appeal to the Federal Court, it has no jurisdiction over the matter afterwards and cannot direct that the convicted person should not be transferred to another jail to enable him to consult his lawyers. The Court having pronounced that the proceedings in which the petitioner was convicted were not illegal and dismissed the case, has no further concern with or jurisdiction in the matter. Though the terms of S. 561-A, Cr. P. C. are wide they do not extend the jurisdiction of the High Court to matters which are not already inherently within that jurisdiction. AIR (V 33) 1946 Lah 112: 225 Ind Cas 102: 47 Cr LJ 687.

——**S. 561-A — Order of executive officer in excess of his powers — Person aggrieved failing to seek his remedy in accordance with law, i. e. through ordinary Courts — He cannot ask High Court to exercise its inherent powers.**

It is true that even the executive officers of the Crown cannot interfere with the life or liberty of His Majesty's subjects except in strict accordance with the provisions of the law for the time being in force. If a person has been wronged by any orders of the executive authorities which are in excess of the powers conferred upon them, he has his remedy at law but that remedy has got to be sought in accordance with law, that is to say, through the ordnary Courts. Having failed to obtain such a remedy in the ordinary course of the law, he cannot come to the High Court and ask it to exercise its inherent powers. AIR (V 33) 1946 Pat 191: 12 BR 314: 223 Ind Cas 85: 47 Cr LJ 339.

——**S. 561-A — Sub-Divisional Magistrate getting information that there was dispute between two persons about right to possession of electric supply company, requisitioning same under R. 75A (1) of Defence of India Rules — Order cannot be said to be passed in judicial proceeding and High Court cannot interfere under S. 561-A.**

Section 561-A comes into operation only when the impugned order is passed by a "Court." If the order moved against in the High Court is one passed by an executive officer of the Crown in his administrative capacity, S. 561-A is not attracted.

Where a Sub-Divisional Magistrate getting information that there is a dispute regarding the right to possession of a going concern i. e., an electric supply company, in which the public is vitally interested, requisitions that concern under R. 75A (1) of Defence of India Rules and subsequently hands over possession to one of the disputants, the order passed by him cannot be said to be an order passed in a judicial proceeding even though he has taken this action during the pendency of a criminal proceeding instituted by one of the disputants against the other but not in the proceeding itself. Hence the High Court cannot interfere under Section 561-A, Criminal P.C. AIR (V 33) 1946 Pat 191: 12 BR 314: 223 Ind Cas 85: 47 Cr LJ 339.

——**S. 561-A — Object of S. 561-A.**

Section 561-A has not given increased powers to the Court which it did not possess before that section was enacted. The section gives no new powers; it only provides that those which the Courts already inherently possess shall be preserved and the section is inserted, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal P.C. and that no inherent power had survived the passing of that Code. AIR (V 32) 1945 PC 18: 11 BR 180: 1945 ALJ 47: 26 PLT 56: 47 Bom LR 245: 46 Cr LJ 413: 80 CLJ 19: 1945 OWN 258: ILR (1945) Lah 1: 1945 AWR (PC) 21: ILR (1945) Kar (PC) 89 Sup.: 49 Cal WN 191: 1945 MWN 49: 1945 Mad LJ 86: 71 IA 203: 58 MLW 57: 217 Ind Cas 1.

——S. 561-A — Section 561-A cannot possibly have been intended to relate to powers which were not in existence at all at the date when it was passed. It does not give a power of superintendence or of revision in respect of matters which have been specially created by the Legislature at a later date such as Indian Press (Emergency Powers) Act of 1931. AIR (V 28) 1941 Nag 97: 42 Cr LJ 108: 1941 NLJ 44: ILR (1942) Nag 107: 191 Ind Cas 206.

——S. 561-A — Obiter — A general proposition cannot be laid down that the provisions of S. 561-A, Criminal P. C., could not be used for passing any orders conflicting with any other provisions of the Criminal P.C. AIR (V 24) 1937 Bom 153: 39 Bom LR 82: ILR (1937) Bom 263: 38 Cr LJ 606: 168 Ind Cas 718 (DB).

——S. 561-A—It would be incorrect to interpret S. 561-A, Criminal P.C., as having any reference to bail, a matter which is specially provided for by the Code itself. AIR (V 23) 1936 Cal 809: 40 CWN 1313: ILR (1937) 1 Cal 464: 166 Ind Cas 612.

——S. 561-A — An order dismissing the appeal filed under S. 419 is prima facie final and it cannot be vacated under S. 561-A unless it is proved that either of the conditions precedent to the passing of the order as laid down by S. 421 has not been fulfilled. AIR (V 22) 1935 Sind 84: 36 Cr LJ 831: 29 SLR 203: 155 Ind Cas 736 (FB).

**(Overrules AIR (V 14) 1927 Lah 139: 28 Cr LJ 239: 99 Ind Cas 1039 (2).)**

——S. 561-A — Where a prisoner complains to the Court that he is not being treated in accordance with the jail rules and that he is subjected to hardships in violation of the rules, the Court has power to enquire into the matter to ascertain whether the prisoner is or is not being treated according to its own warrant.

There is no reason to insist on a public inquiry in such a case and no Court will insist on it if public interests are likely to suffer thereby. AIR

(V 18) 1931 Lah 562: 32 PLR 586: 32 Cr LJ 988: 133 Ind Cas 59 (DB).

——S. 561-A — Section 561-A does not confer any new powers but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. There is no conflict between that section and S. 369. AIR (V 15) 1928 Lah 462: 10 Lah 1: 10 AI Cr R 494: 29 Cr LJ 660: 110 Ind Cas 221: 30 PLR 247 (DB).

**2. Inherent powers.**

**(a) General.**
**(b) Extent of.**
**(c) Inherent powers of lower Court.**

**(a) General**

**——S. 561-A — Power of High Court — Order under S. 7, Influx from Pakistan (Control Act, 1949.**

Under S. 561-A, Cr. P. Code, the High Court has no power to interfere with an illegal order under S. 7 Influx from Pakistan (Control) Act, 1949, directing a person to leave India for Western Pakistan, although the position might well be otherwise if an attempt is made to enforce the illegal order or to issue a fresh order of a similar character against him. AIR (V 37) 1950 Nag 161: 51 Cr LJ 817: 1950 NLJ 308: ILR (1950) Nag 361 (DB).

**——S. 561-A — Finding of High Court in application under, on a question of jurisdiction — If can be subsequently challenged in Civil Court.**

The finding given by the High Court in an application under S. 561-A of the Cr. P. Code on a question of law in regard to the jurisdiction of a Criminal Court to try a person cannot be subsequently challenged in a Civil Court. AIR (V 34) 1947 Oudh 210: 22 Luck 428: 1947 OWN 402: 1947 OA (CC) 224: 1947 AWR (CC) 224 (DB).

**——S. 561-A — Cognizable offence — Statutory rights of Police to investigate — High Court, when can interfere.**

In the case of a cognizable offence the Court's functions begin when a charge is preferred before it and not until then. The High Court can, therefore, interfere under S. 561A only when a charge has been preferred and not before.

No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed the Police would have no authority to undertake an investigation and if they do so, the High Court may interfere under S. 561-A. AIR (V 32) 1945 PC 18: 11 BR 180: 1945 ALJ 47: 26 PLT 56: 47 Bom LR 245: 46 Cr LJ 413: 80 CLJ 19: 1945 OWN 258: ILR (1945) Lah 1: 1945 AWR (PC) 21: ILR (1945) Kar (PC) 89 Sup.: 49 Cal WN 191: 1945 MWN 49: 1945-1 Mad LJ 86: 71 IA 203: 58 Mad LW 57: 217 Ind Cas 1.

——S. 561-A — The High Court has got power to order retrial of accused under S. 561-A. This is also clear from Ss. 3 (2) and 4 of the Special Criminal Courts (Repeal) Ordinance of 1943. AIR (V 30) 1943 Cal 594 : 45 Cr LJ 224 : 210 Ind Cas 337 (SB).

**——S. 561-A — To re-arrest accused released on bail.**

Every Judge or Magistrate trying a Criminal case has inherent power to see that the trial is properly conducted and that the ends of justice are not defeated, and if facts are brought to its attention, which suggest that unless the person who is being tried is placed under arrest, the ends of justice will be defeated, the Court has inherent power to direct his arrest. AIR (V 27) 1940 Bom 40: 41 Bom LR 1232 : ILR (1940) Bom 38 : 41 Cr LJ 251 : 186 Ind Cas 101 (DB).

**——S. 561-A — To amend its order made on transfer application with consent of parties, by way of explanation.**

A transfer application was made to the High Court which directed a de novo trial and that the trial Magistrate was not to be bound by any order of the first trial Magistrate. The order was made after a long discussion and was, except in form, a consent order. The petitioner made a further application on the ground that the order was obscure and sought to have it made clear :

Held, that the High Court had no power to amend its order by way of explanation or otherwise. AIR (V 27) 1940 Lah 192 : 41 Cr LJ 708 : 42 PLR 153 : 188 Ind Cas 856.

**——S. 561-A — Re-trial — Adducing fresh evidence.**

Complaint under S. 420, I. P. C. — Offence disclosed coming under S. 477, I. P. C. — Magistrate trying and acquitting accused under S. 420 — Magistrate having no jurisdiction to try under S. 477 — Proceedings before the Magistrate are void — Accused should be re-tried under S. 477 — Accused, however, should not be allowed to adduce fresh evidence so as to fill in gaps under S. 561-A. AIR (V 26) 1939 Lah 513 : 41 PLR 198 : 41 Cr LJ 184 : 185 Ind Cas 415.

**——S. 561-A — When can be exercised.**

The use of extraordinary powers by the High Court under S. 561-A, Criminal P. C., ought to be reserved as far as possible for extraordinary cases. They are not usually invoked when there is another remedy available. Order in the nature of attachment before judgment are not altogether consistent with the spirit of Criminal proceedings, in view of the presumption that the accused is innocent until he is found guilty. AIR (V 21) 1934 Bom 74 : 36 Bom LR 88 : 58 B 152 : 35 Cr LJ 1028 : 149 Ind Cas 1005 (DB).

——S. 561-A — Where the additional Sessions Judge sentenced the accused to undergo rigorous imprisonment for two years and to whipping of twenty-five stripes after the sentence of imprisonment passed by his order has been undergone :

Held, that the last portion of the order was clearly incorrect in this sense that the time mentioned for inflicting the corporal punishment was not in accordance with law.

If a lower Court finds that it has passed an illegal order and informs the High Court of the mistake and the High Court is of the opinion that the order is illegal, it is competent to the High Court to set right the illegality. The form of the information being immaterial the High Court can do so even when it has dismissed the appeal against the order. AIR (V 21) 1934 Pat 551 : 15 PLT 475 : 1 BR 37 : 36 Cr LJ 100 : 152 Ind Cas 291.

**——S. 561-A — Assessor expressing that he is determined to help accused — Order for new trial.**

Where, during the course of the trial of a case with the aid of assessors, one of the assessors expressed that he was determined to help the accused and that he was not going to allow the accused to be convicted :

Held, that he was not a proper person to act as an assessor and the High Court had power to order a new trial under S. 561-A with the aid of new assessors. AIR (V 20) 1933 Lah 926 : 35 Cr LJ 107 : 15 Lah 20 : 146 Ind Cas 446.

——S. 561-A — Under-trial prisoner — Jail Authorities refusing to permit interview —Juris-

diction of Courts to issue orders to Jail Authorities :

Held, that neither the High Court nor the trial Court had any jurisdiction to go into the question of non-compliance with the provisions of Prisons Act, by the Jail Authorities. AIR (V 19) 1932 Lah 390 : 33 Cr LJ 531 : 33 PLR 722 : 14 Lah 182 : 137 Ind Cas 851 (DB).

——S. 561-A — The High Court has power in view of Ss. 423 and 561-A, Criminal P. C., to direct separate sentences passed in separate trials to run concurrently. AIR (V 18) 1931 Bom 529 : 33 Bom LR 1163 : 33 Cr LJ 77 : 134 Ind Cas 1239 (DB).

**——S. 561-A — Condition for exercising powers — Principle explained.**

The special jurisdiction recognized by S. 561-A can be invoked only in exceptional cases for which no express provision has been made by the Code, and to redress only such grievance as calls for an immediate relief, which can be granted only by the High Court. The inherent jurisdiction should be exercised with due care and caution and must conform to sound general principles and precedents. It was never contemplated by the legislature that the High Court should exercise its inherent power for making pronouncements upon questions of law in order to guide a Magistrate in conducting a preliminary enquiry. AIR (V 17) 1930 Lah 465 : 123 Ind Cas 280 : 1930 Cr C 533 : 31 Cr LJ 482 : 31 PLR 482 (DB).

**——S. 561-A — Warrants under Extradition Act, — Can be revised.**

Execution by the District Magistrate (or the (Chief Presidency Magistrate) in British India of a warrant under S. 7 of Extradition Act is not an executive act. The Magistrate has judicially to consider the matter and decide whether the warrant can be executed according to law and the order of the Magistrate is subject to the revisional powers of the High Court. The order can also be interfered with under S. 561-A. On proper proceedings being taken High Court can also interfere under S. 491. 42 Cal. 793, held too widely stated. AIR (V 16) 1929 Bom 81 : 117 Ind Cas 321 : 31 Bom LR 62 : 53 Bom 149 : 30 Cr LJ 772 (DB).

**——S. 561-A — Limits on powers — No conflict with statutes.**

The inherent jurisdiction of the Court which receives recognition in S. 561-A cannot be invoked for the purpose of doing an act which would conflict with any of the provisions of law or general principles of criminal jurisprudence. The rule of law is firmly established that when a statute confers upon a Court a specific power the Court cannot by relying upon its inherent jurisdiction extend its scope of that power. AIR (V 16) 1929 Lah 705 : 126 Ind Cas 72 : 11 Lah 220 : 31 Cr LJ 977 : 31 PLR 824 : 1929 Cr C 351 (DB).

**——S. 561-A — Cognizance of offence — Lahore High Court.**

Jurisdiction to take cognizance of offences must be expressly conferred on the Lahore High Court in order to enable it to punish the offenders, and the inherent powers of that Court cannot be invoked for that purpose. AIR (V16) 1929 Lah 217 : 115 Ind Cas 428 : 30 Cr LJ 460 : 12 AICrR 413.

**——S. 561-A — Search of house.**

In whatever capacity any officer of the Crown in certain actions taken by him, orders search of the house of a public servant or of a subject of the Crown, the High Court would have jurisdiction independent of the Cr. P. Code to interfere with the Case. AIR (V 15) 1928 All 756 : 9 LRA Cr 140 : 10 AICrR 450 : 113 Ind Cas 78 : 30 Cr LJ 62 : 1929 ALJ 57 : 51 All 377.

**(b) Extent of.**

**——S. 561-A — Power of High Court to dispense with attendance of accused during trial.**

Under S. 561-A of the Cr. P. Code, the High Court has inherent power to excuse the personal attendance of the accused during trial and permit him to appear by pleader. AIR (V 38) 1951 MB 28: 52 Cr LJ 73.

**——S. 561-A — Power of High Court to safeguard the rights of parties before it — Right of appellant undergoing imprisonment to give instructions regarding appeal to his counsel in Jail without the presence of police officer.**

The High Court has had the power to safeguard the rights of parties before it in civil and criminal cases as laid down by law ever since its inception and those rights have been safeguarded and continued under S. 561-A of the Cr. P. Code and the High Court ought to see that those rights are not infringed.

No Court shall fail in its duty of allowing a party who is undergoing imprisonment to give instructions to his vakil freely and frankly without police officers (who naturally represent the other side) being present and taking down shorthand notes of the instructions and broadcasting them thereafter to their superior officers. There is also no rule under which an appellant before the High Court or before a Sessions Judge can be made, under mere executive orders of Government, to submit to the presence of a police officer at the interview between him and his counsel or to such police officer's taking down shorthand notes of the instructions between the party and his vakil. The party should be allowed to have interviews and give instructions without the presence of any police officer and subject only to the restrictions imposed by R. 430 of the Madras Jail Manual. AIR (V 37) 1950 Mad 259: 51 Cr LJ 666: (1949) 2 MLJ 730: 1949 MWN 840.

**——Ss. 561-A and 369 and 430 — Inherent power of High Court to set aside order passed on appeal heard before date fixed for hearing and to re-hear the appeal.**

The High Court has inherent power under S. 561-A, Cr. P. Code, to set aside an order passed on an appeal heard before the date fixed for hearing and to re-hear the appeal. It cannot be said that either S. 369 or 430 of the Code in any way affects the power because the application to set aside the judgment is neither an application to review that judgment nor one praying that it be altered. It is really one to set aside the prior proceedings (i. e.,) the hearing of the appeal and the judgment. Case law discussed. AIR (V 36) 1949 All 176: 50 Cr LJ 228: 410: 1948 OWN 362: 1948 ALW 360.

**——S. 561-A — If enlarges power of High Court under S. 491, Cr. P. Code.**

Section 561-A of the Cr. P. Code does not enlarge or add to the power of the High Court under S. 491, Cr. P. Code. AIR (V 36) 1949 Mad 307: 50 Cr. LJ 405: (1949) 1 MLJ 1: LR (1949) Mad 737: 1948 MWN 853: 1949 FLJ 43: 62 LW 51 (FB).

**——Ss. 561-A, 205 and 540-A — Exemption of accused from appearance — Inherent power of High Court.**

The High Court has inherent powers under S. 561-A, Cr. P. Code, to exempt an accused from appearance in Court beyond those contained in Ss. 205 and 540-A, Cr. P. Code. AIR (V 36) 1949

Nag 334: 50 Cr LJ 932: 1949 NLJ 266: ILR (1949) Nag 451 (DB).

——**S. 561-A — Inherent power — Award of costs — Order quashing proceedings as vexatious and frivolous — Power to award costs to successful accused.**

The High Court has no inherent power to award costs to a successful accused when quashing proceedings against him on the ground that the proceedings are frivolous or vexatious. S. 561-A of the Cr. P. Code gives the High Court no new power; it only preserves the existing powers. AIR (V 35) 1948 Bom 169: 49 Cr LJ 203: ILR (1947) Bom 625: 49 Bom LR 812 (DB).

——**S. 561-A — Inherent powers — Setting aside conviction under.**

The powers conferred on the High Court by S. 561-A, Cr. P. Code, are no doubt very wide but they are not unlimited. They can be exercised only when the Code makes no provision for dealing with the matter, and the Court is satisfied that there is an abuse of its process which calls for interference, or otherwise to secure the ends of justice it is necessary that the High Court should step in and exercise its inherent powers. Though it cannot be said that High Court can never set aside a conviction in exercise of its inherent powers it will do so only in very exceptional cases. AIR (V 35) 1948 Oudh 17: 1947 AWR (CC) 105: 1947 OA (CC) 105: 1947 OWN 391: 22 Luck 391: 48 Cr LJ 948 (DB).

——S. 561-A — Inherent powers — Setting aside of irregular trial and conviction — Trial on Sunday and refusal of adjournment to get legal aid—Plea of guilty and conviction — Sustainability. See AIR (V 34) 1947 Bom 388: 48 Cr LJ 631: 49 Bom LR 148.

——S. 561-A — Exemption of accused from appearance — Power of High Court to grant request for dispensation of attendance of accused arrested without warrant. See AIR (V 34) 1947 Mad 433: 48 Cr LJ 874: (1947) 2 MLJ 142.

——**Ss. 561-A and 369 — Inherent power — Setting aside its own order by the High Court.**

Section 561-A of Cr. P. Code does not confer any new powers on the High Court and it only provides that the powers which it already possesses should be reserved. S. 369 prohibits the Court from altering or reviewing its judgment after the same has been signed and S. 561-A cannot be invoked to exercise a power contrary to such prohibition. AIR (V 34) 1947 Oudh 221: 1947 OWN 355: 1947 OA (CC) 130: 1947 AWR (CC) 130.

——S. 561-A — Inherent powers — Conditions for exercise — Order passed by officer in executive capacity — Proper remedy — Application under S. 561-A—Maintainability. See AIR (V 33) 1946 Pat 191: 12 BR 314: 223 Ind Cas 85: 47 Cr LJ 339.

——**S. 561-A — S. 561, if confers powers.**

Section 561-A confers no powers. It merely safeguards all existing inherent powers possessed by the High Court necessary (among other purposes) to secure the ends of justice. AIR (V 32) 1945 PC 94: ILR (1945) Lah 57: 11 BR 493: 46 Cr LJ 662: 49 CWN 477: 1945 MWN 366: (1945) 2 MLJ 40: 58 MLW 343: 47 Bom LR 634: 1945 ALJ 340: 1945 NLJ 425: 26 PLT 217: 72 IA 120: 220 Ind Cas 91.

——S. 561-A — The inherent power of High Court cannot be invoked with respect to any matter expressly dealt with by the Code. AIR (V 24) 1937 Nag 181: ILR 1937 Nag 236: 38 Cr LJ 384: 167 Ind Cas 373 (DB).

——S. 561-A — High Court has power under S. 423 (d) or S. 561-A, Criminal P. C., to order trial Court to enquire under S. 476, Criminal P.C., and make complaint if it does not wish to enquire itself. AIR (V 24) 1937 Sind 193: 38 Cr LJ 1002: 170 Ind Cas 891 (DB).

——**S. 561-A — Powers under S. 561-A can be exercised by High Court.**

Under S. 561-A, inherent powers in hearing the appellant or his Pleader for the second time may be exercised by the High Court and not by a Court of inferior jurisdiction. AIR (V 22) 1935 Sind 84: 36 Cr LJ 831: 29 SLR 203: 155 Ind Cas 736 (FB).

——**S. 561-A — Rectification of error.**

High Court in appeal has power to rectify the error of the first Court. 1934 MWN 890.

——S. 561-A — Though there is nothing in S. 222 (2) to prevent separate trials in respect of various sums of money misappropriated on several different dates the Court may in appropriate cases stop the trial if it is shown to be oppressive or an abuse of the process of court. AIR (V 17) 1930 Mad 978: 59 MLJ 854: 1930 Cr C 1194: 1930 MWN 1097: 32 MLW 789: 32 Cri LJ 223.

**(c) Inherent powers of lower Court.**

——S. 561-A — Criminal Courts have an inherent power to make such orders as may be necessary for the ends of justice. This inherent power is not to be capriciously or arbitrarily exercised; it is to be exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. AIR (V 25) 1938 Cal 258: ILR (1938) 1 Cal 588: 39 Cr LJ 596: 175 Ind Cas 409 (DB).

——S. 561-A — Per Sulaiman, C. J.—An Appellate Court cannot invoke the aid of its inherent jurisdiction in ordering a Subordinate Court to do something in a case. In the first place new categories of inherent jurisdiction should not be invented; particularly if, prior to 1923, no appeal was at all permissible. In the second place, the inherent jurisdiction is generally confined to the proceedings before the Appellate Court and does not include an authority to issue orders to the Court below directing it to do something in the case. If such inherent powers were invoked then the provisions of the Code would become quite unnecessary. AIR (V 24) 1937 All, 305: 1937 ALJ 192: 1937 AWR 290: 38 Cr LJ 561: ILR (1937) All 517: 168 Ind Cas 434 (FB).

——**S. 561-A — Exercise of inherent power by Appellate Court — Remand.**

An Appellate Court, when acting under S. 476B Criminal P.C., cannot invoke the inherent powers conferred on the Appellate Court when hearing an appeal from acquittal or appeal from conviction or appeal from any other order and has not got ample powers to remand the case for further enquiry. AIR (V 24) 1937 All 305: 1937 ALJ 192: 1937 AWR 290: ILR (1937) All 517: 38 Cr LJ 561: 168 Ind Cas 434 (FB).

——**S. 561-A — Order for custody of girl after trial was over — Legality of — Penal Code, Ss. 366, 376, 372, 373, 344. 366-A.**

Where after having accepted the majority verdict of the jurors in a case against the accused for having committed offences under Ss. 366, 376, 372, 373, 344 and 366-A, I.P.C., the Judge recorded an order in the exercise of his inherent jurisdiction relating to the custody of the girl with reference

to whom the offences were committed, to the effect that she should be kept in a place till the legality of her marriage with the complainant or the accused was established:

Held, that there was no justification either in law or in practice founded upon inherent powers of Courts for such a direction after the trial was over and the order was wholly without jurisdiction. AIR (V 21) 1934 Cal 756: 38 CWN 1211: 36 Cr LJ 231: 152 Ind Cas 973.

3. Expunging remarks.

See also Criminal P. C. Ss. 367 and 439.

(a) General.
(b) Irrelevant, libellous matter and inseparable remarks.
(c) Caution to be exercised.
(d) Remarks when the case is sub judice.
(e) Remarks prejudicial to magistrates.
(f) Power of lower Court.

(a) General.

——S. 561-A — Expunging remarks — Remarks about Magistrate by High Court in order on facts and circumstances proved or admitted.

A magistrate who, before exercising his own powers under the Cr. P. Code, thinks it necessary to consult any police officer be he a Senior Superintendent of Police, is utterly unfit to exercise any magisterial powers. Where it is proved that a magistrate had behaved in this fashion and that he had disregarded the law, on facts and circumstances clearly proved or admitted, and the High Court expresses the opinin about such a magistrate, it will not expunge such remarks from its order on the application of the Crown, when it is satisfied that the remarks are perfectly justified. (1947) 231 Ind Cas 32: 48 Cr LJ 656 (Lah).

——S. 561-A — Expunging remarks from judgment —Principles to be observed stated — There is nothing improper in Judge when acquitting accused to state that acquittal was due to fact that he was given benefit of reasonable doubt and that suspicion still remains.

In considering applications for expunging remarks from judgments of lower Courts, two principles of cardinal importance have to be observed, one is that the proper freedom and independence of Judges must be maintained: they must be allowed a proper and full latitude in the expression of their opinion without fear or favour on the evidence before them. On the other hand, an accused, when acquitted, is entitled to the full benefit of that acquittal and the judgment ought not to be inconsistent in this sense that while the Judge acquits an accused of the offences charged he uses words which detract from the force of the acquittal. If a Judge exculpates he must not inculpate. After all a man is presumed to be innocent until he is proved guilty; that presumption is not weakened when he is acquitted but is on the contrary confirmed.

The mere fact, however that the Judge states that the acquittal of the accused was due to the fact that he was given the benefit of a reasonable doubt and that there remained suspicion and not proof against the accused is not inconsistent with the acquittal of the accused, for the Judge thereby merely gives one reason for the acquittal of the accused and his view of the effect of the evidence. Such a statement cannot be said to exceed judicial duty or propriety and cannot be said to deprive the accused of the full benefit of his acquittal which is subject to this lawful statement. AIR (V 33) 1946 Sind 121: 47 Cr LJ 374 (DB).

——S. 561-A — Observations in nature of homily not affecting character of any particular person need not be expunged.

In a proper case, the High Court has inherent power to expunge a part of a judgment of a Subordinate Court; but it will take such action only when the words objected to are not relevant to the case and are of a scandalous or very imporper nature and which adversely affect the character of persons before the Court.

Where the observations by the lower Court were in the nature of a homily not affecting the character of any particular person but relating to the conduct of the officials towards public in enforcing laws, though the observations should not have been indulged in, they were not of such a nature as to call for expunction. AIR (V 31) 1944 Mad 320 : 57 LW 112 : ILR (1944) Mad 614 : (1944) 1 MLJ 153 : 1944 MWN 132 : 45 Cr LJ 763 : 214 Ind Cas 334 (DB).

——S. 561-A — Defamatory remarks against witness.

The purpose of S. 561-A is directly to put beyond question the inherent powers that exist in High Courts, over and above the statutory powers conferred by other provisions of the Criminal P. C. One of the inherent powers of the High Court is to prevent grave injustice and injury being caused to a person who, though not a party, has, as a witness, been called before the Court upon a summons which he cannot disobey and who has nevertheless been made the subject of defamatory remarks by a Magistrate or Judge, which remarks can in no way be justified from the record and the making of which therefore, must involve the abuse of the judicial office. To expunge any such passages is "otherwise to secure the ends of justice" within the meaning of S. 561-A, and since the High Court has this power, it has the necessary ancillary power to call for the record so that its inherent powers may be exercised. It makes no difference whether the High Court acts suo motu or at the instance of the person aggrieved. AIR (V 31) 1944 Sind 133 : ILR (1944) Kar 252 : 46 Cr LJ 88 : 215 Ind Cas 283 (DB).

——S. 561-A — Public servant appearing as a witness in Court— Court is free to make relevant comments on evidence only — Remarks should not be based on conjectures and surmises. AIR (V 31) 1944 Sind 133 : ILR (1944) Kar 252 : 46 Cr LJ 88 : 215 Ind Cas 283 (DB).

——S. 561-A — Expunging of passages — Jurisdiction of High Court when there is no appeal or revision.

The High Court has no jurisdiction to expunge passages from the judgment of an inferior Court which has not been brought before it in regular appeal or revision. AIR (V 27) 1940 Bom 266 : 42 Bom LR 478 : ILR (1940) Bom 415 : 41 Cr LJ 855 : 190 Ind Cas 205 (DB).

——S. 561-A — The High Court can interfere under S. 561-A and expunge remarks from judgment in cases where remarks are made about a person who is not a party to the proceedings or not a witness in the case. The High Court can also interfere when remarks are made about a party to the proceedings or a witness to the case which are not justified by the findings or when it can be shown that the judgment is due to bias or perverse. AIR (V 27) 1940 Lah 42 : 41 Cr LJ 380 : 186 Ind Cas 799.

——Ss. 561-A, 367 — Disparaging remarks made against a person not before the Court and unwarranted by evidence or made against a witness without affording him any opportunity to offer explanation, should be expunged from the judgment. AIR (V 27) 1940 Mad 134 : 1939 MWN

1131 : 50 MLW 782 : 41 Cr LJ 317 : 186 Ind Cas 472.

——S. 561-A — Although a Magistrate is entitled to draw legitimate inferences from the evidence on record, yet when there is no evidence on record to support the remarks made by the Magistrate for expunging which an application is made, even as legitimate inferences, such remarks are wholly unjustified and when they reflect on the character of the applicant and would affect his future, it is only fair that they should be expunged. AIR (V 25) 1938 Lah 793 : 40 Cr LJ 214 : 179 Ind Cas 523.

**——S. 561-A — Jurisdiction, how to be exercised — Remarks of damaging character and wholly irrelevant to point.**

The inherent power of a High Court to expunge a portion of a judgment of an inferior Court is unbounded by the law, which expressly gives the Court authority to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. On the other hand, this jurisdiction has always been regarded by the High Courts as one of an extraordinary character to be exercised with care and caution in exceptional cases, because, it is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the High Court, and because, in weighing evidence and in arriving at conclusions on questions of fact, lower Courts have often to make remarks which reflect adversely on the character of witnesses.

It is the duty of the High Court, in order to prevent abuse of the process of the Courts and secure the ends of justice, to delete passages commenting adversely upon a person who is not a party to the proceedings and has not had a fair opportunity of being heard, and also to delete such passages when they are based upon no evidence or evidence not properly upon the record. But the exercise of the power should not, in practice, be extended beyond the limits adopted hitherto.

The power can be used to delete passages which, though based on evidence, damage the character of a person, are wholly irrelevant to any point in issue and which, a Court has unnecessarily gone out of its way to include in a judgment. Further, where its notice has been drawn to a judgment which appears to it to be couched in language injudicious and uncalled for, the High Court can and ought to express its opinion in the matter whether any passage is or is not ultimately expunged.

The proceedings in Courts and the language of their judgments should not themselves promote the feelings of enmity, the promotion of which by others it is their duty to punish under the law. AIR (V 23) 1936 Lah 429 : 37 Cr LJ 661 : 38 PLR 638 : 162 Ind Cas 624.

——S. 561-A — Though the High Court will not entertain any and every application for formally expunging remarks in a judgment made by some person, whether an accused or not an accused, who feels himself aggrieved by remarks made in a judgment, still there are cases in which such action is called for and in such cases the High Court is competent to do so and will do so. AIR (V 15) 1928 All 182 : 9 LRACr 3 : 9 AICrR 91 : 108 Ind Cas 124 : 29 Cr LJ 336.

——S. 561-A — The High Court can expunge suo motu objectionable remarks in the lower Court's judgment in the exercise of its inherent jurisdiction without notice to trying Magistrate or the District Magistrate. AIR (V 15) 1928 Nag 242 : 107 Ind Cas 912 : 29 Cr LJ 313 : 10 AICrR 19.

### (b) Irrelevant libelious matter and inseparable remarks.

**——S. 561-A — Expunging remarks — Inherent powers of High Court — Appeal or revision — If to be pending before it — Defamatory remarks against witness in judgment not justified by evidence on record — Power of High Court to expunge at instance of witness.**

It is beyond doubt that the inherent powers of the High Court can be invoked for expunging objectionable remarks from a judgment of a sub-ordinate Court, when they are not justified by the evidence on record. The High Court can exercise this power even if there be no appeal or revision before it. Grave injustice and injury may be caused to a person who, though not a party, has, as a witness been called before the Court upon a summons which he cannot disobey and who has nevertheless been made the subject of defamatory remarks by a Magistrate or Judge, which remarks can in no way be justified from the record and the making of which must, therefore, involve the abuse of the judicial office. To expunge such remarks at the instance of the person aggrieved is "otherwise to secure the ends of justice" within the meaning of S. 561-A, Cr. P. Code.

Magistrates must doubtless be free to make bold and fearless comments on the evidence before them while writing judgments so that they may be able to discharge their duties effectively. But they should use restrained language while commenting on the character and credibility of witnesses who, unlike accused persons, do not get adequate opportunities to defend themselves. If a Magistrate or Judge oversteps the limits and makes adverse remarks of a sweeping character against witnesses, unsupported by the evidence on record, the High Court, for the ends of justice, has to interfere at the instance of the aggrieved witness, though there may be no appeal or revision against the conviction or acquittal, as the case may be.

The fact that there was impropriety of conduct on the part of a witness or that the witness took an extraordinary interest in the case from its inception or that his evidence was interested in view of his admitted enmity towards the accused, would not and cannot justify the trying Magistrate or Judge in saying that "he has often misused his position as a public man in trying to influence the police and officers in getting a verdict against the accused persons." Such remarks are of a highly defamatory nature and likely to damage the witness's reputation among the public as tending to lower him in public estimation and may prove fatal to his whole political career. The High Court will in such a case expunge the passage complained of from the judgment of the Magistrate or Judge. AIR 1940 Bom 266; AIR 1941 Pat 544, not foll. AIR (Vol 38) 1951 Orissa 92: 16 Cut. L. T. 160.

**——S. 561-A — Expunging remarks from judgment — Mere repetition does not make passage irrelevant.**

Mere repetition does not make a passage in the judgment irrelevant any more than does the fact that the Judge expresses the same

thing in different ways. AIR (Vol 33) 1946 Sind 121 : 47 Cr LJ 374 (DB).

——**S. 561-A — Expunging remarks from judgment — Order expunging remarks mutilating judgment — Chief Court should confine itself to expression of opinion that these remarks should not have been passed.**

It matters little whether certain sentences in a judgment are expunged or whether the High Court gives its opinion that certain sentences in a judgment are not quite proper and ought not to have been written. The right of an accused person not to be deprived of the full benefit of his acquittal does not depend simply upon whether certain sentences can be removed from one paragraph of the judgment without mutilating that judgment or obscuring its meaning.

If an order expunging the remarks would mutilate the judgment it is enough for the High Court to confine itself to an expression of opinion that the remarks should not have been passed. AIR (Vol 33) 1946 Sind 121 : 47 Cr LJ 374 (DB).

——**Ss. 561-A and 367 — Expunging remarks from judgment — Murder case — Motive for crime political and victim and accused both prominent politicians — It is not irrelevant for Magistrate to remark on this fact in his judgment.**

Though there should be no interference by Judges or Magistrates in politics yet where the case put forward by the prosecution is that the motive for the crime was political and that both the man who was murdered and the accused charged with participating in the conspiracy to murder him were prominent politicians, it is not irrelevant or improper for the Court to refer to, to consider and to remark on this fact. AIR (Vol 33) 1946 Sind 121 : 47 Cr LJ 374 (DB).

——**S. 561-A — Criticism of conduct of several persons not relevant to case.**

Where a Magistrate's judgment was more concerned with a criticism of the conduct of several persons than with the merits of the case which involved a simple question of law :

Held, that such sentences should be expunged. AIR (Vol 30) 1943 Lah 298 : 45 Cr LJ 149 : 209 Ind Cas 468 (DB).

——**S. 561-A — Expunging remarks from judgment — Remarks, though relevant and inseparable from judgment, may yet be improper if they deprive accused of full benefit of acquittal.**

The High Court will not interfere to expunge passages from a judgment unless these passages are irrelevant or separable.

Remarks, however, may be relevant and may not be separable from the fabric of the judgment and at the same time be improper in that they deprive the accused of the fullest benefit of his acquittal. They would also be improper if, reasonably construed, it appears that the Judge is attempting to give guidance to the electorate. It is improper for a Judge to point out that he has not given an accused person a clean bill. In fact it is not for him to give an accused any bill at all. When the Judge finds the accused not guilty, it is not for him to cast any doubt upon the innocence of one whom he has acquitted by saying that he is not prepared to say that the accused is innocent. AIR (Vol 33) 1946 Sind 121 : 47 Cr LJ 374 (DB).

——**Ss. 561-A, 439 and 423 — Power under S. 561-A — Remarks inseparable — Interference should be under S. 439 read with S. 561-A or S. 423 (d).**

The High Court will not expunge defamatory passages from the judgment of the lower Court when by so doing, it is necessary to mutilate the judgment or to touch the fabric of the judgment itself. (Ss. 439, 561-A and 423 explained). AIR (Vol 31) 1944 Sind 133 : ILR (1944) Kar 252 : 46 Cr LJ 88 : 215 Ind Cas 283 (DB).

——**S. 561 A — Power of High Court.**

It is an elementary principle of justice that no man should be condemned unless he has had opportunity of defending himself.

The High Court has jurisdiction under S. 561-A, Criminal P. C., to expunge from the judgment irrelevant, inadmissible and offensive remarks against a witness or a person named in the case.

Although in the interests of proper administration of justice the Courts should be allowed to perform their functions freely and fearlessly and to comment upon the statements of witnesses in so far as those statements are relevant to the case, yet it is equally necessary that the Courts should not be allowed to make disparaging remarks upon persons who appear either as witnesses during the course of trial of a case or whose names are mentioned. It is not open to a Court to condemn a witness merely on conjectures or materials not before it in the shape of evidence. Before passing adverse remarks against a witness on the basis of certain facts, those facts must be established by evidence on the record of the case. ('39) 184 Ind Cas 250 : 1939 AWR 189 : 1939 OWN 872 : 40 Cr LJ 923 : 15 Luck 39.

——**S. 561-A — Finding entirely irrelevant to case before Court.**

Where, travelling beyond his legitimate functions in the case, the Magistrate has, on the uncorroborated statements of a boy which have not received the binding sanction of an oath, and without giving an opportunity to the applicant to be heard, held him guilty of indecent assault upon the boy, a finding which was wholly irrelevant for the right decision of the case, the High Court has under S. 516A, Criminal P.C., inherent power, in order to secure the ends of justice, to pass any order that may be necessary to remove the legitimate grievance of the applicant and the offensive remarks will be ordered to be expunged from the judgment of the lower Court.

(Value to be attached to evidence of little children stated) AIR (V 24) 1937 Oudh 277: 1937 OWN 258: 38 Cr LJ 376: 167 Ind Cas 11.

——S. 561-A — Where the passage consists of a comment on the conduct of a Police Officer, who had no opportunity to explain the circumstances referred to and the passage comes at the very end of the judgment, and is separable, it can be expunged as the deletion will not have the effect of mutilating the judgment. AIR (V 21) 1934 Sind 68: 35 Cr LJ 1138: 150 Ind Cas 610 (DB).

——S. 561-A — Under S. 561-A, Criminal P.C., the High Court has ample power to expunge any improper remarks which a Subordinate Court has made in its judgment against a witness or party to secure the ends of justice and in fairness to the witness or the party concerned. (1932) 137 Ind Cas 850: 33 PLR 608: 33 Cr LJ 534 (DB).

——**S. 561-A — Objectionable remarks in judgment.**

A person, who was not a witness in the case and against whom no witness had deposed anything was condemned by the Magistrate in his judgment without giving him an opportunity of being heard, and the remarks were absolutely unfounded so far as the record went.

Held, that the remarks ought to be expunged from the record. AIR (V 16) 1929 Lah 201: 112 Ind Cas 686: 29 Cr LJ 1102.

——S. 561-A — **Relevant remarks, forming reasoned basis of argument, cannot be expunged from judgment — Principle explained.**

Section 561-A declares the inherent jurisdiction of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice and if to secure the ends of justice, it appears to be necessary to expunge any matter from the judgment of a criminal Court, then the High Court has power to do so. Principles which govern the action of High Courts in such a case are these, if an unjustifiable attack be made on a person who has had no opportunity of being heard in his own defence, and the remark is irrelevant and separable it can and should be expunged especially if he is neither a party nor a witness. But it is not proper to delete them unless they are separable, that is to say, if they form an integral part of the argument. A Judge or Magistrate is bound to record reasons for his decision and even in the interest of justice, the High Court cannot delete those reasons and leave the decision without its reasoned basis. Unless the remarks are irrelevant or can be expunged without ruining the argument, the High Court cannot legitimately interfere. AIR (V 16) 1929 Sind 243: 118 Ind Cas 747: 23 SLR 432: 30 Cr LJ 970: 1929 Cr C 537 (DB).

——S. 561-A — High Court has inherent power to order a deletion of passages, which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. The High Court as the Supreme Court of revision must be deemed to have power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it. Such jurisdiction, however, can only be exercised when there is no foundation whatsoever for the remark objected to and not where it is a matter of inference from evidence. AIR (V 14) 1927 All 193: 98 Ind Cas 719: 49 All 254: 25 ALJ 100: 8 LRA Cr 5: 27 Cr LJ 1407: 7 AI Cr R 35.

**(c) Caution to be exercised.**

——S. 561-A — **Expunging remarks in judgment —Limits within which such remarks may be made —Remarks about public servant acting in independent sphere — Need for caution — Remarks about lower Courts in appellate judgment — Principles governing.**

Disparaging remarks in a judgment, whether they amount to a verdict or not imputing crime moral delinquency or improper conduct to a person are a constant source of uneasiness and irritation to him. They lower him in the public estimation and haunt him like a spectre for life, invariably visiting him whenever he enters precincts of a Court of justice as a witness or a party. Being fraught with such serious consequences, they should only be made where any hesitation or reluctance in making them would impede the ends of justice. A Judge should weigh the gravity of the damage that his remarks would cause to the person concerned while at the same time realising that he owes a duty to the parties, the public and the appellate Court of stating in full his reasons for the view he takes of the evidence. When a Judge decides to condemn a man whether a party or witness, the facts on which condemnation is intended to be based must be put to him so as to give him an opportunity to explain the condemnatory facts and thus to remove the judge's suspicion about his conduct. A Judge who condemns a man unheard acts as unfairly as if he were to convict a man without hearing him in his defence. Persons who are attributed ignominous or improper conduct in judicial determinations, though they were neither parties nor witnesses in the cause, have, therefore, a just cause for complaint against this unfair treatment and the law reports are full of precedents where in the circumstances mentioned High Courts expunged the offending remarks. The need for caution in making such remarks is much greater where the person disparaged is a public servant acting in his own independent sphere. In such cases it is absolutely necessary that the Judge's suspicion about his conduct be communicated to him and an opportunity given to him to show cause against the view that the Judge is inclined to take of his conduct. If the officer concerned has not at all appeared before the Judge and has had no opportunity to vindicate himself, the Judge acts most unfairly, if not actually without jurisdiction, in commenting adversely on his conduct. And a Judge who makes his position in Court a mere pretex to condemn another person for personal reasons does not act as a Judge at all; he is a mere party who has arrogated to himself the position of a Judge.

Remarks about the lower Courts in appellate judgments are governed by different principles. Strong and unpleasant criticism of subordinate judicial officers is not always necessary where the appellate Court takes a different view of facts or law from the one taken by the lower Court. To disagree from the conclusions of the lower Court and to reverse or modify their decisions is an ordinary incident of appellate jurisdiction. But a strong rebuke in every case is not a necessary result of such difference. And as a rule strong remarks about a lower Court must be avoided unless the judgment under appeal clearly discloses intellectual dishonesty or gross incompetency on the part of the lower Court. AIR (V 37) 1950 Lah 66: Pak LR (1950) Lah 58: 51 Cr LJ 500.

——S. 561-A — **Expunging remarks — High Court's jurisdiction — Mode of exercise.**

Where the jurisdiction of the High Court under S. 561-A is invoked by a District Magistrate for the purpose of expunging certain remarks imputing perjury and incompetency to an official in the judgment of the trial Court the jurisdiction of the High Court being in such case of an exceptional nature should be exercised sparingly and in very rare cases to prevent injustice. AIR (V 17) 1930 Lah 1048: 1930 Cr C 1224: 32 Cr LJ 268.

——S. 561-A — **High Court can expunge objectionable remarks in lower Court's judgment — The power should be sparingly used — Court should not make remarks against a person who has no chance to explain his conduct.**

The High Court has power to expunge passages from judgments delivered by itself or by a Subordinate Court but this jurisdiction is of an extraordinary nature and has to be exercised with great care and caution. On the one hand it has to be borne in mind that in weighing evidence and arriving at conclusions on questions of fact lower Courts have to review the conduct of witnesses with reference to particular incidents and at times have to adjudge generally on the veracity or otherwise of such persons and in doing so they have often to make remarks which reflect adversely on their character. It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the High Court. At the same time

it is equally necessary that the right of Magistrates to make disparaging remarks on persons who appear, or are named, in the course of a trial, is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself. If the conduct of the witness appears to the Judge to be suspicious or otherwise not above board, he has the right and the duty to test his evidence by putting questions to him. But before he is justified in commenting adversely upon his evidence he must establish the particular fact warranting such criticism by proper evidence in Court and not on conjectures or by reference to materials which are not properly on the record. Again, a Magistrate should not in his judgment make observations prejudicial to the character of person, who is neither a witness nor a party to the proceedings and who has no opportunity of being heard. AIR (V 15) 1928 Lah 740: 109 Ind Cas 812: 9 Lah 269: 29 PLR 461: 29 Cr LJ 620.

——**S. 561-A — Power should be exercised sparingly.**

Section 561-A recognizes the inherent power of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. But the power to expunge a portion of a judgment delivered by a competent Court, if intended for cases of exceptional circumstances and should be exercised very sparingly. There is no precedent for entertaining an application for expunging by a subordinate Magistrate in connexion with a judgment given on appeal by his superior judicial officer. AIR (V 13) 1926 Lah 382: 93 Ind Cas 974: 27 Cr LJ 510.

**(d) Remarks when the case is sub judice.**

——S. 561-A — Remarks by Magistrate in cases which are sub judice, specially when such remarks tend to cause reflection on impartiality of Court trying them are highly improper and should be expunged. AIR (V 29) 1942 Lah 232: 43 Cr LJ 808: 44 PLR 409: 202 Ind Cas 292.

**(e) Remarks prejudicial to Magistrates.**

——S. 561-A — Under S. 561-A the High Court has inherent power to order the expungement of passage in the order of a Sessions Judge granting bail if such passages are likely to prejudice the Magistrate in the impartial trial of the case. AIR (V 12) 1925 Nag 228: 82 Ind Cas 755: 25 Cr LJ 1363.

**(f) Power of lower Court.**

——S. 561-A — The High Courts have power under S. 561-A, Criminal P.C., to order the expunction of irrelevant and scandalous remarks from a judgment of a lower Court but only when the passage objected to amounts to "an abuse of the process of a Court" and never when it is relevant to the points at issue before the Court.

But this jurisdiction is of an extraordinary nature and has to be exercised with great care and caution.

A Sessions Court or any other Court has never possessed any such authority. AIR (V 28) 1941 Rang 324: 1941 Rang LR 566: 43 Cr LJ 373: 198 Ind Cas 455 (DB).

**——S. 561-A — Expunction by Sessions Judge.**

The accused appealed to the Sessions Judge from the refusal by the Magistrate to grant bail. The Sessions Judge, while granting the same, made strong observations against the Magistrate's refusal to grant bail. The Magistrate, while proceeding with the case, made some comments on the remarks of the Sessions Judge who, by an order, directed the expunction of the comments from the Magistrate's judgment. The accused appealed to the Sessions Judge against his conviction by the Magistrate. The Sessions Judge thus heard the appeal on an incomplete copy of the Magistrate's judgment:

Held, that the Sessions Judge heard the appeal on an incomplete copy of the Magistrate's judgment, and therefore, the appeal was not heard at all.

Held, also, that the order expunging the remarks from the Magistrate's judgment was an illegality which raised an irrebuttable presumption that the accused must have been prejudiced thereby and which therefore, could not be cured under S. 537, Criminal P. C.

Held further that the expunged passage was not objectionable and being in favour of the accused, he was in fact prejudiced by its expunction. AIR (V 28) 1941 Rang 324: 1941 Rang LR 566: 43 Cr LJ 373: 198 Ind Cas 455 (DB).

**4. Abuse of process.**

**—S. 561-A — Attempt to create new offence in order to compel men to conform to high standard of probity — Whether abuse of process of Court.**

The inherent jurisdiction of the High Court to pass any orders necessary to prevent abuse of the process of any Court is not questioned and indeed has been clearly expressed in S. 561-A, Criminal P. C. Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked. In the world of business, things are often done which are betrayals of confidence and deceptions which arouse moral indignation but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create new crimes in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises. AIR (V 25) 1938 Mad 129 : 1937 MWN 999 . 46 LW 629 : (1937) 2 MLJ 878 : 39 Cr LJ 261 : 173 Ind Cas 14.

**——S. 561-A — Penal Code, Ss. 366, 497, 498 — Acquittal under S. 366 — Subsequent proceedings launched under Ss. 497, 498 with view to defeat acquittal.**

Where the accused are charged under S. 366, I. P. C., and acquitted on appeal on the grounds that the girl in question went of her own accord to the house of the accused and that there was no taking or sending and a subsquent prosecution is launched against them under Ss. 497 and 498 on the same facts in order to defeat the effect of the previous acquittal, the proceedings are an abuse of the process of the Court and should be quashed under S. 561, Criminal P. C. AIR (V 23) 1936 Cal 224 : 37 Cr LJ 538 : 162 Ind Cas, 176 (DB).

——S. 561-A — In the expression 'abuse of process' in S. 561-A, Criminal P. C., 'process' is a general word meaning in effect anything done by the Court. AIR (V 18) 1931 Pat 81 : 11 PLT 892 : 32 Cr LJ 551 : 130 Ind Cas 538.

**——S. 561-A — 'Process of Court.'**

Criminal proceeding in a subordinate Court constitutes process of the Court and if the High Court comes to the conclusion that the process is being abused, S. 561-A invests the Court with the jurisdiction of passing an order to set aside those proceedings so as to prevent the abuse, but it is a rule of practice that it will be exercised only in exceptional cases. AIR (V 15) 1928 Oudh 104 : 3 Luck 287 : 9 AICrR 356 : 106 Ind Cas 694 :.29 Cr LJ 102 : 1 LC 653.

——S. 561-A — "Process" is a general word, meaning in effect anything done by the Court. AIR (V 13) 1926 Bom 551 : 50 Bom 741 : 28 Bom LR 1043 : 27 Cr LJ 1169 : 7 AICrR 292 :97 Ind Cas 801.

**——S. 561-A — Charge without grounds.**

If a charge is framed where none should have been framed the proceeding of the Magistrate becomes irregular and the High Court has power to interfere, under S. 435 as well as under S. 561-A to prevent abuse of the process of any Court or as necessary to secure the ends of justice. AIR (V 12) 1925 All 311 : 86 Ind Cas 284 : 23 ALJ 21 : 6 LRA Cr 60 : 26 Cr LJ 748.

**5. To secure the ends of justice.**

——S. 561-A — High Court may cancel its order granting bail under S. 498, exercising its inherent powers under S. 561-A to secure the ends of justice though the accused has done nothing to violate any condition on which the bail was granted. AIR (V 19) 1932 All 534: 1932 ALJ 701: 33 Cr LJ 684: 188 Ind Cas 768.

**——S. 561-A — Penalising conduct of party.**

If frivolous and vexatious applications for transfer are resorted to as a means of preventing the ends of justice being attained, the court has the power under S. 561-A to penalise such conduct by committal to prison for contempt of court, apart from the power to direct the payment of costs under S. 526 (6-A). The court may also, in appropriate cases, direct the party to lodge certain sum in court as security for costs incurred by his opponent by such repeated adjournments. AIR (V 17) 1930 Bom 477: 54 Bom 553: 1930 Cr C 1065: 32 Bom LR 1123: 32 Cr LJ 394 (FB).

**——S. 561-A — Exemption from attendance.**

High Court can, under its inherent powers, pass an order excusing the personal attendance of the accused and permitting him to represent himself in Court by a pleader. AIR (V 17) 1930 Nag 61: 121 Ind Cas 651: 1930 Cr C 149: 26 NLR 50: 12 NLJ 180: 31 Cr LJ 284.

**——S. 561-A — Delivery of things.**

The section empowers the High Court, with a view to secure the ends of justice, to direct a party to re-deliver goods to the proper person who is wrongly ordered to deliver them to another under S. 144. AIR (V 15) 1928 All 14: 105 Ind Cas 815: 50 All 414: 26 ALJ 83: 28 Cr LJ 991: 8 LRA Cr 149: 8 A I Cr R 362.

**——S. 561-A — Interpretation.**

The words "or otherwise to secure the ends of justice" can only mean that such other inherent power as the Court possesses is likewise preserved. The High Court is not given nor did it ever possess, an unrestricted and undefined power to make any order which, it might please to consider, was in the interests of justice. Its inherent powers are as much controlled by principle and precedent as are its express powers by statute. AIR (V 15) 1928 Lah 462: 110 Ind Cas 221: 10 Lah 1: 10 A I Cr R 494: 29 Cr LJ 669: 30 PLR 247 (DB).

**——S. 561-A — S. 561-A is not limited by S. 369.**

Section 561-A is in no way limited or governed by S. 369 and the High Court has power to reconsider the question of sentence when the ends of justice require it. AIR (V 15) 1928 Oudh 402: 3 Luck 680: 5 OWN 641: 29 Cr LJ 893: 111 Ind Cas 573.

——S. 561-A — Section 561-A is in no way limited or governed by S. 369 and High Court has power to reconsider the question of sentence when the ends of justice require it. AIR (V 14) 1927 Lah 139: 99 Ind Cas 1039: 9 LLJ 42: 28 Cr LJ 239.

**——S. 561-A — Exemption of Juror.**

Court has inherent power to exempt any particular juror on good cause shown. AIR (V 14) 1927 Nag 117: 99 Ind Cas 849: 28 Cr LJ 177: 7 A I Cr R 333.

**——S. 561-A — Interview of accused with Counsel.**

Under S. 561-A the High Court has power to interfere and direct the police to permit an interview of the accused with his legal advisers. AIR (V 13) 1926 Bom 551: 97 Ind Cas 801: 50 Bom 741: 28 Bom LR 1043: 27 Cr LJ 1169: 7 A I Cr R 292 (DB).

**——S. 561-A — Rehearing of case — Appeal dismissed without reasonable opportunity.**

Where an appeal has been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of the same, the order dismissing the appeal must be held to have been passed without jurisdiction and the Court has inherent power to make an order that the appeal should be reheard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the same. AIR (V 12) 1925 Lah 355: 7 LLJ 108: 26 Cr LJ 1169: 88 Ind Cas 593 (DB).

**6. Section does not override the express provisions of law.**

——S. 561-A — Magistrate can pass order releasing property from attachment in favour of successful party on decision of suit by trial Court even if appeal from such decision is pending but if its decision is reversed on appeal, Magistrate has not further jurisdiction under S. 145 or 146 to pass order regarding delivery of possession of property nor can High Court pass an order under S. 561-A, as it cannot be invoked to override an express provision of law or when there is another remedy open. AIR (V 29) 1942 Pesh 11: 43 Cr LJ 384: 198 Ind Cas 490.

**——Ss. 561A, 145 — Jurisdiction to pass order that attachment shall continue till decision of title by Civil Court, where Magistrate has ordered delivery of possession to one of parties after cancelling preliminary order passed under S. 145(1).**

Where in proceedings under S. 145, Criminal P. C., a Magistrate after attaching the property and passing the preliminary order under sub-s. (1), subsequently cancels the preliminary order and directs delivery of the property attached, to one of the parties the High Court has power under S. 561-A, Criminal P. C., to pass an order that the attachment shall continue, until the question of title has been determined by the Civil Courts. AIR (V 26) 1939 Oudh 284: 1939 OWN 891: 1939 AWR 203: 40 Cr LJ 930: 15 Luck 19: 184 Ind Cas 290.

**——S. 561-A — Inherent powers do not extend statutory powers.**

The Court cannot, by invoking its inherent powers extend the powers given to it by statute. Criminal Courts are not primarily for the purpose of preventing private parties from sustaining pecuniary loss. AIR (V 13) 1926 Mad 139: 49 MLJ